

IHL MODULE 4 – Implementation of IHL

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Improving respect for international humanitarian law: a major challenge for the ICRC

by Cornelio Sommaruga

**Fourth George Steward lecture, International Bar Association, Geneva, 3 June 1994
Statement by Cornelio Sommaruga, President of the International Committee of the Red Cross**

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Introduction

It is a pleasure for me to deliver the fourth George Seward Lecture and to share with all of you who have gathered here in Geneva the current major concerns of the International Committee of the Red Cross (ICRC) with respect to the implementation, development and dissemination of international humanitarian law.

I am especially happy to review these concerns with a group of lawyers from all over the world because, as a lawyer myself, I am keenly aware of the role you may be called upon to play in this field also as distinguished citizens of all your countries.

I should also like to take this opportunity to talk more specifically about the existing mechanisms to ensure respect for humanitarian law and about the ICRC's current efforts to enhance compliance with the rules applicable in any armed conflict. These efforts are aimed at prompting States to adopt preventive measures, improving faithful application of the relevant provisions and establishing a system of sanctions to repress and put an end to violations.

News about armed conflicts, violence and political unrest reaches each and every one of us daily from all parts of the world. It is accompanied by unbearable pictures of

combatants and civilians who have been wounded, tortured, forced into exile, starved or massacred. Yet, the right to assistance, as laid down in the Geneva Conventions, has too often been denied to such victims. Indeed, humanitarian organizations have not only continuously been hindered in their efforts to provide protection and distribute relief to vulnerable groups, they have even become the targets of warring parties.

Aims of International Humanitarian Law

In the face of this tragic reality, I should like once again to stress the aims of international humanitarian law, the so called "Geneva law". These aims are both modest and of crucial importance. They are crucial because humanitarian law seeks to preserve minimum standards of behaviour in situations where people are caught up in armed conflict, yet at the same time they are modest because war retains its cruelty and still leads to widespread suffering, large-scale squandering of resources and the devastation of entire nations. Moreover, all appeals for compliance with humanitarian law contain an element of defeat for the international community if one considers the fact that States undertook, in the UN Charter, to find peaceful means for the settlement of conflicts and ultimately to eradicate war.

From its very inception, some 130 years ago, the International Committee of the Red Cross has endeavoured to bring protection and assistance to victims of armed conflicts in two major ways: by developing and ensuring respect for international humanitarian law and by carrying out humanitarian operations in conflict areas to provide relief for the victims.

The first time action was taken to assist wounded people on the battlefield was during the Italian war of independence in 1859. Five years later, an international conference attended by 16 European States adopted the Geneva Convention for the amelioration of the condition of the wounded in armies in the field, a treaty which contained the first rules for the protection of wounded members of armed forces and aid workers wearing white armbands marked with a red cross. It also laid down the very working principles that have guided the ICRC during this century. Humanitarian law can thus be seen to have emerged from practical experience; in the same way, that law was later developed and its scope of application broadened. Anyone who takes a look at the history of the Red Cross will observe that after every major conflict -whether the naval battle of Lissa in 1866, the First and Second World Wars or, the liberation wars of the sixties and seventies- the ICRC submitted proposals for conventions to the international community. History also shows that the international community was only ready to examine and accept those proposals once mankind had experienced yet another tragic event. This was the case, for example, with the proposed convention for the protection of the civilian population which the ICRC submitted for consideration to the international community gathered in 1934 in Tokyo for the International Conference of the Red Cross. It was not until after the Second World War, against the

backdrop of massive deportations and systematic extermination of population groups, that the ICRC's proposal was finally discussed and adopted in 1949 as the Fourth Geneva Convention. The same can be said of the process which led to the adoption by the Diplomatic Conference of 1977 of the Protocols additional to the Geneva Conventions. Today, a vast and sophisticated body of rules exists to limit the effects of war; I shall return later to various aspects of respect for these rules and improved compliance with them by warring parties.

Legal Status of ICRC

I should now like to say a few words about the ICRC's legal status, which derives from the now universally recognized Geneva Conventions and from the Statutes of the Red Cross and Red Crescent Movement. If National Red Cross Societies are organizations based on rules of national laws and their International Federation a non-governmental organization, on the contrary the ICRC is neither an inter-governmental organization like UNICEF or the Office of the United Nations High Commissioner for Refugees, nor is it a non-governmental organization like the Catholic Relief Services, Médecins sans frontières or Amnesty International. At the Diplomatic Conferences of 1949 and 1977, the private mononational ICRC was cited as a model humanitarian organization and received explicitly a mandate through the Geneva Conventions. Today the ICRC's international legal status has been confirmed by the conclusion of 51 headquarters agreements with governments. Such an agreement was recently signed by Switzerland, giving the ICRC full independence and all the immunities indispensable for its work in his home country. In 1990 the international community granted the ICRC observer status at the United Nations General Assembly, thereby providing further recognition of its special nature as a mononational private association of Swiss citizens, with an international mandate and personality, which acts in behalf of war victims with due regard for the principles of neutrality, independence and impartiality. But let me now return to the ICRC's practical activities.

It was in the context of a war between States that the work of the International Committee of the Red Cross first began to take shape. It all started in Solferino where, in the midst of fighting, local people, spontaneously, helped wounded soldiers on the battlefield under the guidance of a Geneva citizen, Henry Dunant. Later on the ICRC broadened its activities to include assistance and protection for prisoners of war. Today nearly 1,000 delegates, working in 60 delegations including all the major conflict areas of the world, pursue a great variety of activities. In certain conflicts, their work is more particularly oriented towards observing the behaviour of military personnel. This enables the ICRC to submit to the authorities any allegations it has received or observations it has made concerning violations of humanitarian law and to supervise the implementation of its recommendations. To provide you with some examples, this kind of work has been carried out inter alia for the past 26 years by our delegates in the Israeli occupied territories. It was also undertaken during the Gulf war

and continues today in many conflicts where ICRC delegates have direct access to the theatre of military operations, such as in the former Yugoslavia, Afghanistan, Rwanda, Angola, Somalia, Tadjikistan, Mexico, Peru and elsewhere.

Protection of POWs and detainees

Another aspect of the ICRC's work consists, as I mentioned earlier, in providing protection for prisoners of war and security detainees. In almost every international conflict since the Second World War, the ICRC has been able to discharge its mandate with respect to POWs. However, it has constantly had to fight serious violations of the provisions of the Geneva Conventions relative to the treatment and repatriation of POWs. As regards security detainees or better we should call them "political prisoners", a great number of countries have responded positively to the ICRC's offers to send delegates to observe the physical and psychological conditions of imprisonment. For example, 54 countries agreed to ICRC visits in 1992, and 1993, 47 have done so, and allowed us to visit 143,000 prisoners. Our delegates make recommendations to the authorities concerning the treatment of detainees and supervise their implementation. However, the ICRC deplores the fact that a number of States are still reluctant to respond to its offers of services. These include, among others, China, Myanmar, Turkey and Algeria.

In various conflicts, particularly those in Africa, relief work plays a primary role. Ethnic strife and power struggles regularly disrupt the agricultural, economic and commercial life of many countries, leading to serious interruptions in the food supply, dangerous conditions and massive population displacements. In such situations ICRC delegates not only provide protection, as I outlined before, but also supply food and shelter. Some of these relief operations also include measures to preserve livestock and to enable minimal agricultural subsistence. To take but one example, in Somalia in 1992 and 1993 the ICRC carried out food distributions of an enormous size while at the same time providing seed to farmers and organizing the vaccination of more than 3 million head of livestock. I should also mention the ICRC's medical work, which includes evacuations of wounded soldiers and civilians caught in the crossfire. This was the major task of ICRC delegates during the shelling of Beirut in the early 1980s and is one of their major activities today in Kabul and in Rwanda. Hundreds of wounded people have been carried away by ICRC delegates and by local Red Cross and Red Crescent personnel. Thousands have been treated in ICRC hospitals set up directly in or around combat zones. Just one figure to give you an indication of the magnitude of the problem: in 1992, 32,800 surgical operations were performed in 10 ICRC hospitals throughout the world.

The ICRC performs its legal work and operational activities in parallel. Over the years, international humanitarian law has become a complex field which has its own

dynamics, its own time frames, its own conferences and historic commemorations. However, the ICRC continues to propose new humanitarian instruments, taking account of its experience in the field and current developments in the means and methods of warfare. This is necessary because its delegates in the field, who are in direct contact with the evolving reality of conflict, constantly have new legal and practical problems to solve. It is in order to respond to their requests for assistance that the ICRC strives to find new means, both in emergencies and in the long term, to protect people from the effects of modern weaponry and to ensure greater respect for civilians.

ICRC – Current Problems in the Legal Field

To give you a brief overview of the current problems the ICRC has to deal with in the legal field, I shall refer to three major conflicts of recent years which have raised important issues in relation to humanitarian law.

As a result of the Gulf war, awareness of international humanitarian law was heightened among governments, at the United Nations and in international public opinion. Indeed, the coalition forces declared war against Iraq with the stated intention of ensuring respect for humanitarian law in relation both to the sovereign rights of Kuwait and to the ban on aggression contained in the UN Charter. The ICRC took advantage of that momentum to urge all the parties involved to respect and ensure respect for the Geneva Conventions and their Additional Protocol I, an obligation which is laid down in the first article common to those treaties. Moreover, because of the Gulf war several issues pertaining to the conduct of hostilities have received and will continue to receive special attention, namely, collateral damages, the use of the environment as a means of warfare, the sanctions and embargo regime and the use of mines. This fresh attention paid to the legal dimension of the conduct of hostilities and to protection of the civilian population also gave a new impetus to the ratification process of the Additional Protocols.

The cases of Somalia and of the former Yugoslavia will serve to illustrate a different but central issue in relation to the universal application of international humanitarian law. Prior to the Gulf war, UN peace-keeping operations were confined to maintaining cease-fires and providing contingents to serve as observers for agreements concluded between belligerent States. Since then, such operations have increased in number and their scope has changed significantly. The UN operation in Somalia known as UNOSOM II was the first peace-enforcement mission carried out by UN contingents duly mandated by the Security Council. Despite previous agreement, the operation generated hostility and led to violent clashes between UN forces and local armed factions. In the former Yugoslavia, the Security Council mandated UN protection forces to defend designated security areas by using all necessary means, including recourse to force. Thus in Somalia, humanitarian rules were violated by UN

forces in efforts to restore law and order and in the treatment of detained people. In the former Yugoslavia, force was used by UN contingents both in self defense and to ensure compliance with UN resolutions and protection for humanitarian convoys.

Why are UN contingents bound to respect the rules of international humanitarian law? One of the main reasons is that the Geneva Conventions constitute an universal standard since they have been ratified by 185 States. The UN cannot violate the minimal rules the international community sets for itself. The second reason is that the armed forces which make up UN contingents are all bound by humanitarian law and any member of those forces who violates its rules in the course of UN duties is subject to court-martialing by the States providing military staff to the UN. The third reason is that, despite the fact that the UN does not have the legal capacity to become a party to the Geneva Conventions, that it has no combatants and that it cannot detain people as prisoners of war, it nevertheless does use force. In such situations, the universally valid humanitarian rules must be applicable. While this applicability does not prejudice the legitimacy of the resort to force, it bears on the way in which force is being used.

Although this position has been found by the ICRC to enjoy considerable support, it is still under review at UN headquarters in New York. Despite some joint UN-ICRC activity in training advisors on humanitarian law for UN contingents, the UN has still not taken the decisive steps one is entitled to expect from such a prominent international body. Yet explicit support for and full compliance with humanitarian law would tremendously strengthen and promote the universal significance of that law.

Problem of Implementation of International Humanitarian Law

In a great number of internal conflicts, such as those in Angola, Georgia, Bosnia-Herzegovina, Afghanistan, Rwanda, Burundi and Liberia -to mention only the most flagrant cases- the basic rules of humanitarian law have been violated in such a grave, repeated and systematic way as to give rise to fundamental questions about its implementation. Calls for the protection of conflict victims often make no sense owing to the absence of responsible and accountable political and military leaders. For the same reasons, negotiations are conducted with great difficulty and recommendations seldom implemented. Moreover, Red Cross delegates face increasing danger since they no longer enjoy all the necessary guarantees to work in conflict areas. Although I cannot provide you with the solutions to these problems, I am convinced that the international community will have to find new ways to respond to such situations or else run the risk of abandoning countless people to situations of total anarchy and writing off entire sections of countries or even continents when it comes to building international security, world order and lasting peace. Let me put this in the form of a question: can the international community afford to leave part of humanity behind on entering

the new millennium? For the ICRC, whose activities are based on the very principle of humanity, this option is totally unacceptable.

Ever since the initiative was taken to adopt the original Geneva Convention in August 1864, the ICRC has had an historical, moral and legal responsibility to work for the development of and respect for international humanitarian law. To explain how it discharges this responsibility, I should like to review five areas in which it is active and takes initiatives.

First of all, the ICRC strives to promote the **universal ratification** of the existing humanitarian law treaties. Although 185 States are party to the four Geneva Conventions, only 132 and 122 States respectively have ratified their Additional Protocols I and II of 1977. Priority must therefore be given to ratification of these Protocols by all States, especially the most influential ones. These Protocols are enhancing the protection of the civilian population in international and non international conflicts. To obtain ratification by the United States of America, Japan and India, among other States, would constitute an important milestone and give greater authority to the whole body of humanitarian law. The ICRC also supports the ratification process of the 1980 UN Convention on specific conventional weapons which is aimed at preventing the infliction of unnecessary and indiscriminate injury.

Secondly, the ICRC makes ongoing efforts to urge the parties to the treaties to **implement national measures** in crucial areas such as the protection of the Red Cross and Red Crescent emblems and the prosecution of perpetrators of grave breaches of humanitarian law. In follow-up to the International Conference for the Protection of War Victims, a governmental meeting which was held in Geneva last year, States recently received from the ICRC a substantial document which outlined several urgent problems relating to the situation of war victims.

Thirdly, the ICRC is concerned with **the respect for international humanitarian law and measures designed to ensure compliance with its rules**. This concern is at the core of the ICRC's humanitarian diplomacy, which has both a preventive and a limiting effect on violations. A large gap still exists between the declared intention of the international community to prosecute violators of international law, including the humanitarian rules, and the actual efforts currently being made to stop grave and repeated massive violations of those rules. This is evidenced by the international community's inability to put an end to the widespread practice of ethnic cleansing in the former Yugoslavia, to halt the politically and ethnically motivated massacres in Rwanda and to break through the sieges imposed on tens of thousands of people in Bosnia-Herzegovina and in Afghanistan. When violations become policies and humanitarian negotiations fail, measures of another nature are needed. While it is not up to the ICRC to prescribe to States or to the international community and its political and military organizations the action to be taken, it is the ICRC's duty -as the custodian of

international humanitarian law - to continue reminding the States which violate that law and those which strive to ensure respect for its basic rules that the international community must live up to the standards it sets for itself.

I should also like to mention the recent progress made towards establishing a system for the repression of violations of humanitarian law. While that law provides for the repression of grave breaches at the national level, such repression is dependent on the adoption of national implementation measures linked to penal legislation. From the point of view of effective deterrence, it is therefore important that a universal criminal tribunal be established. The decision of the United Nations Security Council to set up an international tribunal to try persons accused of having committed serious violations of humanitarian law in the former Yugoslavia since 1991 was a step in the right direction. It is, however, essential that this tribunal start functioning rapidly and effectively. I should also like to mention the progress in the work of the International Law Commission, which has resulted in the draft statute presently under consideration on a future international criminal tribunal and the draft Code of Offences against the Peace and Security of Mankind. These developments should ensure that those responsible for crimes perpetrated during conflicts, whether international or internal, are duly prosecuted. Beyond the fact that the crimes would thus not go unpunished, this system would have a long-term deterrent effect. At stake is the fate of thousands of people caught up in the horrors of armed conflict. This is why the legal discussions and subsequent setting up of a universal tribunal should be carried out very seriously and without delay.

The fourth area concerns the **development** of international humanitarian law. As with other laws and treaties which must be brought in line with the evolving realities of society, humanitarian law has to be adapted and developed, and new measures introduced to cope with the inventiveness of peoples and nations at war. The ICRC strives to be a driving force behind this process, in which the United Nations and the Depositary State for the Geneva Conventions also have a major role to play. Here I shall mention only five developments in the area of law which the ICRC has induced in recent years: these are the review of the law of naval warfare, the limitations on the use of laser and other directed-energy weapons, the total ban on anti-personnel mines, the protection of the environment in times of armed conflict and the proposed code of conduct for situations of political violence.

Lastly, the ICRC is involved in the **multifaceted task of spreading knowledge** of humanitarian law. Efforts in this area are intended to have a widespread preventive effect by instilling in people's minds the basic principles of humanity, the fundamental human rights applicable in war and the treaty obligations undertaken by States with respect to the behaviour of their armed forces and paramilitary troops. Governments in particular have the obligation to inform citizens about the rules and principles of humanitarian conduct and the

efforts being made to spread knowledge of these rules among their potential enemies. The media should also help inform the public and be ready, especially in periods of mounting tension, to share the burden of such dissemination activities. As for the Red Cross and Red Crescent Movement, it has a very special responsibility in this field. National Red Cross and Red Crescent Societies, the Magen David Adom and all institutions close to the Movement are expected to join the ICRC in spreading the humanitarian message. Of course, we may yet have to go beyond the provisions of the Geneva Conventions since each culture and religion has its own concept of respect for human life and of assistance and compassion for the needy. However, all mankind shares a common goal in aspiring to social order and the absence of war. It is the role of the Red Cross and Red Crescent Movement to help societies attain this goal by spreading the values of non-violence and respect for human dignity, solidarity and tolerance.

Conclusion

Let me conclude by mentioning the ICRC's efforts to place respect for international humanitarian law at the top of government agendas. From 30 August to 1 September of last year, an exceptional Conference for the Protection of War Victims was held in Geneva by the Swiss government on ICRC's initiative. It was attended by 164 State representatives who expressed their governments' determination to live up to the obligations stemming from the Geneva treaties. The follow-up to that Conference should enhance the credibility of humanitarian law and deepen the commitment of States to it, while increasing awareness of the situation of thousands of people caught up in conflicts through the world. Moreover, the 26th International Conference of the Red Cross and Red Crescent, which is to be held at the end of 1995 in Geneva, will provide a crucial opportunity for the international community to confirm its will to repress violations of humanitarian law and, ultimately, to eradicate all forms of armed conflict.

The ICRC firmly believes that the erosion of humanitarian values is not a foregone conclusion, but on the contrary a challenge to be taken up. In its efforts to rise to this challenge, the ICRC is not alone; however, it still needs more committed people. I therefore hope that my lecture has convinced you of the vital importance of contributing to a world more imbued with humanity.

Per Humanitatem ad Pacem is the motto of the International Red Cross! Help us to realize it.

CHAPTER XVI
IMPLEMENTING INTERNATIONAL HUMANITARIAN
LAW

YVES SANDOZ

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A. Presentation

After an introduction situating the relative importance of implementing international humanitarian law in the context of current law and international systems, this article reviews the legal means of putting it into effect.

We think these means come under the following three headings :

First, *means of prevention*, to be used before the provisions of humanitarian law on behalf of victims are to apply, and intended to ensure that these provisions are correctly applied when the time comes to apply them.

Secondly, *means of control*, that is, of constant supervision to ensure that when the provisions on behalf of victims are being applied, they are properly observed.

Finally, *means of repression*, important because penalties are an integral part of any sound legal system, and mainly because they should be a valuable deterrent.

We have added a fourth category under the heading "*Other means*", which deals with means which cannot be classified under the previous headings, or at least under only one of them.

For instance, this applies to the international enquiry into allegations of reprehensible acts which is intended to repress any such acts and to provide permanent scouting. Similarly we felt that the role of the United Nations and of the media in general ought to be looked at under this fourth heading.

This article concludes with a short chapter on the special problem of implementing international humanitarian law in non-international armed conflicts. The system as a whole has been devised for international conflicts; it cannot simply be switched over to non-international conflicts, whose basic data are completely different.

B. Introduction

There can be no talk of implementing international humanitarian law without placing it within the framework of international law' and, In a more general way, against the background of the modern world.

From the very beginning, international humanitarian law has sought to limit the suffering due to armed conflicts, by protecting and assisting victims of such conflicts in so far as possible. That aim has not changed. But whilst international humanitarian law did have an indisputable place in an international system which, to quote Clausewitz's famous aphorism, regards war as "politics continued by other means", it is less easily assimilated, from a purely logical stance, into the present system now that the UN Charter unequivocally outlaws international war.¹ Humanitarian law in general therefore applies only where there has already been a breach of international law. That being so, does it still have a meaning? The International

Law Commission thought not when it refused to place it on the agenda at the beginning of its work in 1948.

Nevertheless, States decided otherwise when, in 1949, they adopted the four Geneva Conventions which are now the basis of international humanitarian law and, later on, when most of them ratified these instruments.

Why, it might be asked, did they come to this unreasonable decision ? Quite simply to look the facts in the face. It very soon became clear that States could not agree among themselves to give the UN the means of enforcing the rules they had adopted as part of its mandate. The UN could not prevent international armed conflicts, and States realized that they would have to depend upon themselves, or on alliances with other States, for their own security. The UN had shown it was incapable of preventing the very many armed conflicts which broke out after it was founded.

However, another question arises as to the actual meaning of international humanitarian law. If a State deliberately violates international law by engaging in an international armed conflict, why should it show any greater respect for international humanitarian law? This is a pertinent question and deserves consideration. One can hardly imagine any State enacting a code of good behaviour for the use of individual lawbreakers on its territory- a code that would, in effect, say to them: "Thou shalt not steal; but if you do, do it decently".

If such apparently unusual language can be used to States, the reason is that there is no system of implementing international law even remotely comparable to State systems. There are no real courts and no real police. Hence the importance of having rules at different levels in the hope that, at each level, they will be observed at least in part. The UN Charter will prevent some conflicts, while in those it fails to prevent, international humanitarian law will prevent some excesses. Clearly this is a pessimistic view of the world and of the role of international law; but it is a realistic one even though, let us hope, respect for the law is a principle to which most States and individuals are still attached, irrespective of any threat of penalty.

Moreover, this approach at different levels is particularly suitable for armed conflicts. It is often hard to say which State is guilty of infringing the Charter in an international armed conflict. This is generally an issue for political discussion leading to resolutions being adopted by a majority at the General Assembly and in the Security Council of the United Nations, but the accused Party's "guilt" is nevertheless still denied by a perhaps considerable, minority and especially by the interested Party.

International humanitarian law offers a totally independent system, and in this it is effective at least to some extent. If it had ruled that it was applicable only after one of the Parties had been found "guilty", or even if it had adjusted the extent of its application, in function of the belligerent's guilt (as at times some people have wished) international humanitarian law would undoubtedly have remained a dead letter. Applying it, or applying it in a certain way, would have been tantamount to pleading guilty; it would have meant surrender in the prior debate. Obviously, then, a multi-level system is meaningless unless the levels -in this case, *jus ad bellum* and *jus in bello* -are completely independent of each other.

The fact remains that the mere existence of international humanitarian law reveals the weak point of international law -its implementation. Of course, implementation at each level also has to be looked at independently. Certainly at each level it only needs imagination to find out the best answers; indeed, the aim of the present article is to examine what means international humanitarian law proposes. But it has to be borne in mind that a perfectly applicable system of international humanitarian law is inconceivable without a change in relations between States so profound as to be able to prevent conflicts from breaking out in the first place. Paradoxically, the comparative inability to implement international humanitarian law is essential to its existence.

C. Implementation During International Armed Conflicts

(a) Means of Prevention

1. Respect for the Law by the States Concerned

Pacta sunt servanda: The best guarantee that international humanitarian law will be applied clearly lies in the respect shown by States for this basic maxim. By formally accepting the Geneva Conventions and, in the case of some, by acceding to their Additional Protocols, States have undertaken to ensure that these instruments are respected by everyone under their authority, irrespective of any express ruling on the subject in the Conventions themselves. From a general standpoint, the defence of international law and of the idea that its concomitant legal obligations are as binding on States as the law of the land on an individual is perhaps one of the most decisive factors today -though apparently very abstract in the intended context -making for the strict application of international humanitarian law.

When adopting the Geneva Conventions, States saw fit to emphasize still further the obligation to abide by treaties, even though this is an integral part of any international treaty. It is mentioned in the Article I, common to all four Conventions, which reads: "The High Contracting Parties undertake to respect and ensure respect for the present Convention in all circumstances". The significance of the phrase "to ensure respect" will be considered later.² It is interesting to note the wealth of precautions in the Geneva Conventions and their Additional Protocols concerning the obligation of respect. As we have pointed out, it is not essential to quote Article I, referred to above; nor should it be necessary to quote the provisions examined below concerning the means we have described as "preventive". For each individual concerned to respect humanitarian law, preventive means are essential and ought to be looked upon as implicitly contained in treaty obligations directly concerning victims. Their express mention shows that States deemed it necessary not only to confine themselves to obligations regarding results, but also to stipulate express obligations as regards means.

Furthermore, the 1977 Protocol 1 accentuates this tendency. Before the specific article on that subject, Article 80 states in a general way:

"Measures for execution

1. The High Contracting Parties and the Parties to the conflict shall without delay take all necessary measures for the execution of the obligations under the Conventions and this Protocol.
2. The High Contracting Parties and the Parties to the conflict shall give

orders and instructions to ensure observance of the Conventions and this Protocol, and shall supervise their execution."

The wording goes so far as to tell the State how it must assume a responsibility, already made clear beyond doubt by the text. Such a strict approach to hard facts is welcome: despite the express obligations as regards means, means are usually still very inadequate.

2. General Dissemination of the Conventions and Protocol I.

There is an essentially identical article in each of the four Conventions (respectively Articles 47-48-127-144) stipulating that the High Contracting Parties have an obligation to "undertake, in time of peace as in time of war, to disseminate the text of the present Convention as widely as possible in their respective countries, and, in particular, to include the study thereof in their programmes of military and, if possible, civil instructions, so that the principles thereof may become known to the entire population, in particular to the armed fighting forces, medical personnel and the chaplains".

Protocol I takes up the same idea in Article 83, para. I, which states:

"The High Contracting Parties undertake, in time of peace as in time of armed conflict, to disseminate the Conventions and this Protocol as widely as possible in their respective countries and, in particular, to include the study thereof in their programmes of military instruction and to encourage the study thereof by the civilian population, so that these instruments may become known to the armed forces and to the civilian population".

This obligation of general dissemination is evidently essential. International humanitarian law imposes obligations on every individual belonging to a Party to the conflict and therefore each person must be trained to act in accordance with this law if confronted with events which call for it to be applied. Combatants and the general public need to know only the specific provisions which might directly concern them, not the entire body of the law. It must also be stressed that both the Conventions and the Protocols mention that the task of dissemination must already be carried out in peace-time. It must be part of everyone's preparation for time of war. One does not wait for armed conflict to break out before giving military training or building shelters. The same must also hold true of disseminating international humanitarian law and this can be done thoroughly only in peace-time. Most States still have a long way to go in this direction.

3. Special instruction for the Authorities Directly Concerned.

The third and fourth Conventions stipulate that civilian or military authorities who in time of war assume responsibilities for persons protected by these Conventions "must possess the text of the Convention and be specially instructed as to its provisions" (Article 121, para. 2 and Article 144, para. 2, respectively).

Protocol I reasserts this provision and even amplifies it slightly. Article 83, para. 2, states :

" Any military or civilian authorities who, in time of armed conflict, assume responsibilities in respect of the application of the Conventions and this Protocol shall be fully acquainted with the text thereof."

It is not simply a matter of giving instruction; these people must actually "be fully acquainted with the text thereof". Likewise, it is perfectly logical that those who are directly involved should be given special training. For instance, a future POW camp commander would be expected to be more fully instructed in this subject than a private soldier .

4. Duties of Commanders

Military commanders' obligations are not restricted solely to monitoring the application of the law and repressing breaches thereof (aspects which we shall return to later); according to the terms of Protocol I they are also in duty bound to disseminate knowledge of the law. In fact, the High Contracting Parties and Parties to the conflict are expressly called upon to require "that, commensurate with their level of responsibility, commanders ensure that members of the armed forces. ..are aware of their obligations under the Conventions and this Protocol" (Article 87, para. 2). Hence., when through pure ignorance subordinates act in breach of the law, their commanding officers' responsibility will definitely be involved.³

5. Training Qualified Personnel

Protocol I, Article 6, para. I, calls on the Contracting Parties to endeavour in peacetime "to train qualified personnel to facilitate the application of the Conventions and of this Protocol, and in particular the activities of the Protecting Powers".

In spite of this emphasis on the value of qualified personnel in helping the protecting Powers to carry out their duties ⁴, their potential usefulness in ensuring that international humanitarian law is applied in their own countries should not be overlooked: they can advise and instruct the authorities directly concerned and actively participate in general dissemination activities.

6. Legal Advisers in the Armed Forces

Such advisers are expressly provided for in Protocol I (Article 82). Their role is 'to advise military commanders at the appropriate level on the application of the Conventions and this Protocol and on the appropriate instruction to be given to the armed forces on this subject'. The obligation is not set out in a very binding manner- such advisers must be available "when necessary" -but here again the tendency to impose obligations in terms of means and not only in terms of results is reinforced in Protocol I.

7. Communication of Translations of the Conventions and Protocols and Laws of Application.

The official versions of the Geneva Conventions are in French and English. The depositary was also responsible for having official translations made into Russian and Spanish. The official versions of the Protocols are in Arabic, Chinese, English, French, Russian and Spanish. States bound by these Conventions and whose national languages are other than the ones above must obviously have the texts translated so that they can be applied by their population and be disseminated. It is a sensible preventive measure to communicate these

translations to the other Contracting Parties in peacetime as required by the Conventions (Articles 48, 49, 128 and 145 respectively) and Protocol I (Article 84); in time of armed conflict this should prevent differences of interpretation which might have unfortunate consequences.

The same holds true of transmission of any laws and regulations for their application, which although undoubtedly desirable⁵ are not obligatory: a Contracting Party may simply incorporate the treaty text into its national legislation.

(b) Means of Control

I. -Obligation on Parties to the Conflict to Put an End to All Breaches

General obligation

Since the Contracting Parties have a permanent obligation to respect the Conventions to which they have subscribed, it is obviously essential, that they exercise sufficient supervision especially in case of conflict, to ensure that the law is respected. Given the present world order, any system of supervision has to rely on the good faith of signatory States and their willingness to apply the law. But no one can be expected to do the impossible; the chance of individual violations can never be ruled out, however efficient the training and dissemination. In such cases the obligation on the Contracting Parties to put an end to such violations, although obviously contained in the general obligation to respect the conventions and Protocols, is expressly repeated in addition to the obligations concerning their repression.⁶ (See Articles 49 para. 3, 50 para. 3, 129 para. 3 and 146 para. 3 of the Conventions and Article 85 para. I of Protocol I).

Obligations on Military Commanders

Protocol I, Article 87, paras. 1 and 3 clearly define an obligation in terms of means:

“1. The High Contracting Parties and the Parties to the conflict shall require military commanders, with respect to members of the armed forces under their command and other persons under their control, to prevent and, where necessary, to suppress and to report to competent authorities breaches of the Conventions and of this Protocol.

3. The High Contracting Parties and Parties to the conflict shall require any commander who is aware that subordinates or other persons under his control are going to commit or have committed a breach in the Conventions or of this Protocol, to initiate such steps as are necessary to prevent such violations of the Conventions or this Protocol, and, where appropriate, to initiate disciplinary or penal action against violators thereof”.

Under Protocol I therefore, military commanders are the mainstay of the supervisory system to be set up by Contracting Parties and Parties to the conflict. This seems justified as Protocol I adds to the Geneva Conventions many rules directly linked to the conduct of hostilities. The role of commanders in repression will be considered below.⁷

Obligation on the High Contracting Parties to Ensure Respect for international Humanitarian Law.

This obligation is mentioned in Article 1 of each Convention and in Article 1, Protocol I. its meaning is not obvious and has been the subject of lengthy discussions. It was one of the main subjects of an enquiry by the *Centre d'etudes de droit international medical in Liege and the Committee on International Medical and Humanitarian Law* of the International Law Association⁸.

Some people feel that this obligation should be seen merely as clarification of the obligation to respect international humanitarian law and is consequently for domestic application. However, prevailing opinion favours a more comprehensive interpretation to the effect that the High Contracting Parties have an obligation to ensure that other States respect the Conventions. The Commentary published under the general editorship of Jean Pictet states that this expression must be interpreted both as strengthening the obligation within the body of national law⁹ and as implying an obligation towards other States.¹⁰

The idea of an obligation towards other States parties to the Conventions was further confirmed at the International Conference on Human Rights (Teheran, 1968), which adopted a resolution wherein the Conference noted "that States parties to the Red Cross Geneva Conventions (sic) sometimes failed to appreciate their responsibility to take steps to ensure respect of these humanitarian rules in all circumstances by other States, even if they are not themselves directly involved in an armed conflict..." The existence of such an obligation will therefore be conceded. What it actually means still has to be defined. This question too was discussed at length during the inquiry referred to above ¹¹. As the findings of this inquiry have confirmed, it seems clear that on this basis the most that can be done is to take diplomatic measures or publicly denounce violations. It would be improper, and probably dangerous, to impose non-military sanctions (and still more obviously, to impose military sanctions or any form of intervention). Therefore, one must not interpret this as merely an obligation in terms of means without any attendant obligation as regards effects.

In practice, States parties to the Geneva Conventions have not really implemented this provision, at any rate publicly, and do not really try to monitor the extent to which it is observed.

2. -Protecting Powers

Definition

A "Protecting Power" is a "State instructed by another State (known as the Power of origin) to safeguard its interests and those of its nationals in relation to a third State (known as State of residence)"¹².

History

We cannot give here a lengthy historical description of this institution, which dates back to the 16th century¹³, although Protecting Powers are not specifically mentioned in the Hague Conventions. It will be recalled, however, that the Protecting Powers played an important part in applying these Conventions during the First World War by virtue of an international

custom recognized to varying extents. Their task was by no means always easy, and States wanted to see it mentioned in a Convention.

This was done in 1929, in Article 86 of the Convention Relative to the Treatment of Prisoners of War. Nevertheless, such an article could not go very far, for it is not possible to dictate to a Protecting Power "duties which were carried out solely at the behest of the appointing Power".¹⁴ A legal basis for the activities of Protecting Powers had to be established and defined, and the Detaining Power had to be made subject to an obligation to support and facilitate the Protecting Power's activities; but as was only logical, the choice of delegates of the Protecting Power was subject to the consent of the Detaining Power .

This article states:

"The High Contracting Parties recognize that a guarantee of the regular application of the present Convention will be found in the possibility of collaboration between the Protecting Powers charged with the protection of the interests of the belligerents; in this connection, the Protecting Powers may, apart from their diplomatic personnel, appoint delegates from among their own nationals or the nationals of other neutral Powers. The appointment of these delegates shall be subject to the approval of the belligerent with whom they are to carry out their mission."

"The representatives of the Protecting Power or their recognized delegates shall be authorized to proceed to any place, without exception, where prisoners of war are interned. They shall have access to all premises occupied by prisoners and may hold conversation with prisoners, as a general rule without witnesses, either personally or through the intermediary of interpreters.

"Belligerents shall facilitate as much as possible the task of the representatives or recognised delegates of the Protecting Power. The military authorities shall be informed of their visits. "Belligerents may mutually agree to allow persons of the prisoners' own nationality to participate in the tours of inspection."

This article was widely applied during the Second World War but proved imperfect in several respects.

As the conflict spread the few States remaining neutral had to agree to act as Protecting Power for more than one country. It came to the point where they were representing adverse Parties and so tended to become a kind of arbitrator in humanitarian affairs who could use reciprocity as a bargaining counter:

While these initial observations are not critical, the following are:

- since their State of origin was not recognized by the Detaining Power, several million prisoners of war had no Protecting Power;
- the lack of a Protecting Power was cruelly felt by civilians in enemy hands, for whom nobody had thought of providing any such protection;
- lastly; "The outrageous nature of some of the violations committed where there had been no control modified the conception of what that control should be. It was no longer merely a question of recognizing a belligerent's right to supervise the

application of the Convention by his enemy and of facilitating his task in so doing. The idea of the private interest of each of the belligerents was replaced by the conception of the overriding general interest of humanity, which demanded such control, no longer as a right, but as a duty."¹⁵

Bearing all these considerations in mind, the ICRC directed its attention after the war to three points:

- the extension to all the Conventions of the principle of supervision by the Protecting Power .
- arrangements for the replacement of Protecting Powers no longer able to act:
- making supervision obligatory.¹⁶

The Law in Force

-The 1949 Geneva Conventions

The common Article 8, 8, 8 and 9 of the Geneva Conventions of 12 August 1949, now in force, states :

"The present Convention shall be applied with the co-operation and under the scrutiny of the Protecting Powers whose duty it is to safeguard the interests of the Parties to the conflict. For this purpose, the Protecting Powers may appoint, apart from their diplomatic or consular staff, delegates from amongst their own nationals or the nationals of other neutral Powers. The said delegates shall be subject to the approval of the Power with which they are to carry out their duties."

"The Parties to the conflict shall facilitate, to the greatest extent possible, the task of the representatives or delegates of the Protecting Powers."

"The representatives or delegates of the Protecting Powers shall not in any case exceed their mission under the present Convention. They shall, in particular, take account of the imperative necessities of security of the State wherein they carry out their duties. Their activities shall only be restricted as an exceptional and temporary measure when this is rendered necessary by imperative military necessities." (The last sentence appears only in the first and second Conventions).

It can be seen therefore that most States adopted the ICRC's point of view; thus -

- the establishment of Protecting Powers is provided for in the four 1949 Conventions ;
- an article, also common to the four Conventions, makes provision for designating substitutes for Protecting Powers in cases where it has proved impossible to designate such Protecting Powers. Another common article concentrates on the work of the ICRC.¹⁷
- in theory the system is obligatory (the Convention "shall be applied with the cooperation.."), the only reservation being that delegates of the Protecting Powers "shall be subject to the approval of the Power with which they are to carry out their duties" and the impossibility of agreement on this point cannot be ruled out.

Furthermore, it will be noted that the Protecting Power's terms of reference are very vaguely defined here. They are however specified in other articles, namely two other general provisions common to the four Conventions, including the important one of the offer of good offices in case of disagreement as to the interpretation of the application of the Conventions (Articles 11,11,11 and 12); they are also mentioned in three provisions of the First

Convention, one of the second Convention, twenty-seven of the Third Convention and thirty-three of the Fourth Convention.¹⁸

However, it is important to note that the role of the Protecting Power is not confined to the missions laid down in those articles where one Protecting Power is specifically mentioned. The principle of co-operation in application and scrutiny assign to the Protecting Power "a general mission.. giving it the right - and the power -to intervene in cases other than these particular ones."¹⁹

The only restrictions that can be imposed on the activities of the Protecting Powers stem from "imperative military necessities" and such restrictions can only be "exceptional and temporary". Furthermore, this provision for restricting the activities of the Protecting Power is made only in the First and Second Conventions, where its role is much less important than in the Third Convention (activities to help prisoners of war) and the Fourth Convention (activities to help civilians). This distinction is made because, unlike the other two Conventions, the first two Conventions "are mainly intended to be applied on the battlefield".²⁰

- 1977 Additional Protocol I

Article 5 of Protocol I was adopted to strengthen the system laid down by the Conventions.

It states:

Article 5-Appointment of Protecting Powers and of their substitute.

"1. It is the duty of the Parties to a conflict from the beginning of that conflict to secure the supervision and implementation of the Conventions and of this Protocol by the application of the system of Protecting Powers, including *inter alia* the designation and acceptance of those Powers, in accordance with the following paragraphs. Protecting Powers shall have the duty of safeguarding the interests of the Parties to the conflict.

"2. From the beginning of a situation referred to in Article I, each Party to the conflict shall without delay designate a Protecting Power for the purpose of applying the Conventions and this Protocol and shall, likewise without delay and for the same purpose, permit the activities, of a Protecting Power which has been accepted by it as such after designation by the adverse Party.

"3. If a Protecting Power has not been designated or accepted from the beginning of a situation referred to in Article I, the International Committee of the Red Cross, without prejudice to the right of any other impartial humanitarian organization to do likewise, shall offer its good offices to the Parties to the conflict with a view to the designation without delay of a Protecting Power to which the Parties to the conflict consent. For that purpose it may, *inter alia*, ask each Party to provide it with a list of at least five States which that Party considers acceptable to act as Protecting Power on its behalf in relation to an adverse Party, and ask each adverse Party to provide a list of at least five States which it would accept as the Protecting Power of the first Party; these lists shall be communicated to the Committee within two weeks after the receipt

of the request; it shall compare them and seek the agreement of any proposed State named on both lists.

"4. If, despite the foregoing, there is no Protecting Power, the Parties to the conflict shall accept without delay an offer which may be made by the International Committee of the Red Cross or by any other organization which offers all guarantees of impartiality and efficacy, after due consultations with the said Parties and taking into account the result of these consultations, to act as a substitute. The functioning of such a substitute is subject to the consent of the Parties to the conflict; every effort shall be made by the Parties to the conflict to facilitate the operations of the substitute in the performance of its tasks under the Conventions and this Protocol.

"5. In accordance with Article 4, the designation and acceptance of Protecting Powers for the purpose of applying the Conventions and this Protocol shall not affect the legal status of the Parties to the conflict or of any territory, including occupied territory.

"6. The maintenance of diplomatic relations between Parties to the conflict or the entrusting of the protection of a Party's interests and those of its nationals to a third State in accordance with the rules of international law relating to diplomatic relations is no obstacle to the designation of Protecting Powers for the purpose of applying the Conventions and this Protocol.

"7. Any subsequent mention in this Protocol of a Protecting Power includes also a substitute."

With reference to the relevant articles of the Conventions, it is noteworthy that

-para. 3 lays down procedure for designation and confers a role on the ICRC within that procedure :

-para. 6 clarified the fact that neither the maintenance of diplomatic relations nor confiding the protection of a Party's interests and nationals to a third State in accordance with the rules of international law relating to diplomatic relations, shall be an obstacle to the designation of a Protecting Power for the purpose of applying the Geneva Conventions and Additional Protocol I;

-para. 5 expressly mentions that the designation and acceptance of Protecting Powers "shall not affect the legal status of the Parties to the conflict or of any territory, including occupied territory ."

The Protecting Power's terms of reference are unchanged by the Protocol, but extend to it where it is applicable. Like the Conventions, Protocol I contains several direct references to Protecting Powers within the meaning of its Article 5.

Practical Application

The system of the Protecting Powers provided for in the 1949 Conventions has worked badly. Since 1949 there have been very few conflicts indeed in which Protecting Powers were

designated (Suez, Goa, Bangladesh), and study of each shows that even there the system really never worked as expected.²¹

As Protocol I has not yet been put to the test in an armed conflict, it is too early to judge how efficient its additional provisions are.

The reasons why the system of Protecting Powers has worked badly have been examined.²² Some of the main reasons are said to be

- the fear that the designation of a Protecting Power will be seen as recognition of the other Party (where it is not recognized);

- unwillingness to admit that an armed conflict exists or that there are differences of opinion as to the character of a conflict;

- the maintenance of diplomatic relations between belligerents ;

- the pace of events in some wars ;

- the difficulty of finding neutral States acceptable to both parties and able and willing to act in this capacity.

Protocol I to some extent rules out a few of these reasons, but it would be rash to predict that the system of Protecting Powers will certainly be revived.

3. Substitutes for the Protecting Powers

The Law in Force

- The Geneva Conventions of 1949

The legislator in 1949 was well aware of the practical difficulties that might arise in designating Protecting Powers. He therefore wisely provided an alternative, consisting in the designation of substitutes for the Protecting Powers, in the common Article 10-10-10-11 of the Conventions, reading as follows:

" Article 10 -Substitutes for Protecting Powers

The High Contracting Parties may at any time agree to entrust to an organization which offers all guarantees of impartiality and efficacy the duties incumbent on the Protecting Powers by virtue of the present Convention.

When wounded and sick, or medical personnel and chaplains do not benefit or cease to benefit, no matter for what reason, by the activities of a Protecting Power or of an organization provided for in the first paragraph above, the Detaining Power shall request a neutral State, or such an organization, to undertake the functions performed under the present Convention by a Protecting Power designated by the Parties to a conflict.

If protection cannot be arranged accordingly, the Detaining Power shall request or shall accept, subject to the provisions of this Article, the offer of the services of a humanitarian organization, such as the International Committee of the Red Cross, to assume the humanitarian functions performed by Protecting Powers under the present Convention.

Any neutral Power, or any organization invited by the Power concerned or offering itself for these purposes, shall be required to act with a sense of responsibility towards the Party to the conflict on which persons protected by the present Convention depend, and shall be required to furnish sufficient assurances that it is in a position to undertake the appropriate functions and to discharge them impartially.

No derogation from the preceding provisions shall be made by special agreements between Powers one of which is restricted, even temporarily, in its freedom to negotiate with the other Power or its allies by reason of military events, more particularly where the whole, or a substantial part, of the territory of the said Power is occupied.

Whenever in the present Convention mention is made of a Protecting Power, such mention also applies to substitute organizations in the sense of the present Article."

This article in fact does not provide a single alternative, but a whole series of proposals.

The parties to the conflict may first of all designate a substitute organization (provided it "offers all guarantees of impartiality and efficacy") in preference to Protecting Powers (para. 1). This allows the Parties a choice., not merely a subsidiary possibility applicable only in the event of failure to find Protecting Powers.

Secondly, it imposes on the Powers detaining persons protected by the Conventions the duty of requesting a neutral State, or an organization as provided for in the above paragraph, if those persons do not already benefit from the activities of a Protecting Power or such an organization (para. 2). There is a twofold difference between this and the previous paragraph: first, the possibility referred to here is really a subsidiary one and may only be envisaged if Article 8-8-8-9 or the first paragraph of Article 10-10-10-11 has not been applied –a situation that should be exceptional: secondly, not only is protection provided at the express request of the adverse Party, but the choice of the State or organization need not be ratified by the adverse Party. This obviously weakens the scope of the protection, even if there is an express reference to the responsibility of the State or organization so designated towards the Party to the conflict on which protected persons depend (para. 4).

Lastly, this course is envisaged where none of the above-mentioned alternatives has been adopted; in other words where the detaining Power has not even found a neutral State or organization fulfilling the necessary conditions and prepared to undertake this responsibility.

In this case, the detaining Power "shall request" a humanitarian organization -or, if need be, "shall accept" the offer of such an organization -to assume the "humanitarian functions" provided for in the Geneva Conventions -not all the functions incumbent upon protecting powers, but only those that are obviously humanitarian. It is difficult, however, to say where these end, and this has not been done so far. The Article gives no further definition of the

organization than the word "humanitarian", but the International Committee of the Red Cross is mentioned as an example. The humanitarian institution referred to in this Article is sometimes called a "quasi-substitute" for the Protecting Powers.²³

-The Additional Protocol of 1977

As regards the substitutes for the Protecting Powers, Article 5, paragraph 4 of Protocol I contains some modifications to the provisions of Article 10-10-1 0-11.

First of all, it no longer offers the possibility of designating a substitute for the Protecting Powers by joint agreement between the parties to a conflict. The designation of a substitute is nevertheless still possible under the Protocol although not expressly mentioned therein, for Protocol I is an expansion of the Conventions and does not formally exclude this possibility.

Article 5 goes on to require the Parties to a conflict to accept without delay an offer by an organization offering all guarantees of impartiality and efficacy to act as a substitute, where the procedure for the appointment of Protecting Powers has come to nothing.

Admittedly, this obligation is subject to certain restrictions. The parties must be consulted before the offer is made, and the substitute may not function without the consent of the Parties to the conflict. However, the principle that the Parties to the conflict are obliged to accept the offer of a substitute has two new features; first it rules out the rather unsatisfactory possibility of a Party designating a substitute of its own accord if it disagrees with the choice of a Protecting Power or substitute (according to Protocol I, all the Parties must agree on the same substitute); secondly, it places the obligation at the level of substitute and not at the level of humanitarian organization or "quasi-substitute". It therefore tends to drop the distinction between the humanitarian and other functions of the Protecting Powers.

Practical application

The rather complicated series of provisions contained in Article 10-10-1 0-11 of the Conventions has never been formally used. In practice, this role has been taken over by the ICRC, exactly on what grounds has not been clearly established.²⁴

The Special Role of the ICRC

The ICRC can act by virtue of the system of Protecting Powers, as a substitute or "quasi-substitute", or outside the system in its own capacity.

In the context of the system provided for in Article 10-10-1 0-11 of the Conventions, one may ask whether the ICRC is entitled to act as substitute, i.e., whether it can claim to be the "organization which offers all guarantees of impartiality and efficacy" referred to in the Conventions. Literally interpreted, the Conventions appear to take the opposite view. Since the ICRC is cited as an example of a "humanitarian organization" suitable to act as "quasi-substitute" and since in the same article it is not mentioned as an example of the kind of organization referred to above, it might reasonably be concluded that States had not thought of using it for this purpose.

The fact that, since the Conventions were adopted, no organization has been appointed to act as substitute; that the ICRC has amply demonstrated its impartiality and efficacy; and that this time the legal drafters of Protocol I of 1977 quoted it as an example of an organization which "offers all guarantees of impartiality and efficacy" (Article 5, para. 4) -these facts amply demonstrate that the ICRC can claim to play such a role.

Has it really done so? *De facto*, certainly, in many circumstances, even though it has rarely been able to assume all the tasks incumbent upon a Protecting Power. But it cannot be said to have done so *de jure*, and as the ICRC is well aware it is largely responsible for this. At present, one of the main problems with any humanitarian work is the effect it might have on politics. States in conflict very often disagree in their definition of the conflict or even on whether it exists. The ICRC's strength lies in avoiding this pitfall. The Geneva Conventions, their Additional Protocols and the Statutes of the International Red Cross leave it every latitude to do so. The ICRC is empowered to offer its services under several headings; as a substitute or "quasi-substitute" within the system of Protecting Powers as an impartial humanitarian organization outside that system (Articles 9-9-9 and 10 in international armed conflicts and Article 3 in non-international armed conflicts); and on the basis of its task, recognized by the Statutes of the International Red Cross, of "working for the faithful application" of the Geneva Conventions (Statutes, Article 6.4). The ICRC does not generally say on what grounds it offers its services, for if it did, this might be a major reason for rejecting them.

It is probably because of this necessary ambiguity, together with its recognized efficacy and impartiality, that *de facto* the ICRC does a great deal- although still far from enough -to monitor the application of the Geneva Conventions. Before the choices of justifying its actions in strict legal terms or of giving practical help to victims, it cannot but choose the latter.

Formation of a New Monitoring Body

The idea has been mooted on various occasions of setting up a body for the sole purpose of monitoring the application of international humanitarian law in time of armed conflicts²⁵ or of entrusting this task to an existing body²⁶ but nothing has ever come of it and it was rejected by the 1974-1977 Diplomatic Conference.

4. Synthesis

The trend of the entire monitoring system based on the system of Protecting Powers is towards simplicity. Conflicting Parties must normally agree among themselves to opt either for protecting powers or for a substitute, which may be the ICRC. If formal agreement is not reached on these points, and irrespective of any such agreement, the ICRC must or may undertake tasks within limits not yet clearly defined.

In practice only the ICRC has acted in this capacity to any important extent since 1949, generally without stating the exact legal basis of its activity. But indisputably that basis exists.

(c) Repression of Violations

I. General Observations

The Parties to the Geneva Conventions, although not under the obligation of putting an end to violations of the Conventions, are under the obligation of repressing those violations known as grave breaches and considered as war crimes.

To be more precise, in the case of a grave breach the application of the adage *aut judicare at dedere* is required, a Contracting Party having the choice of referring the authors of such breaches to its courts or handing them over "for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a *prima facie* case" (common Articles 49-50-129-146).

Each of the Conventions lists grave breaches (in Articles 50-51-130-147). This list is supplemented by Article 11 paragraph 4, and Article 85 paragraphs 3 and 4, of Protocol I.

It is furthermore expressly mentioned that an omission can be a grave breach (Article 86, Protocol I).

It is the responsibility of the Contracting Parties to incorporate these currently valid provisions in their national legislation, either by means of laws for their application or by incorporating them as they stand.

The obligation to repress grave breaches is absolute and would be unaffected even by an agreement between the interested Parties (see the common Article 51-52-131-148).

2. Responsibility of Superiors and Duty of Commanders

Article 86, paragraph 2 of the Protocol provides as follows:

"The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew or had information which should have enabled them to conclude, in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach."

This article is interesting because it raises the question of individual penal responsibility. It cannot however impose sanctions where only the Contracting Parties are competent to do so, that is, in cases of breaches, other than grave breaches, of the Conventions or Protocol I. In the case of grave breaches, those in which intention is a constituent factor should first be examined, and a superior cannot be found guilty of these unless that factor is proved.

Lastly, Article 87 paragraphs 1 and 3 of Protocol I requires the Contracting Parties to instruct military commanders to repress and report to the authorities breaches that they have been unable to prevent their subordinates from committing. Here too the legislator has gone far by imposing this obligation of means, but it can only be a source of satisfaction that emphasis is placed on this essential role of military commanders. It should however be clear that the role of military commanders in repression can only be disciplinary or preventive, and that penal sanctions are a matter for the competent authorities in accordance with national legislation.

Furthermore, for prisoners of war, civilian internees, or the population of occupied territories, humanitarian law does not of course stress repression but the legal and other guarantees to be given: the danger to be avoided in such cases is, indeed, excesses against unprotected persons and not laxity towards the authors of breaches.

3. Mutual Assistance in Criminal Matters

War crimes and grave breaches of the Conventions or Protocol I are imprescriptible and punishable everywhere.²⁷

The principle of mutual assistance in any proceedings relating to such breaches was laid down by Protocol I (Article 88, para. I). However this article does not state either the procedure or the scope of such mutual assistance, but only that it must be "the greatest measure of assistance".

Co-operation in the matter of extradition is given legal mention in Article 88, para. 2 of Protocol I, but with the important restriction provided by the phrase "when circumstances permit". States were unwilling to enter into a more restrictive formal engagement in the already wide area of breaches of the Conventions and Protocol I.

4. Practical Application

It is too early to assess the practical importance of the innovations made by Protocol I in respect of repression of breaches.

The provisions of the Conventions in this respect appear to have been comparatively limited. There may be three major reasons for that: the psychological difficulty, in a wartime atmosphere leading generally to hatred of the enemy, of condemning "excessive zeal" used against the enemy; the fact that in many cases the authorities themselves are responsible for breaches, of which they are guilty either intentionally or more often because their instruction in international humanitarian law has been neglected, and that the separation of legal and political powers is often seriously compromised in such situations; and lastly, let it be said once more, the lack of compulsory jurisdiction and supranational means of coercion whereby States can be forced to respect their engagements.

However, it should not be forgotten that on various occasions breaches have been repressed, and that the deterrent effect of these provisions, although impossible to assess, has certainly been considerable.

5. Other Means

-International Enquiry.

All criminal proceedings entail an enquiry. This type of enquiry is prescribed in national legislation and is not mentioned in the Conventions or in Protocol I.

Very often, however, one of the Parties to the conflict accuses another Party of violating the Conventions.

(d) The Enquiry Procedure Instituted by the Conventions of 1949.

In this case the common Article 52-53-132-145 of the Conventions provides that "an enquiry shall be instituted in a manner to be decided between the interested Parties". If the Parties do not agree on that manner, they must agree "on the choice of an umpire who will decide on the procedure to be followed".

This procedure does however require agreement at least on the umpire, which; is probably one reason why it has never been successful. But another reason for its failure is the furious controversy surrounding widely publicized allegations of breaches. A State committing breaches can fairly often be persuaded to put an end to them provided the negotiations are completely confidential; but it will not usually tolerate aspersions on its humanitarian standards or good faith by an enquiry over which it has not full control.

I. The Fact-Finding Commission Instituted by Protocol I of 1977

Article 90 of Protocol I of 1977 instituted a Fact-Finding Commission. The procedure applied by this institution does not take the place of that provided for in the Conventions, but supplements it.

The major innovation made by the procedure to be followed by that Commission is that it has to enquire into any allegation of a grave breach or other serious violation²⁸ of the Conventions or of Protocol I, with or without the agreement of the accused Party.

However, the Parties to Protocol I are not bound to that procedure unless they make an express declaration recognizing the competence of the Commission to enquire into the allegations made by a Party that has made a similar declaration. Also the Commission (whose conclusions are not made public without the express agreement of the Parties concerned) makes a report and recommendations to the Parties but has no competence other than this. There is no real reason to regret that the Commission's powers are comparatively limited; they could be no wider in the present state of international order .

The Commission is composed of "fifteen members of high moral standing and acknowledged impartiality", elected for five years by the Parties who have declared that they accept its competence, pursuant to a clearly defined procedure. The enquiries are in principle made by a Chamber of seven members, five of whom are appointed by the President of the Commission and one by each of the Parties directly concerned.

It is too early to assess the value of this procedure, as it has not yet been put to the test; the Protocol prescribes that it cannot operate until 20 Parties to the Protocol have expressly declared that they accept the competence of the Commission. So far, nothing like that number of Parties have done so.²⁹

2. The Role of the ICRC

The role of the ICRC is to ensure that the Conventions are applied. It reports direct to the Parties concerned, in principle confidentially, breaches of international humanitarian law that it has itself ascertained. It is however extremely wary if asked to take part in an enquiry into

alleged breaches. The atmosphere of bitter recrimination often surrounding such allegations and the indignation natural at a time of armed conflict make the investigator's task extremely difficult. Logically, an enquiry should lead to conclusions that either condemn the accused Party or give the lie to the accusing Party. In either case one of the Parties will find it very hard to accept the result. The ICRC realizes this. It realizes that by agreeing to be an investigator it agrees to be mixed up in polemics that can only harm its protection and assistance activities in at least one of the Parties; but as everyone understands, the ICRC cannot work really effectively unless it can act in each of the conflicting Parties.

It has therefore adopted the very rigorous principle that it will only agree, as a last resort, to take part in the constitution of a Commission of Enquiry outside its own organization if all the interested Parties so request.

This contingency has not arisen under the Conventions of 1949.

3. Procedure in Case of Disagreement Concerning the Application and Interpretation of the Provisions of the Conventions and of Protocol I.

-Procedure Prescribed by the Conventions .

Where they deem it advisable, particularly in cases of disagreement between the Parties concerning the "application or interpretation" of the provisions of the Conventions (see the common Article 11-11-11-12) the Protecting Powers may lend the Parties to the conflict their good offices with a view to settling the disagreement.

No such meeting has ever taken place, one reason being that the system of Protecting Powers has only very rarely been used.³⁰

-Procedure Established by Protocol I of 1977

Article 7 of that Protocol reads :

"The depositary of this Protocol shall convene a meeting of the High Contracting Parties, at the request of one or more of the said Parties and upon the approval of the majority of the said Parties, to consider general problems concerning the application of the Conventions and of the Protocol."

In this case the meeting does not concern only the Parties to the conflict, but all the Contracting Parties. So far the depositary has not received any request pursuant to this Article.

4. Co-operation With the United Nations.

Article 89 of Protocol I reads :

"In situations of serious violations of the Conventions or of this Protocol, the High Contracting Parties undertake to act, jointly or individually, in co-operation with the United Nations and in conformity with the United Nations Charter."

The scope of this Article is not very clear, especially as States have not yet had occasion to show how they proposed to apply it.

5. The Role of the Media.

The media have no legal function in international humanitarian law. Undeniably, however, they influence its implementation by showing an image of the conflicting Parties towards which those Parties are generally far from indifferent, and that depends largely on the way in which those Parties apply humanitarian law.

e) The Application of International Humanitarian Law in Non-International Armed Conflicts.³¹

The means we have called preventive also concerned the international humanitarian law applicable in non-international armed conflicts: Article 3 of the Conventions of 1949 and Protocol II of 1977 are part of international humanitarian law and can in no wise be excluded from the efforts made to disseminate and teach that law. One very short Article of Protocol II mentions dissemination; it reads: "This Protocol shall be disseminated as widely as possible".

There is however no specific provision mentioning application. As violations of Article 3 of the Conventions, or of Protocol II, cannot be classed as grave breaches, in the strict sense of the term, of the Conventions and Protocol, there is only an obligation to put an end to them but no obligation to punish their author.

The system of Protecting Powers is not of course involved and only the ICRC is granted a brief mention, as being able to "offer its services to the Parties to the conflict" (see Article 3 of the Conventions), but the Parties are not obliged to accept them. No enquiry procedure is provided for. In practice, however, the ICRC has generally been able to take action in this kind of conflict on as large a scale as its action in international conflicts.

(f) Conclusions

Experience shows that the application of international humanitarian law is cramped by rigid procedure, and that its greatest successes appear to have been obtained with the least restrictive procedure. The growing influence of the ICRC over the years, especially in non-international armed conflicts, clearly shows this, just as it shows that "the moderating activities of a third party unconnected with the objectives of the struggle and the exigencies of combat"³² are still essential. It would however be wrong to conclude that strictly legal argument should be rejected; it must still have a place in such activities, because it situates them and places discussion at its true level; but experience shows that it is not sufficient. Nowhere in the world is there any real supranational court or force, and persuasion based on honesty, neutrality and efficacy is probably the essential weapon of those wishing to promote the rule of international humanitarian law.

This branch of international law owes its modest but undeniable success very largely to the fact that it is of use to everybody and keeps clear of political quarrels. Anybody who wants to promote its implementation must never forget this.

NOTES

¹ Undoubtedly, the right of legitimate defence is recognized by the United Nations Charter (Art. 1) and the United Nations may in theory engage in military action against an aggressor (Art. 42), but an international war may no longer take place unless at least one of the Parties to the conflict violates the United Nations Charter.

² Cf. p. 265-266.

³ Cf. p. 275 ff.

⁴ Cf. p. 266 ff.

⁵ For the importance of national laws in implementing international humanitarian law, cf. Bothe, Michel, The role of national law in the implementation of international humanitarian law, in: *Festschrift Patrnogic*, to be published.

⁶ Cf. p. 275 ff.

⁷ Cf. p. 275-276.

⁸ Cf. *Annales droit international médical Commission medico-juridique*, Monaco, No 18, decembre 1968, pp. 29-51.

⁹ "The use of words "and to ensure respect" was, however, deliberate; they were intended to emphasize and strengthen the responsibility of the Contracting Parties. It would not, for example, be enough for a State to give orders or directives to a few civilian or military authorities, leaving it to them to arrange as they pleased for the details of their execution. It is for the State to supervise their execution". Pictet, Jean (Ed.), *Commentary on The Geneva Conventions of 12 August 1949*. Vol. I -Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, ICRC, 1952, p. 26.

¹⁰ "It follows, therefore, that in the event of a Power failing to fulfil its obligations, the other Contracting Parties (neutral, allied or enemy) may, and should, endeavour to bring it back to an attitude of respect for the Convention" (*Ibid.*).

¹¹ Cf. *Annales de droit international médical*. Commission medico-juridique, Monaco, No 18, decembre 1968, especially p. 41 ff.

¹² Pictet, Jean (Ed.), *Commentary on The Geneva Conventions of 12 August 1949*. Vol. I –Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, ICRC, 1952, p. 86.

¹³ For an historical description, cf. Pictet, Jean (Ed.), *Commentary to The Geneva Conventions of 12 August 1949*, Vol. I -Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, ICRC, 1952, pp. 86-93.

¹⁴ *Ibid.*, p. 89.

¹⁵ *Ibid.*, p. 91.

¹⁶ *Ibid.*, pp. 91-92

¹⁷ As regards these articles, cf. pp and....

¹⁸ Pictet, Jean (Ed.), *Commentary to the Geneva Conventions of 12 August 1949*. Vol. I –Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, ICRC, 1952, p. 96.

¹⁹ *Ibid.*, p. 96.

²⁰ *Ibid.*, p. 96.

²¹ For further information, cf. especially Forsythe, David P., Who are the guardians: third parties and the law of armed conflict. *American Journal of International Law* (Washington D.C.), Vol. 70, No I, 1 January 1976, p. 41 ff., especially pp. 46-48.

²² Cf. in particular Abi-Saab, Georges, Le renforcement du systeme d'application des règles du droit humanitarian, *Revue de droit pénal militarize et du droit de la guerre* (Bruxelles), Vol. XII -2, 1973, p. 223 ff., especially pp. 227-228.

²³ Although the wording is not perfectly suited to our purpose, it will be used below for simplicity's sake. ,

²⁴ Cf. below.

²⁵ Cf. especially Patrnogic, Jovica, Control of the application of humanitarian conventions, *Revue de droit pénal militaire et de droit de la guerre* (Bruxelles), No. V -2, 1966, p. 405 ff.

²⁶ Cf. especially de La Pradelle, Paul and Aureglia, Louis, Rapport sur le controle de l'application des Conventions humanitaires en cas de conflits armés. *Annales de droit international medical* (Monaco), No.6, December 1960, p. 17 ff.

²⁷ Cf. the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity (United Nations General Assembly Resolution 2391 (XXIII) of 26 November 1968), common Article 49 (I), 50 (II), 129 (III) and 146 (IV) of the Geneva Conventions for the Protection of War Victims of 12 August

1949, and Article 85 of Additional Protocol I of 1977. The *Law of Armed Conflict A Collection of Convention of Resolutions and Other Documents*, Edited by D. Schindler and J. Toman, 3rd edition, Dordrecht, Martinus Nijhoff Publishers, Geneva, Henry Dunant Institute, 1988, pp. 925-932, 391-392, 418,475-476, 546-547,671-672.

²⁸ The phrase grave breach has a precise meaning and designates breaches that are listed, whereas the phrase *serious violation* is to be understood as having its usual meaning, which the Commission is Left to determine.

²⁹ On 30 June 1988 only 11 of the 76 States Parties to Protocol I had made that declaration.

³⁰ Cf. p. 271

³¹ No mention will be made here of applicability of customary international law in non-international armed conflicts, regarding which, of., *inter alia*, Kalshoven, Frits, in *Current Problems of International Law*, A. Cassese (ed.), Milan, 1975, pp. 265-285.

³² Bugnion, Francis. Le droit humanitaire applicable aux conflits armés internationaux: Le probleme de controle. *Annales d'etudes internacionales* (Genève), Vol. 8, 1977, p. 57.

Implementing International Humanitarian Law: Problems and Priorities*

by Dieter Fleck

The implementation of international humanitarian law applicable in armed conflicts must be considered in the light of three basic problems.

First, in time of peace no one wants to think about the kind of situation where this body of law is put into practice. Nor is it easy to foster enthusiasm for legal rules which are beyond people's personal experience. But unless certain efforts are made and steps taken in peacetime, it cannot be expected that these rules will be implemented in time of crisis or war.

Actual documented practice is a second problem: the applicable rules have largely been violated during armed conflicts. The general consensus has it that such violations cannot be successfully sanctioned and that humanitarian protection therefore cannot stand the test of reality.

The third problem is related to the first and the second. Humanitarian law can be expected to evolve only after armed conflicts have ended, in times of lasting peace; many people therefore believe that progress can be made only when the need for measures of implementation seems most remote.

Given these problems and preconceived notions, it is heartening to see that increased interest has been aroused, not only by the frequent reports of grave breaches of humanitarian principles but also by the complex state of national decisions regarding the ratification of the 1977 Protocols additional to the Geneva Conventions¹ and the 1980 Weapons Convention,² in efforts made to implement the relevant parts of treaty-based and customary international law in this respect.

This article asks three practical questions: what is required under existing international law (I)? Which provisions of humanitarian law have already been implemented (II)? What national and international measures should now be taken (III)? The article ends with a general assessment (IV) including some suggestions on how to solve the main problems mentioned at the beginning.

Contents

* Article based on a lecture given at the Seminar on the Implementation of international Humanitarian Law, organised by the ICRC in cooperation with the international Institute of Humanitarian Law and the Bulgarian Red Cross, Sofia, 0-22 September 1990.

¹ At present (February 1991) Protocol I (relating to the protection of victims of international armed conflicts) is in force for 100 States, Protocol II (relating to the protection of victims of non-international armed conflicts) for 90 States.

² Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be excessively injurious or to have indiscriminate effects, in force for 28 States.

- What is required under existing humanitarian law?
 - National legislation
 - Organizational measures in peacetime
 - Organizational measures to be taken in the event of armed conflict
 - Dissemination and educational measures
- What has been achieved in practice?
- What remains to be done?
- Conclusions

I. What is required under existing humanitarian law?

The rules of international humanitarian law are to a great extent peremptory norms (*jus cogens*) which, in accordance with Article 53 of the Vienna Convention on the Law of Treaties, are "accepted and recognized by the international community of States as a whole" as norms "from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character".³ Most of the provisions of international humanitarian law are also *self-executing*. They are unequivocal and complete and hence can be implemented by government agents and individuals without national legislative measures.⁴ There are, however, certain exceptions. Some of the provisions of international humanitarian law do require legislative measures for implementation; insofar as these measures have not yet been taken, they should be drawn up when ratification is decided on or as soon as possible thereafter. This is especially true for the obligation to prosecute grave breaches, but the implementation of *self-executing* provisions can and should be facilitated and supported by national laws, regulations and directives as well.

Many provisions of humanitarian law expressly call for national measures of implementation. In doing so, they comply with Article 26 of the Vienna Convention, which provides that any treaty in force is "binding upon the parties to it and must be performed by them in good faith"; they also meet the specific requirements for humanitarian protection in wartime conditions, when respect for the rules cannot easily be expected unless express national and international action has been taken to direct and support implementation.

³ Lauri Hannikainen, *Peremptory Norms (jus cogens) in International Law. Historical Development, Criteria, Present Status*, Helsinki, Finnish Lawyers' Publishing Company, 1988.

⁴ Krzysztof Drzewicki, "International Humanitarian Law and Domestic Legislation with Special Reference to Polish Law", *Revue de droit pénal militaire et de droit de la guerre*, Brussels, Vol. XXIV-1-2, 1985, pp. 29-52 (33).

There exists; a wealth of general and specific studies on this topic,⁵ which is also the subject of a comprehensive programme of action drawn UPI by the International Committee of the Red Cross and the League of the Red Cross and Red Crescent Societies and adopted at the last International Conference of the Red Cross.⁶ The programme and continuing activities in this field require the active support of nations. and of individuals, who play a role of growing importance in encouraging respect for this part of international law, intended to protect the individual against States as well. The Red Cross Movement should be encouraged to cast a critical eye on the results of these endeavours. Governments and National Red Cross and Red Crescent Societies will have the opportunity to do so at the forthcoming 26th International Conference of the Red Cross and Red Crescent.⁷

Each country has different needs and priorities for the implementation of international law. The same holds true, of course, for experts working in this field at international level. When it comes to humanitarian law, one traditional school of thought considers penal sanctions, legal provisions against the misuse of the protective emblems and administrative regulations to be important.⁸ I consider organizational and educational measures and dissemination to be more important. A comprehensive survey of required measures should include the following:

1. National legislation

⁵ See International Committee of the Red Cross and Henry Dunant Institute (eds.), *Bibliography of International Humanitarian Law Applicable in Armed Conflicts*, second edition, Geneva 1987, Part V: "Implementation of International Humanitarian Law", pp. 423-507; "Implementation of the Protocols", *International Review of the Red Cross*, No. 217, July-August 1980, pp. 198-204; Michael Bothe and Karin Janssen, "The implementation of international humanitarian law at the national level -Issues in the protection of wounded and sick", *International Review of the Red Cross*, No. 253, July-August, pp. 189-199; *International Institute of Humanitarian Law*, 12th Round Table on Current Problems of International Humanitarian Law, Refugee Day, and Red Cross and Red Crescent Symposium, Summary of Reports and Discussions on Current Problems of International Humanitarian Law (San Remo, 2-5 September 1987) Umesh Palwankar, *National Measures for the Implementation of International Humanitarian Law -An Outline of the Present Situation Illustrating Some of the Main Problems*, pp. 1-8; Andre Andries, *Prevention and Repression of Breaches of International Humanitarian Law -Preliminary Legislative and Other Measures for an Effective Application of International Humanitarian Law*, pp. 9-19; L. R. Penna, *Implementation of International humanitarian Law and Rules of International Law on States Responsibility for Illicit Acts*, pp. 20-23; Michel Veuthey, "Implementation and Enforcement of Humanitarian Law and Human Rights Law in Non-International Armed conflicts: The Role of the International Committee of the Red Cross", *The American University Law Review*, Washington D.C., Vol. 33 (Fall 1983), No 1; Michel Veuthey, "The Humanitarian Network: Implementing Humanitarian Law through International Cooperation", *Bulletin of Peace Proposals*, Oslo, Vol. 18, 1987, N° 2 pp. 133-146; Hubert Bucher, "Die Umsetzung der Zusatzprotokolle zu den Genfer Abkommen ins Bundesrecht", in Yvo Hangartner and Stefan Trechsel (eds.), *Völkerrecht im Dienste des Menschen, Festschrift für Hans Haug*, Bern and Stuttgart, 1986, pp. 31-45; Frits Kalshoven Yves Sandoz (eds), *The Application of Humanitarian Law*, Dordrecht, Martinus Nijhoff Publishers, 1987; Frits Kalshoven Yves Sandoz (eds.), *Implementation of International Humanitarian Law*, Dordrecht, Martinus Nijhoff Publishers, 1989; Francoise J. Hampson, "Fighting by the rules: Instructing the armed forces in humanitarian law", *International Review of the Red Cross*, 1989, No. 269, March-April 1989, pp. 111-124; id., "Winning by the rules: law and warfare in the 1980s", *Third World Quarterly*, London, Vol. 11, No. 2, April 1989, pp. 31-62.

⁶ *Third Programme of Action of the International Red Cross and Red Crescent Movement with respect to dissemination of international humanitarian law and of the principles and ideals of the Movement (1986-1990)*, adopted at the 25th International Conference of the Red Cross (Geneva, 1986) in Resolution IV.

⁷ See: "National Measures to Implement International Humanitarian Law – A new move by the ICRC", *International Review of the Red Cross*, N° 263, March-April 1988, pp. 121-140; Marfa Teresa Dutli, "National measures for implementation of international humanitarian law", *Dissemination*, N° 13, May 1990, pp. 8-10.

⁸ This point of view has been criticized by G.I.A.D. Draper in "The Implementation and Enforcement of the Geneva Conventions of 1949 and of the Two Additional Protocols of 1977", *Recueil des cours de l'Académie de droit international de la Haye*, 1979, III, pp. 5-54.

- Laws and regulations should provide for the application of the Geneva Conventions (I, 48; II, 49; III, 128; IV, 145) and Additional Protocol I (AP I, 84).⁹
- National legislation must be enacted to provide for appropriate penal sanctions of grave breaches of international humanitarian law (I, 49-50; II, 50-51; III, 129-130; IV, 146-147; AP I, 85-91).
- Legislative measures are required to prevent and suppress, at all times, misuse of the protective emblems (I 53-54; II 43-45).

2. Organizational measures in peacetime

- National Red Cross and Red Crescent Societies and other voluntary aid societies must be duly recognized and authorized by their government (I, 26).
- Medical establishments and units shall, as far as possible, be situated in such a manner that attacks against military objectives cannot imperil their safety (I, 19).
- Medical establishments, units, transports and personnel shall be marked by the distinctive emblem of the red cross or red crescent (I, 38-44; II, 41-45; IV, 18).
- Optional light, radio and electronic signals should be provided to mark medical establishments, units and transports more effectively (API, Annex I, Articles 5-8).
- In the study, development, acquisition or adoption of a new weapon, means or method of warfare, it must be determined whether its use would, in some or all circumstances, be prohibited by international law (AP I, 36).
- To the maximum extent feasible, military objectives shall not be located within or near densely populated areas (AP I, 58).
- A civil defence organization should be set up for exclusively humanitarian tasks: to protect the civilian population against the dangers and to help it to recover from the immediate effects of hostilities or disasters, and to provide the conditions necessary for its survival (IV, 63; AP I, 61-67).
- National information bureaux for prisoners of war and civilians (III, 122-124; IV, 136-141), and tracing services for missing persons and children (AP I, 33, 78) shall be organized.
- Preparation shall be made for the notification of hospital ships (II, 22).
- Steps shall be taken to safeguard cultural property (1954 Hague Convention, 3).
- Legal advisers for military leaders shall be employed and trained (AP I, 82).

⁹ The Roman numerals stand for one of the four 1949 Geneva Conventions, AP I (or II) for Additional Protocol I (or II) of 1977; the Arabic numerals refer to the relevant article.

3. Organizational measures to be taken in the event of armed conflict

- Special agreements should be considered for all matters concerning which it may be deemed suitable to make separate provision (I, 6; II, 6; III, 6; IV, 7).
- Protecting Powers or substitutes should be appointed (I, 8, 10; II, 8, 10; III, 8, 10; IV, 9, 11; AP I, 5).
- The activities, of the International Committee of the Red Cross must be facilitated and supported (I, 9; II, 9; III, 9; IV, 10; AP I, 81).
- The possibilities and procedures for international fact-finding should be encouraged and supported (I, 52; II, 53; III, 132; IV, 149; AP I, 90),.
- The use of good offices for the settlement of disputes should be accepted and supported (I, 11; II, 11; III, 11; IV, 12).
- Hospital zones and localities shall be established for the wounded and sick (I, 23 and Annex I).
- Hospital and safety zones and localities shall be established for the civilian population (IV, 14 and Annex I).
- Prisoners of war shall be protected, and procedures shall be enacted for a competent tribunal to determine the status of persons who, have fallen into enemy hands (III, 5 para. 2; AP I, 45 para. 2).

4. Dissemination and educational measures

- Dissemination activities shall be developed at various levels for the military forces and the civilian population (I, 47; II, 48; III, 127; IV, 144; AP I, 83; AP II, 19).
- Qualified personnel shall be trained to facilitate the implementation of the Geneva Conventions and the Additional Protocols (AP I, 6), the 1954 Hague Convention on the protection of cultural property and the Regulations for its execution (1954 Hague Convention, 25-27).
- The armed forces shall receive instruction in international humanitarian law (AP I, 82).

II. What has been achieved in practice?

The International Society for Military Law and the Law of War devoted its XIth Congress (Edinburgh, 19-23 September 1988) to the implementation of international humanitarian law at the national level. A General Report, based on written reports from 18 countries on four

continents, and a wide-ranging discussion¹⁰ provide a broad spectrum of opinions and legal answers to questions about national implementation.

The International Institute of Humanitarian Law has performed an outstanding task over the last twenty years by disseminating knowledge of the law in international courses, encouraging national activities to further this end, and maintaining a continuing humanitarian dialogue. Extensive documentation and evaluation of national activities worldwide can be expected from a research project directed by Professor Michael Bothe.¹¹

Taking my own country, Germany, as an example, an important task was certain to finalize the ratification of the Additional Protocols. The Ratification Act was signed on 11 December 1990¹² and the ratification document was deposited with the Swiss Federal Council on 14 February 1991.¹³ The German declarations of understanding made on this occasion meet international standards and clearly state that even members of an alliance who have different positions on ratification of the Additional Protocols can still solve problems of applicability in this respect. In accordance with Article 90, para. 2 of Additional Protocol II Germany also recognized ipso facto the competence of the International Fact-Finding Commission. The establishment of this new body to ensure respect for the Conventions and the Protocols should be broadly supported so as to ensure equitable geographical representation as required under Article 90 para. 1 d).

International treaty law is part of internal German law by virtue of the ratification of the relevant treaties (Art. 59, para. 2 of the Basic Law of the Federal Republic of Germany). Moreover, the general rules of international law are directly applicable internally and take precedence over all other legislation (Art. 25 of the Basic Law). Consequently, the provisions of the four Geneva Conventions and their Additional Protocols" insofar as they are considered to be general rules of international law within the meaning of this constitutional provision (i.e. insofar as they are part of universally applicable customary international law), are in practice part of our constitution. This is in fact the case for a considerable part of treaty-based and customary humanitarian law, but not for each single provision.

In keeping with this general approach, grave breaches of international humanitarian law are sanctioned in Germany by the provisions of the general Criminal Law (*Strafgesetzbuch*). The unauthorized use of the red cross and red crescent emblems and other associated signs is prohibited and punishable under the Administrative Offenses Act (*Ordnungswidrigkeitengesetz*). The protection of medical personnel, units and transports is governed by directives and service regulations, which also define protected personnel and contain provisions on marking and identification, on the extent of permissible use of medical vehicles and medical aircraft, and on disguising the distinctive emblem in exceptional cases. Preparations for National Information Bureaux for protected persons (III, 122-125; IV, 138-141; AP I, 78) are made both by the Federal Ministry of Defence and the German Red Cross. No provisions have been made for the establishment of zones of special protection (IV, 14) but the establishment of hospital zones (I, 23), for which the selection of suitable locations

¹⁰ Published in: *Revue de droit militaire et de droit de la guerre*, Brussels, Vol. XXVIII-I-2, 1989, pp. 11-379.

¹¹ Michael Bothe (ed.), *National Implementation of International Humanitarian Law, Proceedings of an International Colloquium held at Bad Hamburg*, June 16-19, 1988, Martinus Nijhoff Publishers, Dordrecht/Boston/London, 1990.

¹² 11 December 1990 Law related to the Additional Protocols of 1977 to the Geneva Conventions of 1949 (*Bundesgesetzblatt* 1990 n 1550).

¹³ See the present issue of *International Review of the Red Cross*, pp. 234-236.

can be a problem, is being studied. The Geneva Conventions set forth strict requirements for the establishment of such zones. It is difficult to meet all requirements in densely populated areas and detailed planning in peacetime appears to be impossible.

The German Red Cross plays an active role in disseminating humanitarian law, motivating volunteers from a broad cross-section of the civilian population to deal with this complex set of rules. The German Red Cross; has published, in addition to a four-language edition of the Fourth Geneva Convention and the Additional Protocols,¹⁴ a number of manuals on certain aspects of particular interest.¹⁵

A Presidential Commission of the German Red Cross acts as the main forum for all questions related to the implementation of humanitarian law in Germany, thus making available advice by highly qualified independent experts and at the same time promoting ongoing dialogue with representatives from the Ministries of External Affairs, the Interior, and Defence. The Federal Armed Forces and the German Red Cross co-operate closely in various activities to disseminate and implement humanitarian law.

The Federal Armed Forces, for their part, have legal advisors down to division level. Their task is not only to provide legal counsel as required under Article 82 of Additional Protocol I, but also to act as attorneys in disciplinary matters. Germany does not have a special criminal jurisdiction for the armed forces but there are military disciplinary courts. The Defence Ministry's legal service deals with all relevant international legal affairs, including the legal assessment of new weapons, means or methods of warfare (AP I, 36).

Dissemination and educational measures are actively supported by the universities, the German Society for Military Law and Humanitarian Law and two specialized academic journals,¹⁶ which are used in addition to international journals available.

III. What remains to be done ?

A comparison of what is required and what has been done reveals that although valuable work has been accomplished in numerous countries, many argued measures of implementation remain to be taken. This is a serious problem and undoubtedly one of the main reasons why humanitarian law is disregarded in armed conflicts.

Measures of implementation have to be assessed from the long-term point of view. Given the complexity of peacetime and wartime tasks, the question of what should be done to ensure

¹⁴ *Das IV. GenferAbkommen vom 12. August 1949 zum Schutze von Zivilpersonen in Kriegszeiten, Textband* (Vol. 1), Eds. Wolfgang Voit and Elmar Rauch, Bonn 1980, 293 pages (texts in German, French, English, and Russian); *Zusatzprotokolle zu den Genfer Abkommen vom 12. August 1949 über den Schutz der Opfer bewaffneter Konflikte, Textband* (Vol. 2), Eds. Wolfgang Voit and Elmar Rauch, Bonn 1981, 452 pages (texts in German, French, English, and Russian).

¹⁵ *Der Schutz der Zivilkrankenhäuser und ihres Personals*, Ed. Hans Giani, Heft 3, Bonn 1980, 79 pages; *Zivilschutz*, Ed. Georg Bock, Heft 4, Bonn 1981, 98 pages; *Der Schutz im Bereich der öffentlichen Verwaltung*, Ed. Walter Hofmann, Heft 5, Bonn 1982, 79 pages; *Polizei (Vollzugspolizei der Länder, Bundesgrenzschutz)*, Eds. Ernst Rasch and H. Joppich, Heft 6, Bonn 1983, 74 pages; *Heft für Juristen*, Eds. Wolfgang Voit and Michael Bothe, Heft 7, Bonn 1984, 136 pages; *Es begann in Solferino*, Eine Darstellung der Genfer Rotkreuz-Abkommen, German Red Cross, 40 pages; *Es begann in Solferino*, Die Genfer Rotkreuz-Abkommen, Problemfälle - Beispiele - Sachverhalte, Lösung der beschriebenen Fälle, Handbuch für Lehrkräfte, Juristen and Konventionsbeauftragte, Horst Seibt, German Red Cross, 64 pages.

¹⁶ *Neue Zeitschrift für Wehrrecht*, *Humanitäres Völkerrecht - Informations-schriften*.

the proper implementation of humanitarian law is not easy to answer. We cannot meet all requirements at once and therefore have to set priorities.

To take the example of my own country again, particular efforts are presently being made to draft new German military manuals on humanitarian law.¹⁷ A collection of all relevant international instruments, with annotations and an index, is also being prepared. Moreover, we are about to draft a handbook on humanitarian law which will in fact be the first complete and concise modern reader on the subject to be published in German. It is necessary to publish military manuals on humanitarian law and to distribute them far beyond military circles, for the handbook cannot be prepared without outside help from universities and Red Cross experts. An English translation of the draft is being sent to our allies and all friends willing to assist us in this task. The results of all these discussions will be incorporated into the final text. Finally, a precis of the handbook and a collection of cases and solutions, will be part of our manuals programme.

A number of different measures of implementation which should be taken up relate to the *identification* of works and installations containing dangerous forces (AP I, 56), and the identification of cultural property. Here Germany will have to harmonize differences in implementation which derive from its federal system. We also have to take decisions on the *status of civilian personnel* employed for military tasks, and to prepare the necessary *notifications* on the status of personnel, the recognition of aid societies and humanitarian organizations (I, 26), and on hospital ships (II, 22). A practical problem is posed by the protection of *search and rescue helicopters*, since they are also designed for reconnaissance and not just for humanitarian missions. This is a problem faced by most armed forces in the world. *Ad hoc* protection for search and rescue missions in times of armed conflict is an important issue, one worth taking up at international level. This also holds true for various other measures which can hardly be promoted except in international co-operation. The training of *legal advisers* in the armed forces is already to an important degree based on international exchange activities, of which the courses organized by the International Institute of Humanitarian Law are of particular value. Our courses in Germany are open to foreign participants both as students and lecturers. Thus we can benefit from international support even at home.

Other measures to be considered and planned in peacetime concern medical zones (I, 23 and Annex) and *security zones* (IV, 14 and Annex), *the protection of cultural property*, in particular refuges intended for sheltering movable cultural property (1954 Hague Convention 8), and the organization of a *National Information Bureau* in co-operation with the National Red Cross Society (III, 122, IV, 136). The 25th International Conference of the Red Cross (Resolution XIV) urged the States party to the Conventions to consider taking such measures as may be necessary to institute their National Information Bureau in peacetime so that they would be in a position to fulfill tasks as soon as possible in the event of an armed conflict. German planning efforts in this respect are still in the early stages, and we could benefit from the expertise of the International Committee of the Red Cross to make full use of modern information technology which could help not only to save manpower and financial resources but also to standardize information and thus make the Bureau more effective. A

¹⁷ *Zentrale Dienstvorschrift 15- ZDv 15 [Joint Services Manual 15] Humanitäres Völkerrecht in bewaffneten Konflikten* [International Humanitarian Law in Armed Conflicts] (under preparation); 15/1 -*Grundsätze* [Principles]; 15/2 -*Handbuch* [Handbook]; 15/3 -*Textsammlung* [Collection of Instruments]; 15/4 -*Sammlung von Fällen mit Lösungen* [Collection of Cases and Solutions].

small mobile system and a few trained experts to handle it could render extremely valuable services in armed conflicts. This idea might sound too practical, but the question should nevertheless be asked whether industrialized countries could not offer assistance in this field, in the interests of humanitarian protection, to the parties to ongoing conflicts or to victims of disaster situations.

Lastly, various *legal issues* should be settled in co-operation with the relevant ministries, agencies, allied forces, alliances, etc. (e.g. rules of engagement -AP I, 87).

While it remains true that implementation of international obligations is a national responsibility, efforts taken by or under the auspices of international organizations may enjoy a higher degree of publicity, at least among the relevant agencies and experts. Problems may arise, however, in terms of effectiveness and lack of national support. In the absence of a functioning system of Protective Powers and/or substitutes, the International Fact-Finding Commission (AP I, 90), the formal establishment of which is now possible, could act as a deterrent against violations of humanitarian law. I consider it a task of top priority in this respect to make strong efforts to enlarge participation in and support for this new system and to develop ideas as to how it could make inquiries and use its good offices, as provided in Article 90, paras. 2 c) and d). It would be helpful if the Commission could established publish its own rules as soon as possible, even if these rules are not very likely to be put to the test in the foreseeable future.¹⁸

The International Committee of the Red Cross, whose mandate to gather and assess all information on legislative and other measures taken for the implementation of humanitarian law and to report regularly on the follow-up was expressly renewed by the 25th International Conference of the Red Cross (Resolution V), can be expected to offer not only a general review of current achievements and problems in the implementation field but also prospects and suggestions for future work to be taken 'Up by the Red Cross Movement. The States party to the Geneva Conventions should meet the challenge and give full support to necessary activities.

The problem of ensuring "respect for human rights in armed conflicts" can also be tackled through United Nations bodies, which have in fact been dealing with the matter now for many years and which should stress this as one of the main activities to be undertaken during the United Nations Decade of International Law (1990-99).¹⁹

Finally, nations might be encouraged to report to the Swiss Federal Council, as the depositary of the Geneva Conventions and their Additional Protocols, on national rules and regulations and other measures adopted to implement humanitarian law. The Geneva Conventions and their Additional Protocols (I, 48; II, 49; III, 128; IV, 145; AP I, 84) provide that the High

¹⁸ J. Ashley Roach, *Fact-Finding Commission Under Article 90: Criteria for Implementation*, paper presented to the 15th Round Table on Current Problems of International Humanitarian Law (San Remo, 4-8 September 1990). See also his article in the present issue of the IRRC, pp. 167-189, "The International Fact-Finding Commission -Article 90 of Protocol I additional to the Geneva Conventions".

¹⁹ The UN Commission on Human Rights, in its resolution 1990/66 (7 March 1990), entitled *Human rights in times of armed conflicts*, calls upon all governments to give particular attention to the education of all members of security and other armed forces, and of all law enforcement agencies, in the international law of human rights and international humanitarian law applicable in armed conflicts. Information on the scope of education provided to members of the police and the armed forces is requested by all governments, and an analytical review of the replies received shall be submitted to the Sub-Commission at its forty-second session.

Contracting Parties shall communicate to one another, through the Swiss Federal Council and, as appropriate, through the Protecting Powers, not only their official translations of the Conventions and Protocols but also the laws and regulations which they may adopt to ensure the application thereof. Similar information on the 1954 Hague Convention on the Protection of Cultural Property could be sent to UNESCO.

The activities; of all the above require a considerable degree of planning and co-ordination if they are to be really useful. To make such co-ordination possible, the States should be encouraged to assist the International Committee of the Red Cross by giving advice, offering information and reporting on relevant activities upon request.

Since successful implementation of humanitarian law depends to a great extent on international co-operation, the forthcoming 26th International Conference of the Red Cross and Red Crescent should be used as a forum for the exchange of information and opinions and for the assessment of current problems and of proposals for further development of implementation work.²⁰

IV. Conclusions

Frequent violations of humanitarian rules and a widespread ignorance of their content, problems and limits have caused considerable difficulties for acceptance of this part of international law. At the same time, the great complexity and the technical nature of various measures may hinder proper implementation. Such problems of motivation and acceptance can only be solved through joint efforts and continued international co-operation.

Convincing solutions are not to be found in the isolated efforts of specialists. Appropriate attitudes towards the protection of the victims of armed conflicts require a generalized approach which takes into account other humanitarian problems, such as population growth, environmental hazards, internal disturbances, hunger, refugee movements, terrorism, drug abuse and exploitation by multinational companies.²¹ For the men, women or children who suffer it does not matter very much whether their suffering is caused by war, terrorism, political oppression or natural disaster. On the other hand, the diversity and the extent of existing challenges have led to a greater awareness for specific tasks at hand.

In all of these situations various organisational problems call for concentration and integrated solutions. It is a well-known fact, for example, that even large organisations do not have enough time to turn their staff. We cannot expect more than a limited number of lessons on humanitarian law to be given in military courses. But the participation of a legal adviser in the review of operational plans may will result in a higher degree of awareness of legal provisions in an even shorter time.

Plans of action and lists of priorities for the implementation of humanitarian law cannot be worked out unilaterally but only through joint international efforts. Such co-operation will lead to a better understanding of the practical impact of this field of law even in peacetime. In

²⁰ Bosko Jakovljevic, *Ensuring Observance of International Humanitarian Law: The International Conference of the Red Cross and Red Crescent and the Implementation of International Humanitarian Law*, paper presented to the 15th Round Table on Current Problems of International Humanitarian Law (San Remo, 4-8 September 1990).

²¹ Cf. *Winning the Human Race. The Report of the Independent Commission on International Humanitarian Issues*, Foreword by Sadruddin Aga Khan and Hassan bin Talal, London and New Jersey, 1988.

this regard I should like to stress the practical importance of humanitarian co-operation for bilateral relations, in view also of the importance of human rights as part of the common cultural heritage of mankind. Serious efforts to implement international humanitarian law may have confidence-building effects.

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**The application of the Geneva Conventions by the International Criminal
Tribunal for the former Yugoslavia**
by William J. Fenrick

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The 1949 Geneva Conventions on the protection of war victims and their Additional Protocol I of 1977 apply to international armed conflicts. Article 3 common to the Conventions and Additional Protocol II apply to non-international armed conflicts. This "two box" approach to international humanitarian law is conceptually simple. It is the result of a process whereby the representatives of States have indicated a greater willingness to accept restrictions on conduct during international armed conflicts than during internal conflicts. Many modern armed conflicts, however, have both international and internal aspects. When and if conduct in these conflicts is scrutinized by courts with a criminal jurisdiction, it is reasonable to presume that these courts will endeavour to find legally acceptable means to apply similar rules to similar conduct.

The experience of the International Criminal Tribunal for the former Yugoslavia (ICTY) with the issue of conflict classification and the related issue of determining applicable law should be of interest to all those concerned with the application of international humanitarian law by criminal courts. As long as humanitarian law remains in two boxes, courts which address criminal responsibility in complex modern conflicts will be compelled to undergo similar analytical contortions.

Article 2 of the ICTY Statute gives the Tribunal the power to prosecute persons committing or ordering to be committed grave breaches of the 1949 Geneva Conventions. Article 2 common to these Conventions indicates that the Conventions apply in their entirety to all armed conflicts involving one or more High Contracting Parties on each side; to all cases of total or partial occupation of the territory of a High Contracting Party by the forces of another High Contracting Party; and to armed conflicts involving powers which are not parties to the Conventions if those powers accept and apply the provisions thereof. A reasonable argument can be made that the grave breach provisions are part of customary law and apply to all international armed conflicts. In any event, the Geneva Conventions applied throughout the territory of the former Yugoslavia during the period of conflict as a matter of treaty obligation. It should also be noted that their Article 3, which applies to non-international armed conflicts, encourages parties to such conflicts to enter into special agreements to bring into force all or part of the Conventions' other provisions. All the parties to the conflict entered into a web of special agreements under the auspices of the International Committee of the Red Cross pursuant to Article 3 common to the 1949 Geneva Conventions or to other general principles of international humanitarian law.

Unfortunately, simply stating that the sovereign entities in the territory of the former Yugoslavia were bound by the Geneva Conventions as a matter of treaty or custom does not resolve the issue of whether or not the grave breach provisions were relevant. At various times, (a) the Socialist Federal Republic of Yugoslavia (SFRY), which was succeeded on 29 April 1992 by the Federal Republic of Yugoslavia (FRY), was engaged in armed conflict against one or more of its neighbours: Slovenia,

Croatia, Bosnia and Herzegovina; (b) Croatia was engaged in armed conflict against the SFRY, the "Republic of Serbian Krajina", the FRY, and Bosnia-Herzegovina; (c) the latter was engaged in armed conflict against the SFRY, the FRY, the Republika Srpska, Croatia, the HVO (the Bosnian Croat entity), and the Bosnian Muslim faction controlled by Fikret Abdić; and (d) Slovenia was engaged in armed conflict with the SFRY.

One is tempted to cut the Gordian knot and simply argue that all the fighting that occurred in the territory of the former Yugoslavia between 1991 and 1995 was part of one large international armed conflict. It is difficult, however, to fit all the fighting into such a framework. For example, it is difficult to see how the fighting between the Bosnian government and the Abdić faction can be regarded as part of an international conflict. The most bizarre incident to date involving the conflict classification issue occurred during the Blaskić Trial when a witness testified that Bosnian Croat forces, theoretically engaged in a conflict with Bosnian Serb forces, opened their lines temporarily to allow Bosnian Serb tanks access to a location where they could shell Bosnian Muslim positions. Once the task was completed, the Bosnian Serb tanks went back to their own side of the confrontation line and recommenced firing at Bosnian Croat forces. There are times when the events in the territory of the former Yugoslavia appear to bear more similarities to those of the Thirty Years War in the 17th century than to contemporary conflicts.

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Standards for the classification of armed conflicts

The decision on the *Defence Motion for Interlocutory Appeal on Jurisdiction* (hereinafter *Tadić Jurisdiction Decision*) rendered on 2 October 1995 gave the Appeals Chamber a first opportunity to address the issue of conflict classification. [1] The offences with which Tadić was charged occurred in Bosnia and Herzegovina in 1992; they involved a Bosnian Serb perpetrator and Bosnian Croat or Muslim victims.

At the trial level, the defence argued that the conflict in question was not international and that there were no Article 3 agreements bringing the grave breach provisions into effect. The prosecutor argued that for a variety of reasons the conflict was international and, to the extent that the conflict had internal aspects, the grave breach provisions applied as a result of relevant Article 3 agreements. The United States, in an *amicus* brief, argued that the events in the former Yugoslavia should be regarded as parts of a single international conflict and that violations of Article 3 common to the Geneva Conventions could be prosecuted under the grave breach provisions of those Conventions. On appeal, the prosecution also argued that the Security Council had determined that the conflict in the former Yugoslavia was international and that this determination should be given full effect.

The Appeals Chamber declined to decide on the nature of the conflict, leaving the issue to be resolved as a matter of mixed fact and law by the Trial Chamber. It did indicate in its decision that classification was a complex issue and that the Security Council was also aware of this complexity:

"[W]e conclude that the conflicts in the former Yugoslavia have both internal and international aspects, that the members of the Security Council clearly had both aspects of the conflicts in mind when they adopted the Statute of the International

Tribunal, and that they intended to empower the International Tribunal to adjudicate violations of humanitarian law that occurred in either context.” [2]

The Appeals Chamber went on to adopt a relatively conservative approach to Article 2 of the ICTY Statute, deciding that “in the present state of development of the law, Article 2 of the Statute only applies to offences committed within the context of international armed conflicts”. [3]

Although the defence would appear to have conceded the point and the prosecution argued in support of it, the Chamber was unwilling to consider the possibility of prosecuting under Article 2 of the Statute for grave breaches occurring in an internal conflict if appropriate agreements under Article 3 of the Geneva Conventions had been concluded. It did, however, envisage the possibility of such prosecution under Article 3 of the Tribunal’s Statute. Implicitly, the Chamber decided that it was not possible to prosecute violations of Article 3 common to the Geneva Conventions under their grave breach provisions. The relatively cautious approach to interpretation of Article 2 of the ICTY Statute taken by the majority can be contrasted with a much more progressive approach adopted in a separate opinion by Judge Abi-Saab. He was of the view that the Tribunal should assume jurisdiction under Article 2 of the Statute for acts committed in internal conflicts on the basis of either a new interpretation of the Geneva Conventions or the establishment of a new customary rule ancillary to those Conventions. [4]

The majority judgment in the *Tadic Jurisdiction Decision* set the standard for consideration by the Trial Chambers of the issue of conflict classification.

The major decisions at the trial chamber level addressing the classification issue have to date been the *Rule 61 proceeding concerning Ivica Rajic*, [5] the *Tadic Trial Decision*, [6] and the *Celebici Trial Decision*. [7] These decisions have tended to focus on three related questions: (a) did an international conflict exist when the offences were committed? (b) was the accused linked in an appropriate fashion to one side of the international conflict? and (c) were the victims in the hands of a party to the conflict or occupying power of which they were not nationals? Most of the victims were civilians, and Article 4 of the Fourth Geneva Convention (on the protection of civilians) states that: “[p]ersons protected are those who find themselves ... in the hands of a Party to the conflict or Occupying Power of which they are not nationals.” In the absence of any other relevant international decisions, particular heed has been paid, for better or worse, to the *Nicaragua* decision of the International Court of Justice [8] when considering conflict classification in the *Rajic* and *Tadic* proceedings. The *Nicaragua* decision was concerned with State responsibility for violations of international humanitarian law, not with individual criminal responsibility. Further, it was concerned with the peculiar facts of the US-supported struggle of the *contras* in Nicaragua, and these facts are not necessarily similar to the facts arising in the territory of the former Yugoslavia.

In the *Rajic Rule 61 proceeding*, a trial chamber consisting of Judges McDonald, Sidhwa, and Vohrah reviewed and reconfirmed an indictment against Ivica Rajic alleging that Bosnian Croat forces under his command had attacked the Bosnian Muslim village of Stupni Do on 23 October 1993 and committed several offences for which Rajic was responsible including wilful killing, a grave breach under Article 2(a) of the ICTY Statute. Bearing in mind the *Tadic Jurisdiction Decision*, the trial chamber was of the view that it was necessary to establish an undefined quantum of third-State (Croatian) involvement in the clashes between Bosnian government and Bosnian Croat (HVO) forces to convert an internal conflict into an international armed conflict. The prosecution advanced two theories. First, the conflict was international

because of the direct military involvement of Croatian forces engaged in combat with Bosnian forces in Bosnia and, second, the conflict was international because, in the hostilities between Bosnia and Herzegovina and the Bosnian Croats, the Bosnian Croats were closely related to and controlled by Croatia and its armed forces.

The Chamber found that there was an international conflict between Bosnia and Herzegovina and Croatia during the appropriate period but this was not enough, by itself, to establish that grave breaches had been committed by Bosnian Croats. It was also essential to establish that Croatia exerted such political and military control over the Bosnian Croats that the latter might be regarded as an agent or extension of Croatia. After reaching this conclusion, the Chamber went on to decide that the Bosnian civilian victims were protected persons in that they were effectively “in the hands of” Croatia, a country of which they were not nationals.

The Trial Chamber in the *Tadic* case consisted of Judges McDonald, Vohrah, and Stephen. As indicated earlier, Tadic is a Bosnian Serb who committed offences against Bosnian Muslims or Croats in Bosnia and Herzegovina in the summer of 1992. In brief, the majority, consisting of Judges Vohrah and Stephen, held implicitly that the Geneva Conventions did apply in Bosnia throughout the period covered by the indictment because of an ongoing international armed conflict between Bosnia and the SFRY/FRY. [9] The majority then made two unsubstantiated assertions in a single paragraph: firstly that the armed forces of the Republika Srpska (Bosnian Serb army) and the Republika Srpska as such were, at least from 19 May 1992 onwards, legal entities distinct from the armed forces of the FRY and from the FRY itself, and secondly that members of the Bosnian Serb forces were nationals of Bosnia. [10] The date 19 May 1992 was significant as that of the dissolution of the old SFRY national army into two new components – the Bosnian Serb army and the FRY army – and the formal withdrawal of the latter from Bosnia.

Relying on these assertions the majority went on to review the *Nicaragua* case in order to determine the proper rule for applying general principles of international law relating to State responsibility for *de facto* organs or agents to the specific circumstances of rebel forces fighting a seemingly internal conflict against the recognized government of a State, but dependent on the support of a foreign power in the continuation of that conflict. The majority noted that the International Court of Justice (ICJ) had set a particularly high standard for determining whether or not the United States was responsible for the activities of the *contras*. The central portion of the ICJ Judgment on this point was as follows:

“585 ... United States participation, even if preponderant or decisive, in the financing, organizing, training, supplying and equipping of the *contras*, the selection of its military or paramilitary targets and the planning of the whole of its operation, is still insufficient itself, on the basis of the evidence in the possession of the Court, for the purposes of attributing to the United States the acts committed by the *contras* in the course of their military or paramilitary operations in Nicaragua For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed.” [11]

The majority identified two substantial differences between the facts of the *Nicaragua* case and the facts in the *Tadic* case. First, the Bosnian Serb army was an occupying force, not a raiding army, and second, the FRY clearly did control Bosnian Serb military activities until approximately 19 May 1992.

It was the position of the majority that the law applicable to State responsibility was also relevant to determining which body of law applied for individual criminal responsibility. In order to establish State responsibility, it was necessary to establish that the FRY exercised effective control over the Bosnian Serb army or the Republika Srpska. Logistical support, personnel support and common aims were insufficient. To establish effective control, the Prosecution must establish either that the FRY army controlled the Bosnian Serb army by giving it orders and directing its operations, or that the FRY government controlled the government of the Republika Srpska. In the view of the majority, all that the prosecution succeeded in establishing was that the Republika Srpska and the Bosnian Serb army received financial and other support from the FRY and armed forces of the FRY, and that they coordinated their activities to reach common goals. This was not enough.

On the basis of its assessment of the law as contained in the *Nicaragua* decision (the effective control test) and its assessment of the facts, the majority found that the Bosnian Serb army and the Republika Srpska could not be regarded as *de facto* organs or agents of the FRY. As a consequence, the civilian victims in the *Tadic* case could not be regarded as protected persons within the meaning of the Fourth Geneva Convention, because they were not in the hands of a party — of which they were not nationals — to an armed conflict. The Bosnian victims were in the hands of their fellow Bosnian (Serb) nationals. As a consequence, the grave breach provisions of the Geneva Conventions recognized in Article 2 of the ICTY Statute did not apply. [12]

Judge McDonald, continuing to adopt the approach she had formulated in the *Rajic Rule 61 Proceeding*, filed a robust dissent in which she argued that the majority had misinterpreted the *Nicaragua* decision and in any event had misapplied its mistaken interpretation to the facts. In her view, *Nicaragua* established two distinct tests for attributability: effective control and agency. She summarized her analysis as follows:

“25. The separate opinion of Judge Ago [in the *Nicaragua* case], also cited by the majority, explains with lucidity the concept that a State can be found legally responsible even where this is no finding of agency. He states: ‘[T]he negative answer returned by the Court to the Applicant’s suggestion that the misdeeds committed by some members of the *contra* forces should be considered as acts imputable to the United States of America is likewise in conformity with the provisions of the International Law Commission’s draft. It would indeed be inconsistent with the principles governing the question to regard members of the *contra* forces as persons or groups acting in the name and on behalf of the United States of America. Only in cases where certain members of those forces happened to have been specifically charged by United States authorities to commit a particular act, or to carry out a particular task of some kind on behalf of the United States, would it be possible so to regard them. Only in such instances does international law recognize, as a rare exception to the rule, *that the conduct of persons or groups which are neither agents nor organs of a State, nor members of its apparatus even in the broadest acceptance of that term, may be held to be acts of that State*. The Judgment, accordingly, takes a correct view when, referring in particular to the atrocities, acts of violence or terrorism and other inhuman actions that Nicaragua alleges to have been committed by the *contras* against the persons and property of civilian populations, it holds that the perpetrators of these misdeeds may not be considered as having been specifically charged by United States authorities to commit them unless, in certain concrete cases, unchallengeable proof to the contrary has been supplied.’ [13]

Therefore it appears that there are two bases on which the acts of the VRS [Bosnian Serb army] could be attributed to the Federal Republic of Yugoslavia (Serbia and

Montenegro): where the VRS acted as an agent of the Federal Republic of Yugoslavia (Serbia and Montenegro), which could be established by a finding of dependency on the one side and control on the other; or where the VRS was specifically charged by the Federal Republic of Yugoslavia (Serbia and Montenegro) to carry out a particular act on behalf of the Federal Republic of Yugoslavia (Serbia and Montenegro) thereby making the act itself attributable to the Federal Republic of Yugoslavia (Serbia and Montenegro). In *Nicaragua*, the court required a showing of effective control for this latter determination.”

If “effective control” is the proper test, Judge McDonald, interpreting the same evidence and accepting the same facts, concluded that the FRY did effectively control the Bosnian Serb army, that the creation of that army was a legal fiction, and that the attack which provided the opportunity for Tadic to commit offences had to have been planned before the Bosnian Serb army was created on 19 May 1992. [14]

In the *Celebici Trial Decision* addressing incidents that occurred in 1992 and involved Bosnian Serb victims and perpetrators linked to the Bosnian government, the Trial Chamber has adopted a different approach to the issue of conflict classification. It explicitly adopted the premise that “should the conflict in Bosnia and Herzegovina be international, the relevant norms of international humanitarian law apply throughout its territory until the general cessation of hostilities, unless it can be shown that the conflicts in some areas were separate internal conflicts, unrelated to the larger international armed conflict.” [15]

The Chamber appears to have neatly side-stepped the *Nicaragua* decision and its various tests as irrelevant to the situation in Bosnia and Herzegovina and as of limited relevance to the determination of individual criminal responsibility. In lieu thereof, the Chamber considered the first relevant question to be: “Was there an international armed conflict in Bosnia and Herzegovina in May 1992 and did that conflict continue throughout the rest of that year, when the offences charged in the indictment are alleged to have been committed?” [16] The Chamber held that an international armed conflict existed in Bosnia-Herzegovina at the date of its recognition as an independent State on 6 April 1992 and the parties were Bosnia-Herzegovina and the FRY. Further, there was no general cessation of hostilities in Bosnia-Herzegovina until the signing of the Dayton Peace Agreement in November 1995. The Chamber went on to consider whether the nature of the conflict changed after the purported withdrawal of FRY forces in May 1992. It concluded:

“234. The Trial Chamber is in no doubt that the international armed conflict occurring in Bosnia and Herzegovina, at least from April 1992, continued throughout that year and did not alter fundamentally in its nature. The withdrawal of JNA [SFRY army] troops who were not of Bosnian citizenship, and the creation of the VRS and VJ [FRY army], constituted a deliberate attempt to mask the continued involvement of the FRY in the conflict while its Government remained in fact the controlling force behind the Bosnian Serbs. From the level of strategy to that of personnel and logistics the operations of the armed forces of the JNA persisted in all but name. It would be wholly artificial to sever the period before 19 May 1992 from the period thereafter in considering the nature of the conflict and applying international humanitarian law.”

Having reached this conclusion, the Chamber went on to consider whether the victims of the alleged acts were persons protected under the Geneva Conventions. It held that none of the victims, all Bosnian Serbs, appeared to meet the criteria to be regarded as prisoners of war under the Third Geneva Convention. On the other hand, at the urging of the prosecution the Chamber adopted a very progressive approach towards identifying persons protected under the Fourth Geneva

Convention. Civilians protected under that Convention must be “in the hands of” a party to the conflict of which they are not nationals. It should be recollected that in the *Tadic* case, the Trial Chamber held that the victim group (Bosnian Muslims and Bosnian Croats) were not persons protected under the Fourth Convention because they were in the hands of Bosnian Serbs, a group which shared their Bosnian nationality. In the *Celebici* case, the Trial Chamber held that the victim group (Bosnian Serbs) should be regarded as protected persons and therefore they should not be regarded as sharing the nationality of their Bosnian Muslim and Bosnian Croat captors. Instead of taking for granted that the Bosnian Serbs automatically assumed Bosnian nationality when Bosnia and Herzegovina became an independent State, the Chamber adopted a more flexible approach, relying in particular on the ICJ decision in the *Nottebohm* case [17] and its requirement for an effective link, but also on the emerging right under international law to the nationality of one's own choosing in cases of State succession:

“264. The law must be applied to the reality of the situation before us and thus, to reiterate, the relevant facts are as follows:

- Upon the dissolution of the SFRY, an international armed conflict between, at least, the FRY and its forces and the authorities of the independent State of Bosnia and Herzegovina took place;
- A segment of the population of Bosnia and Herzegovina, the Bosnian Serbs, declared their independence from that State and purported to establish their own Republic which would form part of the FRY;
- The FRY armed and equipped the Bosnian Serb population and created its army, the VRS;
- In the course of military operations in the Konjic municipality, being part of this international armed conflict, the Bosnian government forces detained Bosnian Serb men and women in the Celebici prison-camp.

“265. Without yet entering the discussion of whether or not their detention was unlawful, it is clear that the victims of the acts alleged in the Indictment were arrested and detained mainly on the basis of their Serb identity. As such, and insofar as they were not protected by any of the other Geneva Conventions, they must be considered to have been ‘protected persons’ within the meaning of the Fourth Geneva Convention, as they were clearly regarded by the Bosnian authorities as belonging to the opposing party in an armed conflict and as posing a threat to the Bosnian State.”

Further developments

The approaches taken by the chambers in the *Tadic* and the *Celebici* trial decisions are diametrically opposed. The prosecution has appealed the Trial Chamber decision in *Tadic*, arguing that:

- the Trial Chamber erred in relying upon the *Nicaragua* case and the “effective control” test to determine the applicability of the grave breach provisions of the Geneva Conventions;
- for the grave breach provisions to be rendered applicable, the provisions of the Geneva Conventions and the relevant principles and authorities of international humanitarian law only require that the perpetrator be demonstrably linked to a party to an international armed conflict of which the victim is not a national;
- assuming the *Nicaragua* case is to be relied upon, that decision also applied an “agency” test, which is a more appropriate standard for determining the applicability of the grave breach provisions;

- in any event, assuming that the “effective control” test mentioned in the *Nicaragua* case is applicable to determining the applicability of grave breach provisions, the Trial Chamber erred in finding that this test is not satisfied on the facts of this case, which also satisfy the “agency” test outlined in the *Nicaragua* case.

The main argument advanced by the prosecution is that the *Nicaragua* case is not relevant to determining the applicability of the grave breach provisions or to determining individual criminal responsibility. It is essential to establishing the existence of an international armed conflict in Bosnia and Herzegovina at the time when Tadic is alleged to have committed his crimes. It is then necessary to establish that the perpetrator (Tadic) has a demonstrable link to one party to the international armed conflict while the victim is linked to a neutral or to a party on the other side. Further, as an aside, although Article 4 of the Fourth Geneva Convention defines “protected persons” as persons in the hands of a party of which they are not nationals, determination of nationality is not a simple process when States are in the process of decomposition. A simplistic assumption that persons must be nationals of a new State simply because they are living in its territory at the moment of creation is inappropriate.

One might hope that the forthcoming decision of the ICTY Appeals Chamber in the *Tadic* case will set forth clear rules which will allow the Trial Chambers to determine when the law for international armed conflicts should regulate events occurring in the territory of the former Yugoslavia. If it does so, it will also provide helpful guidance for future courts compelled to apply the “two box” approach of current international humanitarian law to the complex reality of modern conflict.

Notes

1. *In re Dusko Tadic: Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (The Prosecutor v. Dusko Tadic)*, 1995 I.C.T.Y. No. IT-94-1-AR72 (2 October 1995). Majority decision reprinted in 35 I.L.M., 1996, p. 32 .
2. *Ibid.*, para. 77, p. 57.
3. *Ibid.*, para. 84, p. 60.
4. Separate Opinion of Judge Abi-Saab, *ibid.*, p. 6: — not reprinted in I.L.M.
5. *Prosecutor v. Ivica Rajic Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence*, ICTY No. IT-95-12-R61 13 September 1996).
6. *Prosecutor v. Dusko Tadic*, Opinion and Judgment, ICTY No. IT-94-I-T (7 May 1997).
7. *Prosecutor v. Delalic, Mucic, Delic and Landzo*, Judgment, ICTY No. IT-96-21-T (16 November 1998).
8. *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986, p. 14.
9. *Op. cit.* (note 6), paras 118-120, 569.
10. *Ibid.*, para. 584.

11. *Ibid.*, para. 585, quoting from the ICJ *Nicaragua* Judgment, *op. cit.* (note 8), para. 115.
12. *Ibid.*, para 587.
13. *Loc. cit.* (note 8), Separate Opinion of Judge Ago, para 16 (emphasis added).
14. *Op. cit.* (note 6), Separate Opinion of Judge McDonald, paras 7, 8.
15. *Op. cit.* (note 7), para 209.
16. *Ibid.*, para 211.
17. *Lichtenstein v. Guatemala*, I.C.J. Reports 1955, p. 4.

Applicability of international humanitarian law to United Nations peace-keeping forces

by Umesh Palwankar

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Introduction

In recent years, and especially in 1992, the number of United Nations peace-keeping operations has increased at an unprecedented rate. Thirteen such operations were carried out between 1945 and 1987, whereas fourteen have been initiated since 1987. In 1992 alone, three new operations were started - in Cambodia, the former Yugoslavia and Somalia - and 1993 brought another, in Mozambique. The number of United Nations personnel deployed in the field quadrupled during 1992 to more than 50,000 persons, with a total budget of some \$2,500 million at the end of the year.[1]

United Nations peace-keeping forces: definition and characteristics[2]

United Nations peace-keeping forces (PKF) are not armed forces raised by the Security Council by virtue of Articles 43 and 47 of the United Nations Charter, nor are they organized by the States Members on the basis of an invitation (as in Korea in 1950) or of an authorization by the Security Council (as in the Gulf in 1990, and Somalia in 1992). Both these categories are empowered to use coercive measures to restore international peace and security (or adequate security conditions) in the region concerned.

The PKF differ from the forces previously mentioned, primarily in that their mandate is to *keep* the peace.[3] In this area, two broad types of operations undertaken by the UN may be, distinguished. One involves the sending of an *observation mission* [examples: United Nations Truce Supervision Organization (UNTSO) in Palestine, 1948, and United Nations Military Observer Group in India and Pakistan (UNMOGIP), 1949]. Here, the sole function of the mission's members was *observation*, any active role being ruled out. Since these forces are unarmed, no questions concerning the applicability of international humanitarian law (IHL) arise.

UN forces taking part in the other broad category of operations have the specific mandate to *keep* the peace by supervising the armistice or ceasefire agreements which are a precondition for the deployment of such forces. A peace-keeping operation, therefore, is a temporary arrangement aimed at maintaining the necessary

conditions of peace and security, and especially preventing a resumption of hostilities, so that negotiations for settling the differences between the parties can take place; the idea being that the physical presence of a neutral and impartial multinational force could have a powerful deterrent effect on the combatants. Such PKF were first deployed in 1956 [United Nations Emergency Force (UNEF 1, in the Sinai and the Gaza Strip)], and continue to be used today [United Nations Protection Force (UNPROFOR) in the former Yugoslavia, and United Nations Transitional Authority in Cambodia (UNTAC)].

The contingents assigned to the PKF are provided by the States on a voluntary basis at the request of the UN Secretary-General. Moreover, the government of the territory to which the PKF is to be sent, as well as the other party or parties directly involved in the conflict, must also give their assent.

A PKF is placed under the command of the UN, in the person of the Secretary-General, but is under the authority of the Security Council, which the Secretary-General keeps fully informed. Command in the field is exercised by a commander appointed by the Secretary-General with the approval of the Security Council. The commander is answerable to the Secretary-General.

The characteristic of the PKF which directly raises the question of applicability of IHL is that its members are armed. It would be useful here to cite the relevant paragraph of the report that the Security Council requested of the Secretary-General when it was contemplating setting up the United Nations Interim Force in Lebanon (UNIFIL) on 19 March 1978.[4]

"D) The Force will be provided with weapons of a defensive character. It shall not use force except in self-defence. Self-defence would include resistance to attempts by forceful means to prevent it from discharging its duties under the mandate of the Security Council. The Force will proceed on the assumption that the parties to the conflict will take all the necessary steps for compliance with the decisions of the Security Council".

The theoretical and practical problems involved in fulfilling the PKF mission within the limits of the above-mentioned guidelines but without violating IHL will be examined later in relation to the present operations in the former Yugoslavia and in Cambodia. It suffices here to stress the real risk of seeing the PKF becoming involved in a conflict, such as happened during the operation in the Congo in July 1960.[5] The question of the applicability of IHL to the PKF thus has two aspects: first, the respect for IHL shown by these forces; and secondly, the part they can play in ensuring respect for the law.

Applicability of IHL to the PKF: position of the ICRC and the International Conference of the Red Cross and Red Crescent

Both the ICRC and the International Conference of the Red Cross and Red Crescent have on many occasions expressed their opinion on the applicability of IHL to the PKF. Several examples of these affirmations, made at various times and in different forms, could be cited.

At the official level, we should mention the Memorandum entitled "Application and dissemination of the Geneva Conventions" of 10 November 1961, addressed to the States party to the Geneva Conventions and Members of the UN, in which the ICRC draws the attention of the UN Secretary-General to the necessity for ensuring

application of the Conventions by the forces placed at the disposal of the United Nations. Since the UN, as such, is not party to the Conventions, the ICRC considers that each State remains individually responsible for the application of these treaties whenever it provides a contingent for a PKF. In consequence, the State should do what is necessary, especially by issuing appropriate instructions to the troops before they are posted abroad.

The Memorandum also stressed that by virtue of Article I common to the four Conventions, which also requires the High Contracting Parties to ensure respect for the Conventions, the States providing contingents "should each, where necessary, use their influence to ensure that the provisions of humanitarian law are applied by all the contingents concerned, as well as by the unified command".

Resolution XXV ("Application of the Geneva Conventions by the United Nations Emergency Force"), adopted by the 20th International Conference of the Red Cross (Vienna, 1965), made three recommendations. Two of them propose:

- that appropriate arrangements be made to ensure that armed forces placed at the disposal of the UN observe the provisions of the Geneva Conventions and be protected by them (para. 1); and
- that the authorities responsible for the contingents agree to take all necessary measures to prevent and suppress any breaches of the said Conventions (para. 3).

Similarly, in a letter of 10 April 1978 addressed to the UN Secretary-General when a PKF was set up in Lebanon (UNIFIL), the President of the ICRC referred to the contents of the above-mentioned memorandum and resolution, and also proffered an opinion on relations between the PKF and the ICRC, both of which were operating on the same territory but under different mandates. He wrote: "The ICRC knows that it can count on the United Nations and the forces it has deployed in Lebanon to facilitate freedom of movement for ICRC delegates and to guarantee, as far as possible, their safe in the regions where they have to conduct their humanitarian activities in accordance with the Geneva Conventions".

Members and staff of the ICRC have on numerous occasions reaffirmed, in studies and essays, the position of the institution. For example: "The obligation on the UN forces to observe the fundamental principles of the Geneva Conventions can hardly be questioned today". Concerning the Protocols: "It would seem in any case that the UN should take account of the principles which inspired the Protocols".[6] And lastly: "It is uncontested that the United Nations is bound by the customary rules of IHL when engaged in hostilities".[7]

To sum up, the position of the ICRC on the applicability of IHL to the PKF and its observance by these forces emphasizes that:

- the fundamental principles and customary rules of IHL are applicable and must be observed;
- to ensure this, the States providing contingents are under an obligation to issue appropriate instructions to their troops and the UN is under the same obligation with respect to the unified command;
- any breaches of IHL must be repressed by the national authorities of the contingent concerned; and

- since there is a certain complementarity between the ultimate objectives of their respective mandates, the PKF should cooperate with the ICRC, but in no case hinder its activities or question its competence.

Position of the UN

It would be useful here to recall certain important factors in the UN position regarding the applicability of IHL to the PKF.

At the legal level, following discussions within the UN on the possibility of the organization becoming party to the instruments of IHL, the conclusion was reached that certain provisions of the Convention could not apply to or be applied by the UN (for example, those relating to occupation [Articles 27-28 of the Fourth Convention], to the repression of grave breaches [Articles 49/50/129/146 respectively of the four Conventions, Article 85(1) of Protocol I, etc.]. Moreover, since there is no definition (or even mention) of "peace-keeping forces" in the instruments of IHL, these forces might appear as "combatants". It would also have to be determined whether the UN may, or may not, be considered a "Power" for purposes of acceding to the Conventions. Then there is the problem that might arise should the same force comprise troops from States party to Protocol I and States that are not party to the Protocol.

At the political level, a request from the UN for accession to the IHL treaties, or even an attempt to arrive at a general declaration on the applicability of IHL to the PKF (in the form of a resolution by the General Assembly, for example), would create the risk of opening a sensitive debate on the Protocols. On the other hand, a request to accede to the Conventions alone would be prejudicial to the promotion of IHL as a whole.

Finally, it should be noted that although the soldiers within the UN forces are bound by the commitments made by their States of origin, the UN has always insisted on the fact that during the exercise of their mandate these troops are under the sole authority of the organization and not that of their respective States.

The official documents supporting the position of the UN are as follows:

- The "Interoffice memorandum" addressed on 24 May 1978 by Mr. Guyer and Mr. Urquhart to all commanders of UN forces then operative, and a memorandum, dated 30 October 1978, from the Commander-in-Chief of the UN forces to all commanders at General Staff and contingent level. This memorandum specifies that, in cases where the forces have to use their weapons in accordance with their mandate, the principles and spirit of the rules of IHL should apply, as laid down in the Geneva Conventions of 1949, the Additional Protocols of 1977 and elsewhere.
- A letter of 23 October 1978 to the President of the ICRC (in reply to a letter from the President dated 10 April 1978), in which the UN Secretary-General stresses that *"the principles of humanitarian law ... must, should the need arise, be applied within the framework of the operations carried out by United Nations forces"*.
- Another letter, also dated 23 October 1978, addressed by the UN Secretary-General to the permanent representatives of governments sending contingents to the United Nations Interim Force in Lebanon (UNIFIL). This letter points out that in situations where members of such forces have to use their weapons in self-defence, in conformity with guideline D, the principles and spirit of IHL *"as contained, inter alia, in the Geneva (Red Cross) Conventions ... [and] the Protocols of 8 June 1977 ...*

shall apply". To this end, the States providing contingents must ensure that their troops fully understand the principles of IHL and the measures to be taken to ensure their observance. The UN, for its part, *"undertakes, through the chain of command, the tasks of supervising the effective compliance with the principles of humanitarian law by the contingents of its peace-keeping forces"*.

In short, the position of the UN with regard to the applicability of IHL to the PKF is not entirely satisfactory. Admittedly, there have been some declarations in the past, but these were selective and contained no more than a commitment to respect the principles and spirit of IHL. The UN could therefore also examine the most appropriate means of ensuring the application of the pertinent rules of IHL to its forces, including those relative to the methods and means of warfare, to different categories of protected persons, to respect for the distinctive emblems (in this case the Red Cross and the Red Crescent), and to medical personnel and transports.

Current problems

In the light of the foregoing observations, we can examine the present situation with reference to the UN's decision to send PKF into the former Yugoslavia and Cambodia. This involves identifying the shortcomings and problems (existing or foreseeable), both at the general level (ICRC - UN - States providing contingents), and at the operational level, i.e. the implementation of and respect for IHL by the PKF themselves, the role of these forces in ensuring respect for IHL among the different entities on the spot, cooperation between the PKF and the ICRC, and envisaging the steps to be taken.

At the general level, it should be noted that the dispatch of PKF to the former Yugoslavia and Cambodia was not preceded, as on previous occasions, by official measures on the part of the UN to draw attention to the role of IHL.

This is an oversight that should be rectified, especially as other operations have been set up (Somalia, Mozambique).

At the time of writing, [8] there has been no formal statement by the UN on the applicability of the pertinent rules of IHL to its forces.

There has not even been a letter from the UN Secretary-General to the States providing the contingents, such as that of 23 October 1978, reminding them of their obligation to ensure that their soldiers are fully informed about IHL and to repress any violations of the law.

Measures to improve dissemination of IHL

It should be stressed here that primary responsibility at the operational level for ensuring implementation of and respect for IHL by PKF devolves upon the UN. The UN Secretariat has been reminded of this by the ICRC, which also declared its readiness to help, as far as it was able, in disseminating IHL among the PKF, in particular by issuing a model plan of instruction in IHL adaptable to the specific needs of each PKF.

In addition, various programmes designed to spread knowledge of IHL could be undertaken by the ICRC in cooperation with the States concerned and the UN.

One important measure would be the dissemination of IHL among the contingents before their departure, especially by the relevant ICRC regional delegation. The

ICRC delegation in New York could also brief contingent commanders when they pass through UN headquarters.

Lastly, it would be of vital importance to ensure that dissemination activities are carried out in the country of operations, by delegates working on the spot or by ICRC specialists in dissemination to the armed forces. Here, as on other occasions, it could be stressed that the application of and respect for IHL are in the interest of the members of the PKF themselves, for in certain situations they could find themselves caught up in an armed conflict or even be detained by one of the parties. It would then be easier for them to have recourse to the whole system of protection and responsibilities provided for in the IHL treaties.

One could even go further and envisage the dissemination of the principles and fundamental rules of IHL by the PKF themselves among the armed units of the parties to the conflict with which they come into contact. This would be part of these forces' responsibility under IHL to promote respect for the law. The practical steps to be taken would be the selection or proposed selection of a person to be responsible for humanitarian affairs within the PKF; this person would then set up a group of officers capable of teaching the rules of IHL to members of both the PKF and the armed forces in the region concerned.

Implementation of and respect for IHL by the PKF

It would be appropriate to mention very briefly the basic elements of the mandate of the PKF in the former Yugoslavia (UNPROFOR) and in Cambodia (UNTAC) which touch on, or could touch on, the applicability of IHL on the one hand, and ICRC activities conducted by the ICRC in these regions on the other. [9]

In both cases the PKF have military, administrative and police components. The military component has the task of stabilizing the security situation and creating a climate of trust conducive to a negotiated settlement in the former Yugoslavia, and to the holding of elections in Cambodia. With this in view, the PKF will supervise the ceasefire and withdrawal of all foreign forces in Cambodia, and the withdrawal of armed forces from the demilitarized zones in the former Yugoslavia, in particular by disarming and demobilizing the combatants and protecting the population living in the demilitarized zones from any armed attack by setting up crossing points at strategic positions. The members of the PKF carry light weapons to be used solely in self-defence, but are also provided with armoured vehicles for transporting troops and with air support.

There is enormous scope here for the application of the provisions of IHL covering the conduct of hostilities, should the case arise, and especially the whole body of principles and rules of IHL relating to different categories of protected persons.

The other component of the PKF, the civilian police, although unarmed, will have the task of closely supervising the work of the local police to ensure the impartial and effective maintenance of public order and full respect for human rights and basic freedoms. For this purpose, the civilian police forces will accompany the local police on their patrols and have free and immediate access to all premises belonging to the local police or under their control.

Here, as with the activities of the PKF listed at the beginning of this section, the whole question of detention and the ICRC's mandate arises.

The mandate of the military component of the PKF makes no mention of the force's competence to take prisoners. On the other hand, the extent of that mandate as outlined above suggests that in particularly tense situations the PKF could make arrests should the situation so require. This happened once in the past, during the UN operation in the Congo, and the role of the ICRC in such circumstances emerges clearly in the description of these events by a specialist. [10]

The civilian police force of the UN, on the other hand, has the specific mandate to supervise all the activities of the local police and enjoys freedom of access to all their premises. This means that all detainees held by the local police come under the supervision of the UN civil police.

As for the competence of the ICRC operating in the same area as the PKF, the situation is fairly clear in situations of international armed conflict, where the legal rules contained in the relevant provisions of the Third and Fourth Geneva Conventions can be invoked to justify visits to prisoners of war and civilian internees or supervision of their release. The situation is more sensitive in non-international armed conflicts. It would be preferable in such cases for the ICRC's mandate to be set out in a general agreement (e.g.: The Paris accord on the political settlement of the conflict in Cambodia). Failing this, the ICRC should negotiate an agreement with the UN.

The position of the ICRC is quite clear as regards the communication of reports on visits. As a general rule, reports on visits to prisoners captured by the UN forces are delivered to the prisoners' Powers of Origin, the UN and the governments of the States whose contingents have captured or are holding the prisoners visited.

Another area of applicability of IHL to PKF is obviously the respect and protection which these forces owe to the emblem and to medical personnel, transports and establishments. In practice, this does not appear to cause any problems and never has done. On the other hand, referring again to dissemination of IHL in the countries in which the PKF operate, the forces could make a special effort to promote respect for the emblem and for ICRC medical activities among the armed units of the parties in conflict,

Possible role for the PKF in promoting respect for IHL

We are concerned here with determining how the PKF could ensure respect for IHL by the armed forces of the parties to the conflict, police forces and the population.

One way would be to draw up reports on violations of IHL in the sectors where the PKF are deployed. In fact, the mandates of both UNPROFOR and UNTAC[11] foresee that certain of their components (the civilian police in the former Yugoslavia, the human rights component in Cambodia) will have the task of investigating alleged violations of human rights, and the military component (in the case of the former Yugoslavia) of alleged violations in the demilitarized zones. The Secretary-General might ensure that the PKF do the same in respect of violations of IHL, which in some cases also amount to violations of human rights. These reports could be sent to the parties concerned and/or the Security Council to put a stop to such violations and to ensure that appropriate sanctions are applied to those responsible. In this context, both the State concerned and the UN could promote the application of Article 89 of Protocol I (cooperation)[12] and, in addition, the role of the International Fact-Finding Commission (IFFC).

Let us recall here that requests for the services of the IFFC are not automatically confined to international conflicts. At its constituent meeting on 12 and 13 March 1992 in Bern, the IFFC declared itself ready to take action even in situations of civil war if asked to do so by the parties.

In conclusion, the PKF could also play a preventive role, particularly by monitoring the activities of military or paramilitary forces operating in sectors in which UN forces are deployed.

Cooperation between the PKF and the ICRC

There can (and should) also be cooperation and coordination between the humanitarian activities of the PKF and those of the ICRC. This is evident if one looks at practice to date, which shows that operational cooperation has involved tracing missing persons, prison visits, relief work, investigations, release and repatriation of prisoners of war (POWs), evacuations, transport and medical services.

Some examples are cited below:

Concerning the operations of the United Nations Peace-keeping Forces in Cyprus (UNFICYP, since March 1964), one of the reports of the UN Secretary-General mentioned that: "With regard to humanitarian activities, a meeting was held ... with representatives of the International Committee of the Red Cross (ICRC) and it was agreed that the Red Cross would assume primary responsibility for providing relief and taking care of refugees, prisoners, missing persons, allegations of atrocities and similar problems that are traditionally within the terms of reference of the ICRC. The force will continue to play an active role, including investigations and local negotiations, and will fully assist and cooperate in carrying out humanitarian relief operations". [13]

With reference to the above-mentioned investigations, a resolution of the General Assembly had requested the Secretary-General "to provide his good offices, through his Special Representative in Cyprus, to support the establishment of an investigatory body with the participation of the International Committee of the Red Cross which would be in a position to function impartially, effectively and speedily so as to resolve the problem without undue delay". [14]

Similarly, in Cyprus, "[b]ecause of the blockading of certain areas inhabited by Turkish Cypriots, the ICRC has been trying, together with the United Nations, to obtain relaxations enabling these localities to receive food supplies" - [15]

Within the context of the UN operations in the Congo (UNCO), a note from the special representative of the Secretary-General stresses that: "The Secretary General ... repeats his request that the United Nations be permitted again to visit the persons detained and to ascertain their treatment through representatives of the Red Cross". [16] Apart from these visits, the ICRC even organized the exchange of prisoners. [17]

At present in Cambodia, although primary responsibility for the repatriation process rests with UNHCR, all the ICRC's surgical and medical facilities in the country are obviously available to the returnees. Moreover, the ICRC's Central Tracing Agency is especially active in the zones controlled by the factions. In addition, the institution may have to become involved in the protection of minorities.

In the former Yugoslavia, UNPROFOR arranged a meeting between Generals Mladic and Halilovic in Sarajevo on 17 and 18 April 1993. The agreement signed at the conclusion of these discussions, which provided for a ceasefire and the demilitarization of Srebrenica, mentioned a role for the ICRC in evacuating the sick and seriously wounded and in supervising the exchange of prisoners and casualties.

With a view to pursuing this humanitarian cooperation with the PKF, the ICRC is trying to identify suitable areas and to negotiate ad hoc arrangements with the PKF command, insofar as the present situation permits.

In conclusion, it can be said that:

- IHL is indeed applicable to the PKF.

- The UN has in the past recognized the applicability of at least the principles and spirit of the rules of IHL.

- An undertaking by the UN aimed at consolidating the applicability of IHL to its forces would be an excellent means of promoting the applicability of and respect for the law by States providing the contingents, by the State on whose territory the operation is being conducted, and by all parties to the conflict. Such promotion of IHL is in fact an objective of the international community, as expressed in the resolutions which the UN General Assembly has adopted every two years since 1977 on the status of the Protocols additional to the Geneva Conventions. 18

- Much remains to be done, however, to reinforce implementation of and respect for IHL by the PKF, not only at the formal but also at the operational level, bearing in mind both present and future operations. At the moment, the ICRC is examining the most appropriate means, and is counting on the cooperation of the States and the United Nations.

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Notes:

1. Figures taken from a UN publication: "Background Note: United Nations Peace-keeping Operations", prepared by the Communications and Project Management Division, Public Information Department, PS/DPI/15/Rev.2, September 1992.

2. For general works on United Nations forces, see: Michael Bothe, "Le droit de la guerre et les Nations Unies", Etudes et travaux de l'Institut Universitaire de Hautes Etudes Internationales, No. 5, Geneva, 1967, pp. 137-239; D.W. Bowett, United Nations peace-keeping. A legal study of United Nations practice, Stevens & Sons, London, 1964; Rosalyn Higgins, United Nations peace-keeping 1946-1967: Documents and commentary, Oxford University Press, Oxford, Vol. 1: The Middle East (1969), Vol. II: Asia (1970), Vol. III: Africa (1980), Vol. IV: Europe 1981; Finn Seyersted, United Nations forces in the law of peace and war, Sijthoff, Leyden, 1966.

3. Since the PKF are not mentioned in the Charter, their legal basis can be questioned. In practice, however, their legality has been uncontested whenever they have been set up by the Security Council. For fuller details on this point, see in particular Yves Sandoz, "The application of humanitarian law by the armed forces of the United Nations Organization", IRRC, No. 206, September-October 1978, pp. 274-284; and Michael Bothe, *supra*, note 2.

4. UN document S/1261 1, p. 2.

5. " To a large extent, the United Nations troops have been able to fulfil their mandate solely by their presence, using persuasion and conciliation. But they have also made use of their weapons. The nature, extent and duration of these armed incidents have varied", Michael Bothe, *op. cit.*, p. 143.

6. Yves Sandoz, "The application of humanitarian law by the armed forces of the United Nations Organization", IRRC, No. 206, September-October 1978, p. 283.

7. Dietrich Schindler, "United Nations forces and international humanitarian law", in *Studies and essays on international humanitarian law and Red Cross principles in honour of Jean Pictet*, Christophe Swinarski, ed., ICRC, Martinus Nijhoff, Geneva/The Hague, 1984, p. 526.

8. April 1993.

9. For details of these mandates, see: Report of the Secretary-General pursuant to Security Council Resolution 721 (1991), S/23280, 11 December 1991, Annex 111 (for UNPROFOR); and Report of the Secretary-General (S/23613 and Add.1) reproduced in Press release, United Nations, SC/272, 28 February 1992 (for UNTAC).

10. "Circumstances developed in a way that it became necessary for the UN peace-keeping force to arrest and detain some of the foreign mercenaries who took up arms against the UN. A contingent of the mercenaries was actually captured in a field operation and detained under UN custody at the Kamina military base in Central Congo. The detainees were treated according to the rules laid down in the 1949 Geneva Conventions, Part 111 on Prisoners of War. The UN handling of the detainees was supervised by ICRC representatives". Bjorn Egge, "Coordinating UN peace-keeping operations and relief and refugee programmes", paper submitted to the Nordic UN Seminar, Oslo, 29 June 1988, p. 13.

11. *Supra*, note 9.

12. "In situations of serious violations of the Conventions or of this Protocol, the High Contracting Parties undertake to act, jointly or individually, in co-operation with the United Nations and in conformity with the United Nations Charter" (Article 89, Protocol I).

"Acting for the protection of man, also in time of armed conflict, accords with the aims of the United Nations no less than does the maintenance of international peace and security. The Organization showed its concern in two main ways: first, by its participation in the process of reaffirming and developing international humanitarian law; secondly, by its resolutions on the applicability of humanitarian law and requiring its application to given situations or categories of persons, and also by issuing reports evaluating the application and respect of that law.

The United Nations actions to which Article 89 refers may therefore consist of issuing an appeal to respect humanitarian law, just as well as, for example, setting up enquiries on compliance with the Conventions and the Protocol". Commentary on Article 89 of Protocol I, in Commentary on the Additional Protocols of 1977 to the Geneva Conventions of 1949, Yves Sandoz, Christophe Swinarski, Bruno Zimmerman, eds., ICRC, Martinus Nijhoff Publishers, Geneva/The Hague 1985, paras. 3596, 3597, pp. 1034-1035.

13. Additional report by the Secretary-General on the situation in CyDrus. S/1353/Add. 12, 31 July 1974, para. 5.

14. Resolution 32/128, 16 December 1977 (Missing persons in Cyprus), para. 1.

15. IRRC, No. 43, October 1964, p. 515.

16. S/4590, 9 December 1960, Annex: Text of a protest note addressed by the Special Representative to the principal authorities in Stanleyville, para. (f).

17. Michael Bothe, op. cit., p.223.

18. Two paragraphs may be cited from the preamble to the resolution adopted by the General Assembly at its forty-seventh session, 1992 (RES/47/30), in which the Assembly declared itself:

"*Convinced* of the continuing value of established humanitarian rules relating to armed conflicts and the need to respect and ensure respect for these rules in all circumstances ...

(...) *Stressing* the need ... for universal acceptance of such law"

UN Guidelines for Peace-Keeping Forces

Observance by United Nations forces of international humanitarian law

United Nations, Secretary-General's Bulletin, ST/SGB/1999/13, 6 August 1999

The Secretary-General, for the purpose of setting out fundamental principles and rules of international humanitarian law applicable to United Nations forces conducting operations under United Nations command and control, promulgates the following :

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- Section 1 - Field of application
- Section 2 - Application of national law
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- Section 4 - Violations of international humanitarian law
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- Section 7 - Treatment of civilians and persons hors de combat
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- Section 10 - Entry into force

Section 1 - Field of application

1.1 The fundamental principles and rules of international humanitarian law set out in the present bulletin are applicable to United Nations forces when in situations of armed conflict they are actively engaged therein as combatants, to the extent and for the duration of their engagement. They are accordingly applicable in enforcement actions, or in peacekeeping operations when the use of force is permitted in self-defence.

1.2 The promulgation of this bulletin does not affect the protected status of members of peacekeeping operations under the 1994 Convention on the Safety of United Nations and Associated Personnel or their status as non-combatants, as long as they are entitled to the protection given to civilians under the international law of armed conflict.

Section 2 - Application of national law

The present provisions do not constitute an exhaustive list of principles and rules of international humanitarian law binding upon military personnel, and do not prejudice the application thereof, nor do they replace the national laws by which military personnel remain bound throughout the operation.

Section 3 - Status-of-forces agreement

In the status-of-forces agreement concluded between the United Nations and a State in whose territory a United Nations force is deployed, the United Nations undertakes to ensure that the force shall conduct its operations with full respect for the principles and rules of the general conventions applicable to the conduct of military personnel. The United Nations also undertakes to ensure that members of the military personnel of the force are fully acquainted with the principles and rules of those international

instruments. The obligation to respect the said principles and rules is applicable to United Nations forces even in the absence of a status-of-forces agreement.

Section 4 - Violations of international humanitarian law

In case of violations of international humanitarian law, members of the military personnel of a United Nations force are subject to prosecution in their national courts.

Section 5 - Protection of the civilian population

5.1 The United Nations force shall make a clear distinction at all times between civilians and combatants and between civilian objects and military objectives. Military operations shall be directed only against combatants and military objectives. Attacks on civilians or civilian objects are prohibited.

5.2 Civilians shall enjoy the protection afforded by this section, unless and for such time as they take a direct part in hostilities.

5.3 The United Nations force shall take all feasible precautions to avoid, and in any event to minimize, incidental loss of civilian life, injury to civilians or damage to civilian property.

5.4 In its area of operation, the United Nations force shall avoid, to the extent feasible, locating military objectives within or near densely populated areas, and take all necessary precautions to protect the civilian population, individual civilians and civilian objects against the dangers resulting from military operations. Military installations and equipment of peacekeeping operations, as such, shall not be considered military objectives.

5.5 The United Nations force is prohibited from launching operations of a nature likely to strike military objectives and civilians in an indiscriminate manner, as well as operations that may be expected to cause incidental loss of life among the civilian population or damage to civilian objects that would be excessive in relation to the concrete and direct military advantage anticipated.

5.6 The United Nations force shall not engage in reprisals against civilians or civilian objects.

Section 6 - Means and methods of combat

6.1 The right of the United Nations force to choose methods and means of combat is not unlimited.

6.2 The United Nations force shall respect the rules prohibiting or restricting the use of certain weapons and methods of combat under the relevant instruments of international humanitarian law. These include, in particular, the prohibition on the use of asphyxiating, poisonous or other gases and biological methods of warfare ; bullets which explode, expand or flatten easily in the human body ; and certain explosive projectiles. The use of certain conventional weapons, such as non-detectable fragments, anti-personnel mines, booby traps and incendiary weapons, is prohibited.

6.3 The United Nations force is prohibited from employing methods of warfare which may cause superfluous injury or unnecessary suffering, or which are intended, or may be expected to cause, widespread, long-term and severe damage to the natural environment.

6.4 The United Nations force is prohibited from using weapons or methods of combat of a nature to cause unnecessary suffering.

6.5 It is forbidden to order that there shall be no survivors.

6.6 The United Nations force is prohibited from attacking monuments of art, architecture or history, archaeological sites, works of art, places of worship and museums and libraries which constitute the cultural or spiritual heritage of peoples. In its area of operation, the United Nations force shall not use such cultural property or their immediate surroundings for purposes which might expose them to destruction or damage. Theft, pillage, misappropriation and any act of vandalism directed against cultural property is strictly prohibited.

6.7 The United Nations force is prohibited from attacking, destroying, removing or rendering useless objects indispensable to the survival of the civilian population, such as foodstuff, crops, livestock and drinking-water installations and supplies.

6.8 The United Nations force shall not make installations containing dangerous forces, namely dams, dikes and nuclear electrical generating stations, the object of military operations if such operations may cause the release of dangerous forces and consequent severe losses among the civilian population.

6.9 The United Nations force shall not engage in reprisals against objects and installations protected under this section.

Section 7 - Treatment of civilians and persons hors de combat

7.1 Persons not, or no longer, taking part in military operations, including civilians, members of armed forces who have laid down their weapons and persons placed hors de combat by reason of sickness, wounds or detention, shall, in all circumstances, be treated humanely and without any adverse distinction based on race, sex, religious convictions or any other ground. They shall be accorded full respect for their person, honour and religious and other convictions.

7.2 The following acts against any of the persons mentioned in section 7.1 are prohibited at any time and in any place : violence to life or physical integrity ; murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment ; collective punishment ; reprisals ; the taking of hostages ; rape ; enforced prostitution ; any form of sexual assault and humiliation and degrading treatment ; enslavement ; and pillage.

7.3 Women shall be especially protected against any attack, in particular against rape, enforced prostitution or any other form of indecent assault.

7.4 Children shall be the object of special respect and shall be protected against any form of indecent assault.

Section 8 - Treatment of detained persons

The United Nations force shall treat with humanity and respect for their dignity detained members of the armed forces and other persons who no longer take part in military operations by reason of detention. Without prejudice to their legal status, they shall be treated in accordance with the relevant provisions of the Third Geneva Convention of 1949, as may be applicable to them *mutatis mutandis*. In particular :

(a) Their capture and detention shall be notified without delay to the party on which they depend and to the Central Tracing Agency of the International Committee of the Red Cross (ICRC), in particular in order to inform their families ;

(b) They shall be held in secure and safe premises which provide all possible safeguards of hygiene and health, and shall not be detained in areas exposed to the dangers of the combat zone ;

(c) They shall be entitled to receive food and clothing, hygiene and medical attention ;

(d) They shall under no circumstances be subjected to any form of torture or ill-treatment ;

(e) Women whose liberty has been restricted shall be held in quarters separate from men's quarters, and shall be under the immediate supervision of women ;

(f) In cases where children who have not attained the age of sixteen years take a direct part in hostilities and are arrested, detained or interned by the United Nations force, they shall continue to benefit from special protection. In particular, they shall be held in quarters separate from the quarters of adults, except when accommodated with their families ;

(g) ICRC's right to visit prisoners and detained persons shall be respected and guaranteed.

Section 9 - Protection of the wounded, the sick, and medical and relief personnel

9.1 Members of the armed forces and other persons in the power of the United Nations force who are wounded or sick shall be respected and protected in all circumstances. They shall be treated humanely and receive the medical care and attention required by their condition, without adverse distinction. Only urgent medical reasons will authorize priority in the order of treatment to be administered.

9.2 Whenever circumstances permit, a suspension of fire shall be arranged, or other local arrangements made, to permit the search for and identification of the wounded, the sick and the dead left on the battlefield and allow for their collection, removal, exchange and transport.

9.3 The United Nations force shall not attack medical establishments or mobile medical units. These shall at all times be respected and protected, unless they are used, outside their humanitarian functions, to attack or otherwise commit harmful acts against the United Nations force.

9.4 The United Nations force shall in all circumstances respect and protect medical personnel exclusively engaged in the search for, transport or treatment of the wounded or sick, as well as religious personnel.

9.5 The United Nations force shall respect and protect transports of wounded and sick or medical equipment in the same way as mobile medical units.

9.6 The United Nations force shall not engage in reprisals against the wounded, the sick or the personnel, establishments and equipment protected under this section.

9.7 The United Nations force shall in all circumstances respect the Red Cross and Red Crescent emblems. These emblems may not be employed except to indicate or to protect medical units and medical establishments, personnel and material. Any misuse of the Red Cross or Red Crescent emblems is prohibited.

9.8 The United Nations force shall respect the right of the families to know about the fate of their sick, wounded and deceased relatives. To this end, the force shall facilitate the work of the ICRC Central Tracing Agency.

9.9 The United Nations force shall facilitate the work of relief operations which are humanitarian and impartial in character and conducted without any adverse distinction, and shall respect personnel, vehicles and premises involved in such operations.

Section 10 - Entry into force

The present bulletin shall enter into force on 12 August 1999.

Kofi A. Annan
Secretary-General

**Measures available to States for fulfilling their obligation to ensure respect
for international humanitarian law**
by Umesh Palwankar

Umesh Palwankar completed his studies at the Geneva University's Graduate Institute of International Studies, where he was awarded a doctorate in international relations. He was assistant at the law faculty of Geneva University, and also participated as rapporteur in many round table discussions and meetings of experts organized by the International Institute of Humanitarian Law in San Remo. Since 1991, he has been a member of the ICRC's Legal Division, and has published a previous article in the Review, entitled "Applicability of international humanitarian law to United Nations peace-keeping forces" (No. 294, May-June 1993, pp. 227-240).

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Introduction

The present study deals with one specific aspect of the whole issue of finding ways and means of improving respect for international humanitarian law, namely, implementation of the obligation, as contained in Article I common to the Geneva Conventions of 1949 and to their Additional Protocol I of 1977, to ensure respect for this law. It is based upon the premise that the interpretation of common Article 1, whereby the obligation to ensure respect for international humanitarian law implies that every High Contracting Party ought to take action with regard to any other High Contracting Party which does not respect this law, is uncontested. The study therefore does not discuss this issue, but rather identifies and briefly comments upon the various types of measures available to States in order to fulfil their obligation to ensure respect. The examples given for the various measures are merely illustrative and ought by no means to be considered as a judgement by the author regarding their justification in the light of the circumstances under which they were adopted.

General remarks

The **main purpose** of this study is to identify, classify and briefly examine certain legal aspects of action that has been taken by States, in various contexts, in order to ensure respect for international law in general, and thereby provide a list of measures that States could consider adopting, as appropriate, in order to fulfil to their obligation under common Article 1.

Accordingly, it does not dwell on a detailed analysis of the veritable legal nature of this obligation to ensure respect [1]. It should nevertheless be pointed out that in view of the almost universal ratification of the Geneva Conventions and the growing number of States party to their Additional Protocols, as well as the transcendence of humanitarian principles and hence *erga omnes* character of the obligation to respect them [2], all States have the right to ensure that any other State respects customary humanitarian law, and all States party have the obligation to do so, under the strict terms of the Conventions and Protocol I, *vis-a-vis* any State party to these instruments. [3]

Common Article I imposes an obligation on the High Contracting Parties to act, but does not identify any specific course of action. There is no indication of how they should set about ensuring respect for international humanitarian law. It is primarily to fill that gap that the lawful means available have to be identified. A further reason for determining such means is the fact that, in order to make progress in the implementation of international humanitarian law, especially in the context of Article 1, it is necessary to go beyond the framework provided by international humanitarian law itself and to consider other options such as, for example, "humanitarian diplomacy", which mainly involves States and the United Nations. Of course humanitarian action, in this particular context, then becomes implicated in politics, but the responsibility, both individual and collective, laid down in Article I does rest with States and thus necessarily involves politics.

It is worth pointing out at this juncture that the present study focuses upon measures to enable States to "ensure respect" for international humanitarian law by other States, in the sense of **restoring respect** for international humanitarian law by States which are violating it [4]. However, it ought to be borne in mind that States may also fulfil their commitment to ensure respect by way of measures designed to assist other States to respect the law, particularly in peacetime (and possibly during armed conflicts of long duration). Such measures include, for instance: providing legal advisers to assist in developing or adapting national legislation and penal codes for effective implementation of international humanitarian law and to train legal advisers within the armed forces; teaching international humanitarian law as part of any kind of military co-operation; holding regional and international seminars with the participation of States in order to debate the specific problems associated with respect for international humanitarian law; and helping to set up and update regional data banks (or a single international data bank) on the various aspects related to national measures and their implementation, which would be accessible to any State needing information.

The legally permissible measures available to third parties, i.e. States which are not party to an international or non-international armed conflict, to ensure respect for international law in the event of a breach of the law may be classified into four broad categories. The first of these is *measures to exert diplomatic pressure*. The second category is *coercive measures* that States may take themselves. The third comprises steps which States may take *in co-operation with international organizations*. The fourth category differs from the other three, in that it does not relate to measures aimed at restoring respect for international law by a State violating that law, but rather to that aspect of the obligation to ensure respect which

confers on States the duty, moral in the very least, to contribute to assistance action undertaken in conformity with international humanitarian law. The measures in this case could be considered as *contributions to humanitarian efforts*.

Finally, insofar as international humanitarian law is concerned, it should be noted that, under the terms of Article 1 ("in all circumstances", i.e. whenever international humanitarian law is applicable) and pursuant to Article 3 common to the Geneva Conventions, the obligation to ensure respect applies to both international and non-international conflicts.

Measures to exert diplomatic pressure

Generally speaking, such measures do not pose any problems from the legal point of view. They may take more or less the following five forms:

a) Vigorous and continuous protests lodged by as many Parties as possible with the ambassadors representing the State in question in their respective countries and, conversely, by the representatives of those Parties accredited to the government of the aforementioned State.

b) Public denunciation, by one or more Parties and/or by a particularly influential regional organization, of the violation of international humanitarian law.

One example would be the statement made by the United States to the Security Council on 20 December 1990 concerning the deportation of Palestinian civilians from the occupied territories: "We believe that such deportations are a violation of the Fourth Geneva Convention... We strongly urge the Government of Israel to immediately and permanently cease deportations, and to comply fully with the Fourth Geneva Convention in all of the territories it has occupied since June 5, 1967" (S/PV.2970, Part 11, 2 January 1991, pp. 52-53). Similarly, resolution 5038/ES, of the Council of the League of Arab States, at its extraordinary session (Cairo, 30-31 August 1990), condemned, in its paragraph 1. "..... the violation by Iraqi authorities of the provisions of international humanitarian law relative to the treatment of civilians in the Kuwaiti territory under Iraqi occupation".

c) Diplomatic pressure on the author of the violation, through intermediaries.

For instance, the steps that were taken by Switzerland to persuade the USSR, China and France to exert pressure upon the Arab States in the Zerka affair of 1970 when three civilian planes were hijacked by Palestinian movements.

d) Refer all to the International Fact-Finding Commission (Article 90, Additional Protocol I) by a State with regard to another State, both of which have accepted the competence of the Commission.

In fact, the very assertion, by a State which has declared its acceptance of the competence of the International Fact-Finding Commission, of its desire to approach that body, even if the State against which an enquiry is requested has not itself declared its acceptance, might prove a means of inducing the latter to accept the Commission's competence, at least on an *ad hoc* basis, and/or to take steps to suppress continuing violations of international humanitarian law. A refusal could be publicly regretted by States.

Coercive measures that States may take themselves

The list that follows includes only measures available to States which are legally permissible in international law, and does not therefore take into consideration armed intervention undertaken unilaterally, i.e. without any reference to a treaty or custom, by a State or a group of States, as such intervention is not permitted under public international law and as no armed intervention can be based on international humanitarian law [5].

It would be useful at this stage to touch very briefly upon the legality, in international law, of the adoption of coercive (albeit unarmed) measures by States *vis-a-vis* other States. Practice shows that States employ a wide range of such measures in order to exert pressure on other States in retaliation for an act committed by the State against which they are directed. Such measures may be classified in two broad categories, namely retortion and unarmed reprisals.

Retortion refers to acts which are unfriendly, and even damaging, but intrinsically lawful, carried out in response to a prior act which might also be unfriendly but lawful, or internationally unlawful.

Reprisals are acts which are by their very nature unlawful but are exceptionally justified in the light of a prior unlawful act committed by the State at which they are directed. Thus the International Law Commission, which uses the term "countermeasures" to designate such acts, considers the initial illegality to constitute a circumstance which precludes the illegality of the response. [6]

The *lawfulness of the measures themselves* [7], notably with regard to their content and implementation, is determined not only in terms of the limits dictated by the demands of civilization and humanity, but also in terms of their aim. The aim is neither to punish (we are concerned with countermeasures, not sanctions) nor to seek compensation, but solely to oblige the State which is responsible for violating the law to stop doing so, by inflicting damage upon it, and to deter it from repeating the same offence in the future. Thus, in order to remain lawful, the coercive measures must :

- be directed against the State responsible for the unlawful act itself;
- be preceded by a warning to the State in question, asking it to stop the said act or acts;
- be proportional; all measures out of proportion with the act which prompted them would be excessive, and hence unlawful;
- respect fundamental humanitarian principles, as provided for in public international law and international humanitarian law, whereby such measures are forbidden against certain categories of persons;[8]
- be temporary and therefore cease as soon as the violation of the law by the State in question ceases.[9]

Possible measures of retortion

a) *Expulsion of diplomats.*

For instance, during the hostages affair at the United States embassy in Tehran (1979-1980), the United States expelled some of the Iranian diplomatic personnel posted in Washington.

b) Severance of diplomatic relations.

Soon after the aforementioned decision, the United States broke off diplomatic relations with Iran.

c) Halting ongoing diplomatic negotiations or refusing to ratify agreements already signed.

The American Senate refused to examine the SALT II agreements, already signed by the USSR and the United States, following the invasion of Afghanistan (1979).

d) Non-renewal of trade privileges or agreements.

The United States decided, in 1981, not to renew its bilateral maritime agreement with the USSR and to introduce restrictions on the admission of its vessels to American ports as from January 1982, following the repression in Poland.

e) Reduction or suspension of public aid to the State in question.

As a reaction to militia killings and other human rights violations in Suriname, the Netherlands in December 1982 suspended implementation of a 10 to 15-year aid programme to that country.

Possible unarmed reprisals

These include measures to exert economic pressure [10]. The aim is to hamper normal economic and financial relations, either by failing to respect agreements in force or by way of decisions running counter to the rules governing those relations.

a) Restrictions and/or ban on arms trade, military technology and scientific co-operation.

The European Communities took a series of decisions on 4 August 1990 with regard to Iraq which comprised, among others, an embargo on the sale of arms and other military equipment, and the suspension of all technical and scientific co-operation.

b) Restrictions on exports and/or imports to and from the State committing the violations; total ban on commercial relations.

Following the invasion of Afghanistan (1979) the United States set up a grain embargo against the USSR; the European Communities imposed a total ban on imports from Argentina during the Falklands/ Malvinas conflict (1982); the United States suspended commercial relations with Uganda in 1978 in reaction to violations of human rights.

c) Ban on investments.

A ban on all new investment in South Africa was imposed by France in 1985, following a hardening of the repression associated with apartheid.

d) Freezing of capital

The European Communities decided to freeze Iraqi assets on the territory of the Member States (4 August 1990).

e) Suspension of air transport (or other) agreements.

On 26 December 1981, the United States suspended the 1972 US-Polish Air Transport Agreement following the Polish government's repression of the Solidarity movement.

Measures in co-operation with international organizations

Regional organizations

In addition to decisions to take measures to exert economic pressure, such as those identified above, certain regional agencies, particularly those active in the human rights field, may help in another way to promote respect for both human rights and international humanitarian law [11]. This has been the case of the European and Inter-American Human Rights Commissions.

In 1967, a complaint was lodged with the European Commission by the governments of Denmark, Norway, Sweden and the Netherlands against the government of Greece, accusing the latter of violations of the European Convention on Human Rights. As the case was not submitted to the Court, it was the Committee of Ministers which took a decision.

The two aforementioned Commissions have also undertaken fact-finding missions in the field and conducted private interviews with prisoners: the European Commission in Turkey (1986), and the Inter-American Commission during the civil war in the Dominican Republic (1965).

United Nations

As mentioned above [12], Article 1, by imposing an obligation on States, inevitably brings in politics. And one of the most important means at States' disposal, at the international level, is precisely the United Nations. Moreover, any effective attempt by a State to ensure respect for international humanitarian law, especially in the event of massive violations, would be difficult, if not impossible, without the political support of the community of States, and the United Nations is one of the most widely used vehicles for such support in the contemporary world. This is implicitly recognized in Article 89 of Additional Protocol I, which states: "In situations of serious violations of the Conventions or of this Protocol, the High Contracting Parties undertake to act, jointly or individually, in co-operation with the United Nations and in conformity with the United Nations Charter".

The different types of measures which States may take in co-operation with the United Nations are listed below [13].

Measures decided by the Security Council

a) Unarmed countermeasures.

Article 41 of the United Nations Charter lists a series of measures that the Security Council may decide to take if it determines the existence of one of the three situations referred to in Article 39, that is, any threat to the peace, breach of the peace, or act of aggression. An analysis of actual practice, however, reveals a certain reticence and an empirical approach on the part of the Security Council, which has not always found it necessary either to refer expressly to the articles on which it bases itself or to declare formally in the preamble or operative part of a resolution whether the situation in question corresponds to one of the three designated in Article 39.[14] Consequently, when the Security Council places itself in the context of Chapter VII of the Charter, it is implicitly acknowledging that it is in the presence of one of the three situations designated in Article 39. Moreover, the Security Council enjoys great latitude in its competence to classify situations, and "... it is very difficult to find a common guideline in its various resolutions that allows a

coherent classification of the various situations enumerated in Article 39".[15] For example, in resolution 688 of 5 April 1991, the Security Council deemed that the repression of the Iraqi civilian population in Kurdish-populated areas threatened international peace and security in the region (paragraph 1).

The unarmed measures cited in Article 41 are complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

Thus, from 1965 onwards, the Security Council adopted several decisions requesting member States to suspend all their trade relations with Southern Rhodesia.

b) Use of armed force.

It is generally accepted that all military countermeasures by a State are unlawful, and that the sole body competent to impose a sanction involving armed force today is the United Nations and in principle, within that organization, the Security Council [16]. States may thus act on the Security Council's authorization to use force in order to ensure respect by a given State for its international obligations.

A typical example would be the action taken during the Gulf crisis as from 17 January 1991, in pursuance of Security Council resolution 678 of 29 November 1990.

However, as observed earlier, the Security Council enjoys great latitude in deciding which situations constitute threats to international peace and security. For instance, resolution 794 of 3 December 1992 stated that the human tragedy caused by the conflict in Somalia, and further exacerbated by the obstacles being created to the distribution of humanitarian assistance, constituted a threat to international peace and security (preambular paragraph 3). Consequently, in order to stem violations of international humanitarian law, in particular the deliberate impeding of humanitarian assistance (paragraph 5), the Council decided that action be taken under Chapter VII of the Charter, which would include the use of all necessary means to establish a secure environment for humanitarian relief operations in Somalia (paragraphs 7,8 and 10). This decision was to a large extent repeated in resolution 814 of 26 March 1993, using more or less similar terminology (heading of section B and paragraph 14, in particular). In this context, it would be useful to make the following observations. Although the aforementioned action, with allowance for the use of force, was decided upon by the Security Council with a view to ensuring respect for international humanitarian law in an armed conflict situation (provision of humanitarian assistance in this case), it was taken, firstly, on the basis of the United Nations Charter and not of international humanitarian law, and secondly, with the **primary** goal (and the **only one** permitted under Chapter VII of the Charter) of restoring (or maintaining, as the need may be) international peace and security. The lawfulness of the use of force in such circumstances is strictly limited to this goal, and **cannot be derived** from any rule or provision of **international humanitarian law**, not even Article 89 of Additional Protocol I, which calls upon States party to act, in co-operation with the United Nations and in conformity with its Charter, in situations of serious violations of that law. For international humanitarian law starts off from the premise that any armed conflict results in human suffering, and proceeds to elaborate a body of rules **meant precisely to alleviate this very suffering**. It would indeed be logically and legally indefensible to deduce that that same law **itself allows**, even in extreme cases, for the use of armed force. [17] Enforcement measures would therefore **fall outside** the scope of international humanitarian law.

Measures decided by the General Assembly

a) *Implicitly authorized countermeasures.*

The General Assembly may more or less explicitly acknowledge that a State has not respected its obligations under the Charter, but without making any recommendation to member States to adopt countermeasures against it.

For instance, resolution A/RES/ES.6/2 adopted by the General Assembly at its sixth emergency special session, on 14 January 1980, strongly deplores the armed intervention in Afghanistan (paragraph 2), but makes no mention of the USSR. In such cases, there is nothing to prevent States from taking lawful countermeasures.

b) *Explicitly recommended countermeasures.*

The General Assembly may recommend that members (and sometimes even other States) adopt sanctions against a State whose conduct is qualified as contrary to the rules of the Charter.

A perfect example would be resolution A/RES/ES/9/1 of 5 February 1982, adopted at its ninth emergency special session on the situation in the occupied Arab territories. The resolution lists a whole series of measures to be applied against Israel: suspension of economic, financial and technological assistance and co-operation, severing of diplomatic, trade and cultural relations [paragraph 12 (c) and in order to isolate it totally in all fields (paragraph 13).

c) *Besides resolutions requesting States to apply countermeasures, the Security Council, the General Assembly and the Secretary-General may be mobilized by member States to issue statements on the applicability of international humanitarian law and denounce violations which have been committed.*

The Security Council expressed concern with regard to attacks against the civilian populations in the Gulf in resolution 540 of 31 October 1983 on the situation between Iran and Iraq, which specifically condemned all "violations of international humanitarian law, in particular of provisions of the Geneva Conventions in all their aspects" and called for "the immediate cessation of all military operations against civilian targets, including city and residential areas" (paragraph 2); resolution 681 of 20 December 1990, in its paragraph 4, underlined the applicability of the Fourth Geneva Convention to the territories occupied by Israel; General Assembly resolution A/45/172 of 18 December 1990, concerning the situation of human rights and fundamental freedoms in El Salvador, referred to international humanitarian law; the Secretary-General made several appeals calling upon Iran and Iraq to release and repatriate all sick and wounded prisoners immediately (paragraph 40 of report S/20862 to the Security Council, 22 September 1989).

d) *States may also use the public (denunciation) and confidential (in principle, discreet negotiations) procedures provided for in the Commission on Human Rights in order to bring pressure to bear on States to respect applicable international law. They may encourage references to international humanitarian law in the Commission and in the Sub-Commission.*

During their 1990 sessions, for example, both the Commission and the Sub-Commission mentioned international humanitarian law in the cases of Afghanistan, southern Africa, El Salvador and Israel.

e) *States may encourage recourse by the United Nations to the services of special rapporteurs mandated to conduct enquiries into specific violations of international humanitarian law, taking the procedure already employed in the field of human rights as a model.*

In 1984, a report was prepared by experts designated by the Secretary-General to investigate the Islamic Republic of Iran's allegations concerning the use of chemical weapons (S/16433, 26 March 1984); the Commission on Human Rights decided, in paragraph 4 of resolution 1993/2 A (19 February 1993) to appoint a Special Rapporteur to investigate Israel's violations of the principles and bases of international law, international humanitarian law and specifically the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949, in the Palestinian territory occupied by Israel since 1967.

f) States may also, through the Security Council and/or the General Assembly (within the limits set out in Article 96, paragraph 1, of the Charter), request the International Court of Justice to give an advisory opinion on whether an established fact - namely an alleged violation of international humanitarian law by a State or States party involved in a conflict - actually constitutes a breach of an international commitment undertaken by that State or those States.

This is not equivalent to requesting the International Court of Justice to rule on the dispute underlying the armed conflict in question, which it would decline to do,[18] but rather on a more abstract question associated with the responsibility of States party to an international treaty.

Contribution to humanitarian efforts

Such actions may take the form either of support for organizations involved in humanitarian assistance or of practical action to facilitate such assistance.

a) Support.

States could provide financial and/or material support to permanent organizations such as the ICRC and UNHCR, and to *ad hoc* structures, such as that entrusted to Saddrudin Aga Khan for "Operation Salaam" in Afghanistan.

b) Practical action.

States, particularly those in the region concerned, could make available their logistic (airports, ports, telecommunication networks) and medical (hospitals, personnel) infrastructures.

In the Falklands/Malvinas armed conflict (1982) for example, Uruguay, a neutral country sharing a border with Argentina, allowed wounded British military personnel to be repatriated by air from Montevideo, medical supplies for British hospital ships to transit through its territory (under the supervision of ICRC delegates) and Argentine prisoners to be repatriated and handed over to the representatives of their own authorities, also in Montevideo [19].

Protecting Powers

Finally, there exists the system of Protecting Powers which, as provided for in international humanitarian law, is essentially aimed at securing more effective respect for this law. Thus, a Protecting Power is a State mandated by one of the parties to a conflict to safeguard its interests in humanitarian matters *vis-à-vis* the other party or parties to the same conflict. Although it is true that the appointment of Protecting Powers rests with the parties to a conflict, third States could nevertheless encourage belligerents to have recourse to this system either by approaching them unilaterally with proposals to that effect or by activating interest within the United Nations.

Conclusion

In a world characterized by increasing concern about violations of international humanitarian law, which in some cases are occurring on an unacceptably massive scale, the need for States to fulfil their obligation to ensure respect for this law has become both urgent and acute. As this study bears out, there do exist a wide range of measures available to them, measures that they have, on various occasions and in different contexts, adopted in the past. It is therefore up to them, as stated in the Final Declaration of the International Conference for the Protection of War Victims (30 August - September 1993), to make every effort to "ensure the effectiveness of international humanitarian law and take resolute action, in accordance with that law, against States bearing responsibility for violations of international humanitarian law with a view to terminating such violations" [20].

Notes :

1. For such an analysis, see *inter alia* Luigi Condorelli and Laurence Boisson de Chazoumes, "Quelques remarques à propos de l'obligation des Etats de 'respecter et faire respecter' le droit international humanitaire en toutes circonstances" in Christophe Swinarski (ed.), *Studies and essays on international humanitarian law and Red Cross principles* in honour of Jean Pictet, Martinus Nijhoff, Geneva-The Hague, 1984, pp. 17- 36; Nicolas Levrat, "Les conséquences de l'engagement pris par les Hautes Parties Contractantes de 'faire respecter' les Conventions humanitaires" in Frits Kalshoven & Yves Sandoz (eds.), *Implementation of International Humanitarian Law*, Martinus Nijhoff, Dordrecht, 1989, pp. 263-296.

2. "... since such an obligation does not derive only from the Conventions themselves, but from the general principles of humanitarian law to which the Conventions merely give specific expression". Military and paramilitary activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, *ICJ Reports*, 1986, paragraph 220. In the *Barcelona Traction* case, the International Court of Justice (ICJ) observed that States' obligations to the international community as a whole may be conferred by inter- national instruments of a universal or quasi-universal character and that all States may be considered as having a legal interest in their observance. *Barcelona Traction Light and Power Company, Limited*, Judgment, *ICJ Reports*, 1970, paragraphs 33 and 34.

3. See also Resolution XXIII of the *International Conference on Human Rights, Tehran, 1968*, which emphasizes that the obligation to ensure respect for the Conventions is incumbent even upon States that are not directly involved in an armed conflict. It should equally be noted that there have been neither reservations nor interpretative declarations with regard to Article 1. Nor has any State contested the validity of the appeals issued by the ICRC on the basis of that Article to all States party to the Conventions, in connection with the conflict between Iran and Iraq, in 1983 and 1984. Furthermore, both the General Assembly and the Security Council of the United Nations have referred to the obligation under Article 1, as for example in Security Council resolution 681 of 20 December 1990 concerning the Arab territories occupied by Israel, which, in paragraph 5, calls upon the High Contracting Parties to the Fourth Geneva Convention "... to ensure respect by Israel, the occupying Power, for its obligations under the Convention in accordance with Article 1 thereof" and in General Assembly resolution 45/69 of 6 December 1990 concerning the uprising (*intifada*) of the Palestinian people, which similarly, in paragraph 3, calls upon all States party to the Fourth Convention to ensure respect by Israel for this Convention in conformity with their obligation under its Article 1.

4. As L. Condorelli and L. Boisson de Chazoumes observe, this aspect (*vis-a-vis* other States) of the obligation to ensure respect relates to what is required of States in the face of violations of humanitarian law attributable to another State. *Supra* note 1, p. 26.

5. Yves Sandoz, "It would indeed be unthinkable to see international humanitarian law, whose philosophy it is not to link its application to *jus ad bellum*, itself become a pretext for armed intervention", *Annals of International Medical Law*, No. 33, 1986, p. 47. See also the second and fourth preambular paragraphs in the Preamble to Protocol I additional to the Geneva Convention's. With regard to respect for human rights, "the use of force could not be the appropriate method to monitor or ensure such respect". Judgment, *Nicaragua v. United States of America*, ICJ Reports, 1986, paragraph 268. For an overview, with extensive references, of the prohibition of the use of force in international law, see international Law Commission: *Third report on State responsibility*, Chapter X.A. "The Prohibition of the use of Force" (Doc. A/CN.4/440/Add.1, 14 June 1991).

It should be pointed out here that the inadmissibility of the use of force by States is confined to unilateral actions (Article 2, paragraph 4, of the Charter of the United Nations) and hence is without prejudice to cases where the United Nations intervenes, pursuant to Articles 42 and 43, paragraph 1, of the Charter. Nor does it apply to the right of individual or collective self-defence (Article 51 of the Charter)

6. "The wrongfulness of an act of a State not in conformity with an obligation of that State towards another State is precluded if the act constitutes a measure legitimate under international law against that other State, in consequence of an internationally wrongful act of that other State" (ILC Draft Article 30 on State responsibility), *Yearbook of the International Law Commission*, 1979, vol.II, p. 115. For termination or suspension of the operation of a treaty as a consequence of its breach, see Article 60, paragraphs 1- 4 of the Vienna Convention on the Law of Treaties. Also, Arbitral award in the case concerning the Air Service Agreement of 27 March 1946 between the United States of America and France, Decision of 9 December 1978, paragraph 81: "If a situation arises which, in one State's view, results in the violation of an international obligation by another State, the first State is entitled, within the limits set by the general rules of international law pertaining to the use of armed force, to affirm its rights through counter measures". *Report of Arbitral Awards*, Vol. XVIII, p. 417. For an exhaustive study see Frits Kalshoven, *Belligerent Reprisals*, Sijthoff, Leyden and Henry Dunant Institute, Geneva, 1971, 389 pp.

7. This refers chiefly to reprisals. For jurisprudence dealing with the lawfulness of reprisals, refer to the "Naulilaa" and "Lysne" cases, Arbitral awards of 31 July 1928 and 30 June 1930 respectively, *Report of Arbitral Awards*, Vol.II, p. 1025 and p. 1056. Nevertheless, the considerations which follow also apply, by analogy, to measures of retortion which, although intrinsically lawful, should not however stray beyond the bounds of lawfulness. They must for instance respect the principle of proportionality in relation to the objective pursued. They may not be used for purposes other than to put a stop to the unlawful act which prompted them. However, neither practice nor case law provide any clear indications of the bounds of lawfulness of retortion. For details on lawfulness and related considerations with regard to retortion and countermeasures, see International Law Commission: *Third report on State responsibility*, Chapter I.B. "Retortion" (Doc. A/CN.4/440, 10 June 1991), and *Fourth report on State responsibility*, Chapter V. "Prohibited countermeasures" (Doc. A/CN.4/444/Add.1, 25 May 1992).

8. In conformity, *inter alia*, with Article 60, paragraph 5, of the Vienna Convention on the Law of Treaties. Furthermore, paragraph 4 of the same Article makes reservation for the specific provisions of each treaty applicable in the event of a breach. Under international humanitarian law, prohibitions of certain measures against protected persons are to be found in Articles 46, 47, 13(3) and 33(3) of the Four Geneva Conventions respectively and certain articles of Additional Protocol I, such as, for example, Articles 20, 51(6), 54(4). See also International Law Commission, *Fourth report on State responsibility*, Chapter V.C. "Countermeasures and respect for human rights" (A/CN.4/444/Add.1, 25 May 1992) wherein the rapporteur observes that "... humanitarian limitations to the right of unilateral reaction to internationally wrongful acts have acquired in our time... a degree of restrictive impact which is second only to the condemnation of the use of force" (paragraph 78). Among the examples he cites to support his observation, one finds the total blockade of trade relations with Libya declared in 1986 by the United States, which prohibited the export to Libya of any goods, technology or service from the United States with the exception of publications and donations of articles intended to relieve human suffering, such as food, clothing, medicine and medical supplies strictly intended for medical purposes (paragraph 79).

9. This condition ought equally to be read in the light of General Assembly resolution 2131 (XX) of 21 December 1965 on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty, and resolution 2625 (XXV) of 24 October 1970 on the Declaration on Principles of International Law Concerning Friendly Relations Among States in Accordance with the Charter of the United Nations, both of which clearly condemn the use of economic and political force by States to coerce another State in order to obtain from it the subordination of the exercise Of its sovereign rights or to secure from it advantages of any kind.

10. This expression seems the most appropriate to cover the whole range of such measures, rather than employing more restrictive terms such as "embargo", which strictly speaking only concerns exports, or "boycott" which, similarly, only relates to imports.

11. In this connection, see Dietrich Schindler, "The International Committee of the Red Cross and Human Rights", *International Review of the Red Cross*, January-February 1979. No. 208, pp. 3-14.

12. See *General remarks* following the introduction.

13. For a recent study on this and related subjects, see also Hans-Peter Gasser, "Ensuring respect for the Geneva Conventions and Protocols: The role of Third States and the United Nations" in Hazel Fox and Michael M. Meyer (eds.) *Armed Conflict and the New Law*, vol. II "Effecting Compliance", The British institute of international and Comparative Law, London, 1993, pp. 15-49.

14. *La Charte des Nations Unies: Commentaire article par article*, Jean-Pierre Cot and Alain Pellet (eds.), Paris/Brussels, Economica/Bruylant, 1985, p. 651 ff.

15. *Ibid.*, p. 654.

16. *Supra* note 5

17. For this reason, international humanitarian law applies **equally** to all parties in an armed conflict situation, and **independently** of considerations relating to the **legality**

of the use of force (Statements by the ICRC on the applicability of international humanitarian law to United Nations Peace-keeping Forces, 47th and 48th sessions of the General Assembly, 1992 and 1993 respectively). See also "Report on the Protection of War Victims" prepared by the ICRC for the International Conference for the Protection of War Victims, published in *International Review of the Red Cross*, No. 296, September-October 1993, at 3.1.3. In fact, if it were conceded that international humanitarian law does permit the use of armed force in order to put an end to violations of this law, then it could also be argued that any use of armed force which abides by international humanitarian law to the letter is thereby "legal" under that law, independently of the provisions of the Charter. This would be absurd, which is precisely one of the reasons why international humanitarian law **cannot (and must not) in any way be connected** with the legality of the use of force.

18. Interpretation of peace treaties, Advisory Opinion, *ICJ Report*, 1950, p. 72, where the ICJ states that it would not be in a position to express an opinion should the question put to it be directly related to the main point of a dispute actually pending between two States, so that answering the question would be substantially equivalent to deciding the dispute between the parties.

19. For details, see Sylvie-Stoyanka Junod, *Protection of the Victims of armed Conflict, Falkland-Malvinas Islands (1982): International Humanitarian Law and Humanitarian Action* ICRC, Geneva, 1984, 45 pp.

20. See Part II, paragraph 11 of the Final Declaration in *IRRC*, No. 296, September-October 1993, p. 380.

The evolution of individual criminal responsibility under international law

by

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THE international legal provisions on war crimes and crimes against humanity have been adopted and developed within the frame-work of international humanitarian law, or the law of armed conflict, a special branch of international law which has its own peculiarities and which has gone through an intense period of growth, evolution and consolidation in the last 50 years.

The rules of humanitarian law concerning international crimes and responsibility have not always appeared sufficiently clear. One of the thorniest problems is that relating to the legal nature of international crimes committed by individuals and considered as serious violations of the rules of humanitarian Law¹. As regards the traditional tripartition -crimes against peace, war crimes and crimes against humanity -this paper will be devoted essentially to the latter two categories, which are more closely linked to the core of international humanitarian law and are of major interest at this tormented end of the twentieth century. Indeed, the world today is confronted by a disturbing proliferation of conflicts which are no longer international in nature,² as was traditionally the case, and in which the basic problem regarding the classification of offences seems to be that the borderline between war crimes and crimes against humanity appears blurred. In any case, both types of crime, together with the crime of genocide, come under the broader concept of *aimina juris gentium*. The category of crimes against peace has been left aside as its scope is more uncertain and the particular features it presents imply a close connection with *jus ad bellum* issues.

The following section will attempt to analyse the development of crimes within the international legal and jurisdictional framework, starting with the most doubtful precedents (even from the distant past) and then concentrating primarily on the decisions of the Nuremberg and Tokyo International Military Tribunals. The activities of these Tribunals marked the beginning of an important legal evolution, which was later more clearly defined with the setting-up of the ad hoc Tribunals for the former Yugoslavia and for Rwanda and, last but not least, with the diplomatic conference that adopted the Rome Statute of the International Criminal Court.

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¹ See M. C. Bassiouni/P. Nanda, *A Treatise on International Criminal Law*, Springfield, 1973; S. Glaser, *Droit international pénal conventionnel*, Brussels, 1970-78; G. Sperduti, "Crimini internazionali", *Enciclopedia del diritto*, XI, 1962, p. 337; N. Ronzitti, "Crimini internazionali", *Enciclopedia giuridica*, x, 1988; F. Francioni, "Crimini Internazionali", *Digesto delle discipline pubblicistiche*, IV, 1988, p. 464

² On the problems arising from non-international armed conflicts, see T. Meron, "International criminalization of internal atrocities", *AJIL*, 1995, p. 554; T. Graditzky, "Individual criminal responsibility for violations of international humanitarian law committed in non-international armed conflicts", *IRRC*, No.322, March 1998, p. 29.

A brief conclusion will provide some general remarks and touch on the prospect of evolution in the international system in keeping with various trends manifested within the United Nations,³ especially within its International Law Commission.

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War crimes and crimes against humanity: origin and evolution of illegal sphere

Before the Nuremberg and Tokyo trials

Already in that Ordinance for the Government of the Army, published in 1386 by King Richard II of England, limits were established to the conduct of hostilities and -on pain of deadly- acts of violence against women and unarmed priests, the burning of houses and the desecration of churches were prohibited. Provisions of the same nature were included in the codes issued by Ferdinand of Hungary in 1526, by Emperor Maximilian II in 1570 humanitarian rules are found in Articles 8 and 9) and by King Gustavus II Adolphus of Sweden in 1621.⁴ Article 100 of the Articles of War decreed by Gustavus II Adolphus established that no man should "tyrannise over any Churchman, or aged people, Men or Women, Maydes or Children"

The earliest trial for war crimes seems to have been that of Peter von Hagenbach, in the year 1474.⁵ Already at the time -as during and after the Nuremberg Trial- punishment of the accused hinged on the question of compliance with superior orders.⁶ Charles the Bold, Duke of Burgundy (1433-1477), known to his enemies as Charles the Terrible, had placed *Landvogt Peter von Hagenbach* at the helm of the government of the fortified city of Breisach, on the Upper Rhine. The governor, overzealously following his master's instructions, introduced a regime of arbitrariness, brutality and terror in order to reduce the

³ See L. CondoreUi, A. La Rosa, s. scherrer (eds), *Les Nations Unies et le droit international humanitaire/The United Nations and International Humanitarian Law*, Éditions Pedone, Paris, 1996.

⁴ See G. schwarenberger, *International Law as Applied by International Courts and Tribunals*, vol.II: *The Law of Armed Conflict*, Stevens, London, 1968, p. 15 ; K. Ogren, "Humanitarian law in the Articles of War decreed in 1621 by King Gustavus II Adolphus of sweden, *IRRC*, No.313, July-August 1996, p. 438. The Swedish Articles of War had considerable influence in Europe; at the same time, they were based on the first continental models of they were based on the first continental models of

⁵ See schwarzenberger, op. cit. (note 4), P.462.

⁶ See V. Dinstein, *The Defence of "Obedience to Superior Orders" in International Law*, Leyden, 1965; E. Muller-Rappard, *L'ordre supérieur militaire et la responsabilité pénale du subordonné*, Paris, 1965; L.C. Green, *Superior Orders in National and International Law*, Leyden, 1976 ; G. Sacerdoti, "A proposito del caso Priebke: la responsabilità per l'esecuzione di ordini illegittimi costituenti crimini di guerra", *Rivista di diritto internazionale*, 1997, P.130; P. Gaeta, "Rilevanza dell'ordine superiore nel diritto internazionale penale", *Rivista di diritto internazionale*, 1998, p. 69.

population of Breisach to total to total submission. Murder, rape, illegal taxation and the wanton confiscation of private property became generalized practices. All these violent acts were also committed against inhabitants of the neighbouring territories, including Swiss merchants on their way to the Frankfurt fair. When a large coalition (Austria, France, Bern and the towns and knights of the Upper Rhine) put an end to the ambitious goals of the powerful Duke (who also wanted to become king and even to gain the imperial crown), the siege of Breisach and a revolt by both his German mercenaries and the local citizens led to Hagenbach's defeat, as a prelude to Charles' death in the battle of Nancy (1477). Already the year before Charles was killed, the Archduke of Austria, under whose authority von Hagenbach was captured, had ordered the trial of the bloody governor. Instead of remitting the case to an ordinary tribunal, an ad hoc court was set up, consisting of 28 judges of the allied coalition of States and towns. In his capacity as sovereign of the city of Breisach, the Archduke of Austria appointed the presiding judge. Considering the state of Europe at the time -the Holy Roman Empire had degenerated to the point where relations among its different entities had taken on a properly international nature, and Switzerland had become independent (even though this had not yet been formally recognized) -it can be concluded that the tribunal was a real international court.⁷

At the trial, a representative of the Archduke acted as plaintiff, stating that von Hagenbach had "trampled under foot the laws of God and man ". More precisely, the defendant was charged with murder, rape, perjury and other *malefacta*, including orders to his non-German mercenaries to kill the men in the houses where they were quartered so that the women and children would be completely at their mercy. The defence essentially played the card of compliance with superior orders, considering that "Sir Peter von Hagenbach does not recognise any other judge and master but the Duke of Burgundy", whose orders he could not dispute. "Is it not known that soldiers owe absolute obedience to their superiors ?" This basic consideration was underlined by the fact that the Duke himself had personally confirmed and ratified *ex post factum* "all that had been done in his name". Von Hagenbach requested an adjournment to ask for confirmation from the Duke, but the tribunal refused, because this request was considered contrary to the laws of God and because the defendant's crimes had already been established beyond doubt. Therefore, the tribunal found the accused guilty, and, deprived of his rank of knight and related privileges (because he had committed crimes which he had the duty to prevent), von Hagenbach was executed following the Marshal's order: "Let justice be done".

"This case is extremely interesting for several reasons. While it is not easy to establish that the acts in question were war crimes, since most of them were committed before the formal outbreak of hostilities, at the time (as today) the borderline between war and peace was difficult to distinguish and more "fluid" than in later centuries. In any case, Breisach had to be considered as occupied territory. Moreover, even if it is difficult to classify these acts as war crimes, they can nevertheless be considered as early manifestations of what are now known as "crimes against humanity".

Several centuries elapsed before the foundations were laid for incriminating individuals for war crimes considered as grave violations of the law applicable in international armed

⁷ According to Schwarzenberger, in a framework of quasi-international law, whose characteristic is "a state of *de facto* equality in which entities conduct their mutual relations as if they were subjects of international law", the Holy Roman Empire "Had degenerated to such an extent that relations between its members were conducted on a footing hard to distinguish from international relations". *Op. cit.* (note 4), p. 464.

conflicts. During the American Civil War (1861-1865), President Abraham Lincoln issued the Lieber Code (Instructions for the Government of Armies of the United States in the Field, General Orders No.100, of 24 April 1863).⁸ Prepared by Francis Lieber, professor of law at Columbia College in New York, and revised by a board of officers, this text represents the first attempt to codify the laws of war. Under Article 44 "all wanton violence committed against persons in the invaded country, all destruction of property", "all robbery, all pillage or sacking" and "all rape, wounding, maiming or killing of such inhabitants" are punishable (these acts are strictly in the field of war crimes). In Article 47, "crimes punishable by all penal codes", like "arson, murder, maiming, assaults, highway robbery, theft, burglary, fraud, forgery and rape", committed by an American soldier on the territory of an enemy State, are considered as if they had taken place "at home" and are severely punished. Even if only destined for American soldiers and only binding on them, the Lieber Code had an important influence on military regulations of other armies as well.

A further leap was made in the twentieth century. After the First World War, the Treaty of Versailles of 28 June 1919 - in its Articles 228 and 229 - established the right of the Allied Powers to try and punish individuals responsible for "violations of the laws and customs of war".⁹ In particular, Article 228 declared that "the German Government recognizes the right of the Allied and Associated Powers to bring before military tribunals persons accused of having committed acts in violation of the laws and customs of war". The German government therefore had the duty to hand over "all persons accused", in order to permit them to be brought before an allied military tribunal. In the case of an individual "guilty of criminal acts against the nationals of more than one of the Allied and Associated Powers", the possibility of setting up an international tribunal was provided for.

Moreover, Article 227 stated that *Kaiser* Wilhelm II of Hohenzollern was responsible "for a supreme offence against international morality and the sanctity of treaties" and the Allied Powers agreed to establish "a special tribunal" composed of judges appointed by the United States, Great Britain, France, Italy and Japan to try the accused. "In its decision the tribunal will be guided by the highest motives of international policy, with a view of vindicating the solemn obligations of international undertakings and the validity of international morality." The Powers also agreed to submit a request to the government of the Netherlands for the Emperor's surrender, an initiative that failed. As can be seen, the provisions of this article anticipated the category of "crimes against peace", which was to emerge after the Second World War.

The Hague Conventions of 1899 and 1907 and the Geneva Convention of 1929 Relative to the Treatment of Prisoners of War had no provisions on the punishment of individuals who violated their rules.¹⁰ Only the 1929 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field had a somewhat weak provision in Article 30.¹¹ But these Conventions were to be referred to later in the Nuremberg Judgement.

⁸ Text in D. Schindler/J. Toman, *The Laws of Armed Conflicts: A Collection of Conventions, Resolutions and other Documents*, Martinus Nijhoff/Henry Dunant Institute, Dordrecht/Geneva,

⁹ Text in *The Treaties of Peace 1919-1923*, vol. I, Carnegie Endowment for International Peace, New York, 1924, p. 121.

¹⁰ Texts in J.B. Scott, *The Hague Conventions and Declarations of 1899 and 1907*, Carnegie Endowment for International Peace, New York, 1915; Schindler/Toman, *op. cit.* (note 8).

¹¹ "On the request of a belligerent, an enquiry shall be instituted, in a manner to be decided between the interested parties, concerning any violation which has been established

Nuremberg and Tokyo International Tribunals

It was only after the Second World War that a movement started up within the international community which clearly began to shape a deeper consciousness of the need to prosecute serious violations of the laws of war,¹² with regard both to the traditional responsibility of States¹³ and to the personal responsibility of individuals.¹⁴ The horrible crimes committed by the Nazis and the Japanese led to a quick conclusion of agreements among the Allied Powers and to the subsequent establishment of the Nuremberg and Tokyo International Military Tribunals "for the trial of war criminals whose offences have no particular geographical location whether they be accused individually or in their capacity as members of organisations or groups or in both capacities".¹⁵ These special jurisdictions also took into account the new categories of crimes against humanity¹⁶ and crimes against peace.

Article 6 of the Charter of the Nuremberg International Military Tribunal established the legal basis for trying individuals accused of the following acts:

—*Crimes against peace*: the planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties,¹⁷ agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.

—*War crimes* : violations of the laws and customs of war. A list follows with, inter alia, murder, ill-treatment or deportation into slave labour or for any other purpose of the civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, the killing of hostages, the plunder of public or private property, the wanton destruction of cities, towns or villages, or devastation not justified by military necessity.

—*Crimes against humanity* : murder, extermination, enslavement, deportation, and other inhuman acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any

the belligerents shall put an end to and repress it as promptly as possible." (Art. 30). Text in Schindler/Toman, op. cit. (note 8), p. 325.

¹² "Serious violations of the laws and customs of war" is a broader concept than that of "grave breaches".

¹³ On State responsibility, see R. Ago, *Scritti sulla responsabilità internazionale degli Stati*, 2 vol., Napoli, 1978-1986; I. Brownlie, *State Responsibility*, Oxford, 1983. On crimes of State, see also J. Weiler/A. Cassese/M. Spinedi (eds), *International Crimes of State*, Berlin, 1989; G. Carella, *La responsabilità dello Stato per crimini internazionali*, Napoli, 1985; A. Cassese, "Remarks on the present legal regulation of crimes of States", B. Conforti, "in tema di responsabilità degli Stati per crimini internazionali", and M. Sahovic, "Le concept du crime international de l'Etat et le développement du droit international", in *Essays in Honour of Roberto Ago*, Milano, 1987.

¹⁴ "Pour la première fois, les crimes de guerre, les crimes contre la paix, les crimes contre l'humanité sont expressément prévus et définis dans leurs éléments constitutifs par un texte conventionnel", P. Daillier / A. Pellet, *Droit international public*, Paris, 1999, p. 676. See also D. W. Greig *International Law*, London, 1976, p. 115; M. Giuliano/T. Scovazzi/T. Treves, *Diritto internazionale*, Parte generale, Milano, 1991, p. 183.

¹⁵ Art. 1 of the London Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, of 8 August 1945, in Schindler/Toman, op. cit. (note 8), p. 911.

¹⁶ See E. Schwelb, "Crimes against humanity", *BYIL*, 1946, p. 178; J. Graven, "Les crimes contre l'humanité", *RCADI*, 1950, I, p. 427; M. C. Bassiouni, *Crimes Against Humanity in International Criminal Law*, Dordrecht, 1992; E. Zoller, "La définition des crimes contre l'humanité", *Journal du droit international*, 1993, p. 549.

¹⁷ There is no longer any reference to the "sanctity" of treaties, as compared with Art. 227 of the Versailles Treaty.

crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.¹⁸

As far as jurisdiction *ratione personae* is concerned, it covered "leaders, organisers, instigators and accomplices" who had taken part in the formulation or execution of a common plan or conspiracy to commit any of those crimes: all of them were considered for "all acts performed by any persons in the execution of such plan " .

International legal heritage after the Nuremberg and Tokyo trials

The Nuremberg trials (and, with a minor impact, the Tokyo trials) produced a large number of judgements, which have greatly contributed to the forming of case law regarding individual criminal responsibility under international law.¹⁹ The jurisdictional experience of Nuremberg and Tokyo marked the start of a gradual process of precise formulation and consolidation of principles and rules during which States and international organizations (namely, the United Nations and the International Committee of the Red Cross) launched initiatives to bring about codification through the adoption of treaties. As early as 11 December 1946 the UN General Assembly adopted by Wlanimous vote Resolution 95(1), entitled " Affirmation of the Principles of International Law Recognised by the Charter of the Nuremberg Tribunal"²⁰ After "having taken note" of the London Agreement of 8 August 1945 and its annexed Charter (and of the parallel documents relating to the Tokyo Tribunal), the General Assembly took two important steps. The first one was old considerable legal importance: the General Assembly " affirmed" the principles of international law recognized by both the Charter and the Judgement of the Nuremberg Tribunal. This meant that in the General Assembly's view the Tribunal had taken into account already existing principles of international law, which the court had only to "recognize". The second was a commitment to have these principles codified by the International Law Commission (ILC) , a subsidiary organ of the UN General Assembly. Through this resolution the UN confirmed that there were a number of general principles, belonging to customary law, which the Nuremberg Charter and Judgement had "recognized" and which it appeared important to incorporate into a major instrument of codification (either by way of a "general codification of offences against the peace and security of mankind" or even as an "international criminal code"). By the same token the resolution recognized the customary law nature of the provisions contained in the London Agreement.²¹

In 1950, the ILC adopted a report on the "Principles of International Law Recognised in the Charter of the Nuremberg Tribunal and in the Judgement of the Tribunal".²² The ILC report

¹⁸ A similar provision (with fewer specifications) de is to be found in the Statute of the Tokyo Tribunal, Art.5.

¹⁹ *Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945 -1 October 1946*, Official Documents and Proceedings, Nuremberg, 1947. See also T. Taylor, *The Anatomy of the Nuremberg Trials*, New York, 1992; R.H.Jackson, *The Nürnberg Case*, New York, 1948, and *The Case Against the Nazi War Criminals*, New York, 1945; H. Donnetheu Vabres, "Le procès de Nuremberg devant les principes modernes du droit penal intemational", *RCADI*, 1947, I, p. 481; M. Merle, *Le procès de Nuremberg et le châtime des grands criminels de guerre*, Paris, 1949; schwarzenberger, *op. cit.* (note 4), p. 467; G. Ginsburg/V. Kuriastev (eds), *The Nuremberg Trial and International Law*, Dordrecht, 1990. On the Tokyo Tribunal, see B. Röling/A.Cassese, *The Tokyo Trial and Beyond*, Oxford,1993.

²⁰ Schindler /Toman, *op. cit.* (note 8), p. 921.

²¹ "Article 6 of the Nuremberg Charter has since come to represent general international law." Brownlie, *Principles of Public International Law*, Oxford, 1991, p. 562. Along the same lines, M. Shaw, *International Law*, Cambridge, 1998, p. 471; Daillier/Pellet, *op. cit.* (note 14), p. 677.

²² Schindler/Toman, *op. cit.* (note 8), p. 923.

does not discuss whether these principles are part of positive international law or not, or to what extent. For the ILC, the General Assembly had already "affirmed" that they belonged to international law. The ILC therefore limited itself to drafting the content of these principles.

Principle I states that "any person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment". It constitutes official recognition of the fact that an individual- in the broadest sense ("any person") -may be held responsible for having, committed a crime. And this may be the case even if the act is not considered a crime under domestic law (principle II). Principles III and IV provide that a person who acts in his capacity as head of State or as a government official and one who acts on the orders of the government or of a superior are not thereby relieved of responsibility. These two principles affirm what was established in Articles 7 and 8 of the Nuremberg Charter. Article 8, on superior orders, accepted the possibility of mitigation of punishment "if the Tribunal determines that justice so requires".

Principle IV of the ILC text modifies the approach: the individual is not relieved of responsibility "provided a moral choice was in fact possible to him". This leaves a great discretionary power to the tribunals that are called upon to decide whether or not the individual did indeed have a "moral choice" to refuse to comply with an order given by a superior.

Principle VI codifies the three categories of crime established by Article 6 of the Nuremberg Charter. What was defined in the London Agreement as "crimes, coming within the jurisdiction of the Tribunal" has now been formulated ;¹⁵ "crimes under international law", using the same wording found in Article 6. Principle VI represents the core of a possible international criminal code. The affirmation of the Nuremberg principles by the 1946 General Assembly resolution and their formulation by the International Law Commission were important steps toward the establishment of a code of international crimes entailing individual responsibility. But further progress lay ahead.

Already on 9 December 1948, on the eve of the adoption of the Universal Declaration of Human Rights, an important development of the concept of crimes against humanity led to the adoption (by 56 votes to none) of the Convention on the Prevention and Punishment of the Crime of Genocide.²³ The Convention, which entered into force on 12 January 1951, clearly classifies genocide, whether committed in time of peace or in time of war, as a crime "under international law. Article 2 defines genocide as "acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group", such as killing members of the group, causing serious bodily or mental harm to them, deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part, imposing measures intended to prevent births within the group, forcibly transferring children of the group to another group. Article 3 of the Convention states that such acts are considered punishable as are various degrees of involvement in them: conspiracy to commit the acts, direct and public incitement, attempt or complicity. But it is Article 4 that establishes the obligation to punish not only "rulers" or "public officials", but also "private individuals". As for Article 6, it places the competence to try offenders in the hands of both domestic and international tribunals.

²³ Schindler/Toman, *op. cit.* (note 8), p. 231. See also Brownlie, *op. cit.* (note 21), p. 562; R. Lemkin, "Genocide as a crime under international law", *AJIL*, 1947, p. 145; I. L. Kunz, "The United Nations Convention on genocide", *AJIL*, 1949, p. 738; N. Robinson, *The Genocide Convention: A Commentary*, New York, 1960.

It follows that this important Convention introduces a new crime under international law, directly linked to the legal category already established by Article 6 of the Nuremberg Charter, that of crimes against humanity. And, again, international treaty law goes far beyond the traditional boundaries of State responsibility, underlining that individuals are "in the front line" with respect to obligations under a particular branch of international law. And, in keeping with the previous documents, the Genocide Convention offers a broad definition of the crime of genocide and of various levels of participation in it (direct acts, conspiracy, incitement, attempts, complicity). The customary nature of the principles which form the basis of the Convention has been recognized by the International Court of Justice.²⁴

Shortly afterwards, the four Geneva Conventions of 12 August 1949, drafted on the initiative of the ICRC in the wake of the dramatic experiences of the Second World War, reshaped the entire treaty-based system dealing with the protection of war victims.²⁵ The parties to these Conventions undertake the basic general obligation "to respect and to ensure respect" for their rules "in all circumstances" (Article 1 common to the four treaties). An entire chapter of each of the Geneva Conventions deals with acts against protected persons. They are called "grave breaches"²⁶ -and not war crimes—,²⁷ but they are undoubtedly crimes under international law; These acts are defined in detail in Article 50 of the First Convention, Article 51 of the Second Convention, Article 130 of the Third Convention and Article 147 of the Fourth Convention, and include crimes such as wilful killing, torture or inhuman treatment (including biological experiments), wilfully causing great suffering or serious injury to body or health, extensive destruction or appropriation of property, compelling a prisoner of war to serve in the forces of a hostile power or wilfully depriving him of the right to a fair and regular trial, unlawful deportation, the transfer or confinement of a protected person, and the taking of hostages "not justified by military necessity and carried out unlawfully and wantonly". As far as the scope of application *ratione personae* is concerned, the Conventions establish the responsibility of the direct authors of those grave breaches and that of their superiors. The scope of the rules is, in fact, very wide since the word "person" comprises both civilians and combatants, whether the latter are members of official or unofficial forces.

The Hague Convention of 14 May 1954 for the Protection of Cultural Property in the event of Armed Conflict commits the contracting parties to protecting what is called the "cultural heritage of all mankind". They have "to take, within the framework of their ordinary criminal jurisdiction, all necessary steps to prosecute and impose penal or disciplinary sanctions "upon those persons" who commit or order to be committed a breach" of the Convention.²⁸

²⁴ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion of 18 May 1951, I.C.J. Reports, 1951, p. 23.

²⁵ Schindler /Toman, *op. cit.* (note 8), p. 367. See also the Commentaries published under the general editorship of Jean S. Pictet, ICRC, Geneva, 1952-1956; G.I.A.D. Draper, "The Geneva Conventions of 1949", *RCADI*, 1965, I, p. 59.

²⁶ G. Doucet, "La qualification des infractions graves au droit international humanitaire", in F. Kalshoven/Y. Sandoz (Eds), *Implementation of International Humanitarian Law*, Dordrecht/Boston/London 1987, p. 79.

²⁷ But there is no doubt that grave breaches constitute "war crimes". See Brownlie, *op. cit.* (note 21), p. 563; J.A.C. Gutteridge, "The Geneva Conventions of 1949", *BYIL*, 1949, p. 294.

²⁸ Art. 28, Schindler /Toman, *Op. cit.* (note 8), p. 745. Art. 85, para. 4(d) of the 1977 Protocol I makes also attacks against historic monuments, works of art or places of worship under certain conditions a war crime. See M. Frigo, *La protezione dei beni culturali nel diritto internazionale*, Milano, 1986; J. Toman, *The Protection of Cultural Property in the Event of Armed Conflict*, Paris, 1996.

The two 1977 Protocols additional to the Geneva Conventions of 1949 have added more "precise rules to what has become an extensive legal system."²⁹ In particular, Article 11 strengthens the protection of individuals as far as their physical and mental health and integrity are concerned by stipulating that serious violations constitute a grave breach of international humanitarian law. Moreover, Article 85 adds a great number of violations to the already existing list of grave breaches. Again, with Article 1 of Protocol I, parties undertake to respect and ensure respect" for the Protocol "in any circumstances".

Evolution in the 1990s: from the ad hoc Tribunals to the International Criminal Court

An important step in the lengthy process of developing rules on individual criminal responsibility under international law was taken with the setting-up of the two ad hoc Tribunals for the prosecution of crimes committed, respectively, in the former Yugoslavia (ICTY) and in Rwanda (ICTR). These Tribunals represent major progress towards the institution of a kind of permanent jurisdiction. But they have also provided clarification as regards the substance of what is becoming a sort of international criminal code, in the sense envisaged by the UN General Assembly in its Resolution 95 (I).³⁰

The various UN Security Council resolutions on the establishment of tribunals for the prosecution of individuals responsible for acts committed in the former Yugoslavia and in Rwanda contain provisions on acts punishable under international law.³¹ In particular, Articles 2, 3, 4 and 5 of the Statute of the International Tribunal for the former Yugoslavia enumerates the different crimes coming under the jurisdiction of the court. Article 2, on grave breaches of the 1949 Geneva Conventions, gives the Tribunal the power to prosecute persons "committing or ordering to commit" such grave breaches. Article 3 enlarges the scope to cover violations of the laws and customs of war. Article 4 reproduces Articles 2 and 3 of the 1948 Genocide Convention.

Article 5 authorizes the Tribunal to prosecute persons responsible for crimes committed against civilians in armed conflicts "whether international or internal in character". In the already codified tradition, Article 7 gives a wide scope to "individual criminal responsibility", covering all persons who "planned, instigated, ordered, committed or

²⁹ Texts in Schindler /Toman, *op. cit.* (note 8), p. 621. See also Y. Sandoz/C. Swinarski/ B. Zimmermann, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ICRC/Martinus Nijhoff, Geneva, 1987

³⁰ 30 *Op. cit.* (note 20).

³¹ *Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991*, adopted 25 May 1993 by SC Resolution 827/1993 ; text in UN Doc. 5/25704 (1993). See also E. David, "Le Tribunal international pénal pour l'ex-Yougoslavie", *Revue beige de droit international*, 1992, p. 565; A. Pellet, "Le tribunal criminel international pour l'ex-Yougoslavie –Poudre aux yeux ou avancée décisive ?", *Revue générale de droit international public*, 1994, p. 7; D. Shraga/R. Zacklin, "The International Criminal Tribunal for the Former Yugoslavia", *European Journal of International Law*, 1994, p. 360; A. Cassese, "The International Criminal Tribunal for the Former Yugoslavia", in *Studi Panzera*, Bari, 1995,1, p. 235; G. Carella, "Il Tribunale penale internazionale per la ex-Yugoslavia", in P. Picone (ed.), *Interventi delle Nazioni Unite e diritto internazionale*, Padova, 1995, p. 463; P. Tavernier, "The experience of the International Criminal Tribunals or the Former Yugoslavia and for Rwanda", and M. C. Roberge, "Jurisdiction of the ad hoc Tribunals for the Former Yugoslavia and Rwanda over crimes against humanity and genocide", *IRRC*, No.321. November-December 1997, pp. 605 and 651 respectively.

otherwise aided and abetted in the planning, preparation or execution of a crime". The responsibility of a person with an official position (head of State or government, government official) and the effects of superior orders are treated in Article 7 along the same lines as in the Nuremberg Charter and the ILC report of 1950 (principles III and IV). Reference is made to the possibility of mitigation "if the International Tribunal determines that justice so requires" (as in Article 8 of the Charter).

The Statute of the Rwanda Tribunal appears slightly different, but the global approach of its provisions does not reveal major differences.³²

This great *corpus* of principles and rules, all this legal heritage has now been codified in an organic way in a single instrument, the Rome Statute of the International Criminal Court (ICC), adopted by a UN diplomatic conference on 17 July 1998.³³ Articles 5 to 8 of the Statute deal with the definition of the crimes coming under the jurisdiction of the ICC. They are the most serious crimes" and are "of concern to the international community as a whole" (Article 5). This is a comprehensive definition which covers, from a genuinely universal perspective, both "grave breaches" and "serious violations" of the Geneva Conventions and of the laws and customs of war in general. Such offences contravene the legal and ethical rules and principles of the international community.

The Rome Statute has adopted a new typology of crimes, with four categories instead of three: genocide, crimes against humanity, war crimes and crimes of aggression. As indicated earlier, this paper leaves aside the problem of whether or not the crime of aggression constitutes a "crime against peace", as defined in the Nuremberg Charter, or a "crime against the peace and security of mankind", as defined in the Draft Code prepared by the International Law Commission. Article 6 of the Rome Statute confirms in the same words, the provisions of the 1948 Genocide Convention and represents a further step towards the codification of principles and rules which appear to be generally accepted. It is with Articles 7 and 8 that a major evolution has taken place in respect of crimes against humanity and war crimes. Here, detailed provisions have replaced those of Article 6 of the Nuremberg Charter and of their successive formulations.

"Crime against humanity" means -in a comprehensive definition — an act committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack" (Article 7).³⁴ It belongs to general, customary international law and it has been defined in several instruments subsequent to the Nuremberg Charter and its Article 6. A clear indication of what constitutes a crime against humanity is given by the International Tribunal for the former Yugoslavia in its decision on the *Erdemovic* case: ' , 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. They are inhumane acts that by their extent and gravity go beyond the limits tolerable to the international community, which must perforce demand their punishment. But crimes against humanity also transcend

³² The Statute lists genocide and crimes against humanity in the first place and adds a reference to Art. 3 common to the Geneva Conventions and to 1977 Additional Protocol II. The peculiar context of the Rwanda conflict explains these differences.

³³ UN Doc. A/CONF.183/9. Final Act : UN Doc. A/CONF. 183/10. See also F. Lattanzi (ed.), *The International Criminal Court : Comments on the Draft Statute*, Napoli, 1998; F. Lattanzi/E.sciso (eds.), *Dai Tribunali penali internazionali ad hoc a una Corte permanente*, Napoli, 1996; P. Ungari/M.P.Pietrosanti Malintoppi, *Verso un Tribunale pennanente internazionale sui crimini contro l'umanità*, Roma,1997.

³⁴ Donat-Cattin, "Crimes against humanity", in Lattanzi (ed.), *op. cit.* (note 33), p. 49.

the individual because when the individual is assaulted, humanity comes under attack and is negated. It is therefore the concept of humanity as victim which essentially characterises crimes against humanity".³⁵ Obviously; no distinction is made between war and peace, international or internal armed conflicts.³⁶ What is identified as the core principle is the concept of humanity itself. The individual, the victim, becomes part of a much broader concept: that of mankind. There is a close link: here to the Martens Clause, as codified by the Hague Convention No. IV of 1907, which in its preamble refers to "the principles of the law of nations, as they result from the usages established among civilised peoples, from the laws of humanity, and the dictates of public conscience", and confirmed by Article 1 of 1977 Additional Protocol 1.³⁷

The structure of Article 7, with its two parts, reflects a new approach: the first part enumerates acts that constitute crimes against humanity and the second offers definitions for some of them. The inclusion of murder, extermination, enslavement and deportation simply confirms the Nuremberg heritage. What in the Nuremberg Charter was generally referred to as "other inhuman acts committed against any civilian population", in the Rome Statute becomes a list of acts which takes into account the dramatic experiences of populations over the last 50 years in both international and domestic conflicts and even in times of so-called peace: "imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; torture, rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, or any other form of sexual violence of comparable gravity; enforced disappearance of persons, *apartheid*". Each one of these acts is defined in the second part of Article 7. As can be seen, a considerable number of them are crimes of a sexual nature. Since the Hagenbach case, the behaviour of certain men in conflict and other situations of violence has gone dramatically beyond what at the time was considered as the crime of rape: today such crimes have become "widespread" and "systematic".³⁸ But the seriousness of the crime has always been the same: "He that forces any Woman to abuse her, and the matter be proved, he shall dye for it".³⁹ Moreover, the acts committed in the former Yugoslavia have given rise to the concept of "ethnic cleansing", which has been commented on by the ICTY, particularly in its decision on the *Review of Indictment against Karadzic and Mladic*.⁴⁰ Article 7 ends the list with a broad category: "other inhumane acts or- a similar character intentionally causing great suffering or serious injury to body or mental or physical health". Such a definition leaves the door open to the future inclusion of other act, thus taking into account the fact that cases brought before domestic and international jurisdictions have shown men to be only too capable of enlarging on this category of crime, which institutes the most serious violation of the idea of humanity itself.

Article 8 of the Rome Statute deals with the traditional concept of war crimes. A comparison between the list it contains and that found in Article 6 of the Nuremberg Charter shows that

³⁵ Decision of 29 November 1996, UD Doc. IT-96-22- T.

³⁶ This principle was already stated by the ICTY in the *Tadic* case, judgement of 7 May 1997, UN Doc.IT-94-1-T. The Statute of the Rwanda Tribunal makes no distinction, because most of the crimes committed in the first period lacked the character of having taken place in a conflict situation.

³⁷ See S. Miyazaki, "The Martens Clause and international humanitarian law", in C. Swinarsky (ed.), *Studies and Essays in Honour of Jean Pictet*, ICRC, Geneva, 1984, p. 433; P. Benvenuti, "La clau-sola Martens e la tradizione classica del diritto naturale nella codificazione del diritto dei conflitti armati", in *Scritti degli allievi in onore di Giuseppe Barile*, Padova, 1995, p. 171.

³⁸ See T. Meron, "Rape as a crime under international humanitarian law", *AJIL*, 1993, p. 424; K.D.Askin, *War Crimes against Women, Prosecution in International Law*, The Hague, 1997.

³⁹ Art. 88, Articles of War, in Ögren, *op. cit.* (note 4), p. 441.

⁴⁰ 40 UN Doc.IT-95-5-R61.

the process of defining various acts, as war crimes has developed enormously and led to an enlarged and more detailed codification.⁴¹

In a broad sense, war crimes come under the jurisdiction of the ICC, in particular when "committed as a part of a plan or policy or as part of a large scale commission of such crimes" (Article 8). This means that the ICC is also given jurisdiction over acts committed by individuals.⁴² Several categories of crime are dealt with. The first is the grave breaches established by the Geneva Conventions. The second comprises "other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law". The list which follows is extremely detailed, with 26 types of act or behaviour. It is the longest list of crimes ever included in an internationally binding instrument. The third category refers to serious violations of Article 3 common to the Geneva Conventions, which pertains to armed conflicts not of an international character and covers acts committed against persons taking no active part in the hostilities (such as violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; and outrages upon personal dignity, in particular humiliating and degrading treatment, the taking of hostages and refusal to grant judicial guarantees "recognised as indispensable". A fourth is related to "other serious violations of the laws and customs applicable in armed conflicts not of an international character". The last two categories are followed by clauses excluding from the ICC's jurisdiction acts committed in situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence "or other acts of similar nature". The general right of States to maintain or establish law and order or to defend their unity and territorial integrity "by all legitimate means" is expressly recognised.⁴³ In any case, the fourth category applies to situations of "protracted armed Conflict between governmental authorities and organised armed groups or between such groups", that is, the vast majority of contemporary internal conflicts.

A few concluding remarks

The categories of war crimes, crimes against humanity and genocide, considered as, part of the broader category of *crimina juris gentium*, have developed in a significant and considerable way since the Second World War.⁴⁴

A proliferation of treaties and constant work to expand the scope of international law by creating new jurisdictions and by clarifying concepts both in legal provisions and in judicial decisions are the salient features of the evolution described in these pages.

⁴¹ See H. H. Jescheck, "War crimes", *Encyclopedia of Public International Law*, 4, p. 294; Y. Dinstein/M. Tabory (eds), *War Crimes in International Law*, The Hague/Boston/London, 1996; T.L.H. McCormack/J. Simpson (Eds.), *The Law of War Crimes. National and International Approaches*, The Hague/Boston/London, 1997; P. Lamberti Zanardi/G. Venturini (eds), *Crimini di guerra e competenza delle giurisdizioni nazionali*, Milano, 1998; C. Keith Hall, "The jurisdiction of the permanent International Criminal Court over violations of humanitarian law", in Lattanzi, *op. cit.* (note 33), P.19; M. Lachs, *War Crimes : An Attempt to Define the Issues*, London, 1945. Daillier/Pellet, *op. cit.* (note 14), p. 679: "La structure interne d'apparence complexe répond à un souci d'efficacité face à la diversité des conflits armés -internationaux et non internationaux- et à l'opposabilité variable des acquis conventionnels de 1949 et de 1977 aux États."

⁴² M. C. Roberge, "The new International Criminal Court: A preliminary assessment", *IRRC*, No.325, December 1998, p. 674.

⁴³ No doubt, these provisions must be interpreted in a very strict way.

⁴⁴ B. Conforti, *Diritto internazionale*, Napoli, 1997, p. 204.

When Article 6 of the Nuremberg Charter was adopted, its provisions on war crimes were already declaratory of general international law of customary origin. War crimes were violations of existing provisions of *jus in bello*. The Nuremberg Judgement stated in that regard that "with respect to war crimes, however, as has already been pointed out, the crimes defined by Article 6, Section b, of the Charter were already recognised as war crimes under international law. They were covered by Articles 46, 50, 52 and 56 of the Hague Convention of 1907, and Articles 2, 3, 4, 46 and 51 of the Geneva Convention of 1929. That violation of these provisions constituted crimes for which the guilty individuals were punishable was too well settled to admit of argument"⁴⁵ As we have seen, however, the customary origins of rules on war crimes go back nearly half a millennium.

The notion of crimes against humanity appears to have undergone the greatest development. Under the Nuremberg Charter, crimes against humanity were linked to war crimes (which in turn were connected to crimes against peace). The point of reference was the Second World War, and crimes were considered only if committed before or during that war. But the Judgement anticipated the autonomous character of such crimes: Julius Streicher and Baldur von Schirach were convicted solely of crimes against humanity.⁴⁶ For Streicher, this led to the death sentence. Although explicitly recognized only after the Second World War, crimes against humanity were taken into account already long before as they were seen to be closely linked to the principle of humanity, which is a cornerstone of humanitarian law. Von Hagenbach and others responsible for *crimina juris gentium*, in war, in peace and in borderline situations, committed acts which could be termed crimes against humanity under international law. After 1946, it appeared beyond any doubt that this category of crimes had become part of customary international law. The judgement of the ICTY in the *Tadic* case affirmed it openly. The Rwanda Statute considers crimes against humanity an autonomous category. The connection with war crimes has disappeared: Article 1 of the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, referring to crimes against humanity under Article 6 of the Nuremberg Charter, completes the wording with "whether committed in time of war or in time of peace".⁴⁷

If war crimes and crimes against humanity are now two autonomous, self-sustained categories, it cannot be denied that they are often closely linked in modern conflicts, especially in connection with crimes against the civilian population. Murder, deportation and other acts in the long lists that appear in recent instruments are clear examples of connection and overlapping. The four Geneva Conventions and Protocol I codify a significant range of acts and situations which demonstrate that violations can be classified both as war crimes and crimes against humanity.

An important contribution to the evolution of the concept of individual criminal responsibility has been made by the Draft Code of Offences against the Peace and Security of Mankind, prepared by the International Law Commission. Already in the 1951 and 1954 drafts,⁴⁸ Article 1 provided that "offences against the peace and security of mankind are crimes under international law, for which the responsible individual shall be punished".

⁴⁵ *Trial of the major war criminals before the International Military Tribunal*, op. cit. (note 19), p. 253.

⁴⁶ Ibid., pp. 301-304 and 317-320. See also L. Oppenheim, *International Law*, R. Jennings and Watts (eds), Part 2, London, 1992, p. 996.

⁴⁷ Adopted on 26 November 1968. Text in Schindler/Tomall, op. cit. (note 8), p. 925.

⁴⁸ Yearbook of the International Law Commission, vol. II, 1954.

Article 1 of the 1996 text now states that " crimes against the peace and security of mankind are crimes under international law, and punishable as such, whether or not they are punishable under national law".⁴⁹ According to Article 2, "a crime against the peace and security of mankind entails individual responsibility". As far as the list of acts is concerned, the Draft Code takes into account all the developments described above. The crime of genocide (Article 17) reflects the 1948 Convention, with the same wording as in Article 6 of the Rome Statute. For crimes against humanity, the Code (Article 18) adds that acts are "instigated or directed by a Government or by any organisation or group ".The list is, however, less detailed than that in Article 7 of the Rome Statute. In particular, instead of mentioning the crime of *apartheid*, the Code includes it in a general provision on "institutional discrimination on racial, ethnic or religious grounds involving the violation of fundamental human rights and freedoms and resulting in seriously disadvantaging a part of the population ". War crimes are listed more or less in the same way as that later chosen for Article 8 of the Statute, but in a less extensive formulation. However, all the different categories of crime mention the acts as "committed wilfully in violation of international humanitarian law". A new provision on the protection of the natural environment is introduced which says that "in the case of armed conflict, using methods or means of warfare not justified by military necessity with the intent to cause widespread, long-term and severe damage to the natural environment and thereby gravely prejudice the health or survival of the population".

Article 19 adds a further provision relating to crimes against UN and associated personnel committed with a view to preventing or impeding an operation involving such personnel. The only exclusion is when UN personnel are engaged as combatants against organized armed forces in an enforcement action authorized by the Security Council under Chapter VII of the UN Charter. In that case, "the law of international armed conflicts applies". The protection of UN personnel under the Rome Statute is included in Article 8 (b) iii and (e) iii.

Not only has the typology of crimes entailing individual responsibility been enlarged and given a clearer outline, but some general principles have also been laid down. When an act is being considered, the crime of omission is taken into account. Starting with the judgement of the US military commission in the *General Yamashita* case on atrocities committed against the civilian population in the Philippines, failure to prevent a crime from being committed has been considered to be an act as serious as the crime itself and deserving of equal punishment. "Where murder and rape and vicious revengeful actions are widespread offences, and there is no effective attempt by a commander to discover and control the criminal acts, such a commander may be held responsible, even criminally liable, for the lawless acts of his troops".⁵⁰ Articles 86 and 87 of Additional Protocol I and the Rome Statute clearly take the same line.

Another important development should be mentioned here in relation to the practice of codifying international law: there is a growing connection between humanitarian law and human rights law. Indeed, some recently adopted provisions of humanitarian law appear clearly influenced by human rights rules and standards of protection. The Rome Statute refers to concepts like "personal dignity", the prohibition of "humiliating and degrading treatment", "Judicial guarantees", the prohibition or "persecution" (as "intentional and severe deprivation

⁴⁹ Text in Yearbook of the International Law Commission, vol. 11(2), 1996.

⁵⁰ Judgment of 7 December 1945, UN War Crimes Commission, 4 *Law Reports of the Trials of War Criminals*, 1948, 3.

of fundamental rights contrary to international law by reason of the identity of the group or collectivity"), discrimination and *apartheid*. These concepts have all been established in the main instruments adopted by the UN for the protection of the rights of the individual. However, the principle of humanity is at the core of international humanitarian law and forms the basis of all the developments discussed in this paper.⁵¹ Moreover, the principle of individual responsibility has clearly been established by humanitarian law.

Finally, there is a growing reciprocal influence between treaty-based and customary international law. Customary law has come to play a role of paramount importance, since contemporary humanitarian law applicable in armed conflicts is no longer limited to the Geneva Conventions and their Additional Protocols. Customary law has accelerated the development of the law of armed conflict, particularly in relation to crimes committed in internal conflicts. In this respect, the case law established by the ad hoc Tribunal for the former Yugoslavia has made an important contribution.⁵²

We have come a long way since the 1474 Hagenbach case. But the basic idea underlying the legal heritage whose foundations were laid many years ago and which has since been developed remains the same: the principle of humanity must be considered as the very heart of a legal system aimed at providing protection against criminal acts committed by individuals, both in war -whether internal or international- and in peace. This is not only a moral duty, but a basic obligation under international customary law.

The laws of humanity and the "dictates of public conscience", today as well as in the past, call for exceptional efforts aimed at promoting principles and rules designed to ensure effective protection of the individual, who is to a dramatically increasing extent the victim of acts of generalized violence. The "peace and security of mankind", together with the protection of human rights and severe sanctions for serious violations and grave breaches of humanitarian law applicable in armed conflicts, are among the international community's major assets. For this, we should be grateful first and foremost to the International Committee of the Red Cross on the 50th anniversary of the Geneva Conventions of 12 August 1949.⁵³

⁵¹ E. Greppi, "Diritto internazionale umanitario dei conflitti armati e diritti umani: profili di una convergenza", in *La comunità internazionale*, 1996, p. 473. On the relationship between international humanitarian law and human rights law, see the bibliography in *IRRC*, No.324, September 1998, p. 572.

⁵² See L. Condorelli, "Il sistema della repressione dei crimini di guerra nelle Convenzioni di Ginevra del 1949 e nel primo Protocollo addizionale del 1977", in Lamberti Lanardi/Venturini, *op. cit.* (note 41), p. 26. Also: T. Meron, "War crimes in Yugoslavia and the development of international law", *AJIL*, 1994, p. 70; A. Cassese, "The International Tribunal for the Former Yugoslavia and the implementation of international humanitarian law", in *op. cit.* (note 3), p. 229.

⁵³ The 50th anniversary offers an excellent opportunity for reflection, because "some anniversaries are bound to evoke powerful memories" (C. Sommaruga, "Humanitarian challenges on the threshold of the twenty-first century", *IRRC*, No. 310, January-February 1996, p. 20). On the role of the ICRC and with that of the United Nations, see H.P. Gasser, "The International Committee of the Red Cross and the United Nations involvement in the implementation of international humanitarian law", in *op. cit.* (note 3), p. 259.

International Criminal Law and the Ad Hoc Tribunals

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1. HISTORICAL BACKGROUND

The privilege of opening the first trial in history for crimes against the peace of the world imposes a grave responsibility. The wrongs we seek to condemn and punish have been so calculated, so malignant and devastating that civilization cannot tolerate their being ignored because it cannot survive their being repeated.¹

Thus spoke Justice Robert Jackson in his opening address at the Nuremberg trials on 20 November 1945. Over 50 years later- it is obvious with heart-breaking clarity that civilisation continues to tolerate devastating acts during times of armed conflict and in times of "peace" - in the former Yugoslavia, Rwanda, Afghanistan, Zaire, former Soviet Union -the list goes on. In the face of continuing horrors what has the international community done to date ?

In August of 1945 the four major victorious Allies of World War II in London agreed upon the Charter for an International Military Tribunal.² This Tribunal was empowered to try major German officials accused of war crimes. Not long after a similar Tribunal was established in Tokyo to try Japanese officials accused of breaching international humanitarian law.³ Despite being deemed victors' courts these were the first international criminal proceedings and for many years they were the last.

It is with ease that a critical perspective may be taken on both these Tribunals -in relation to rules of evidence and procedure Nuremberg had limited guidance.⁴ However the impact of these Tribunals on the development of international law cannot be underestimated. Indeed the Statutes of the current *ad hoc* Tribunals,⁵ as well as the Statute of the International Criminal Court,⁶ rely heavily upon the Charter of the IMT .

¹ Telford Taylor, *The Anatomy of the Nuremberg Trials* (1992) 167.

² *Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis*, 8 August 1945, 82 UNTS 279 ('London Agreement'). The Charter of the International Military Tribunal is appended to the Agreement ('*Charter of the IMT*').

³ *Charter of the International Military Tribunal for the Far East*, 19 January 1946, revised 26 April 1946 ('*The Tokyo Charter*'), reproduced in C Bevens, *Treaties and Other International Agreements of The United States of America 1776-1949* (1970) vol14, 27.

⁴ 'Rules of Procedure of the International Military Tribunal' (1945) 1 *Trial of Major War Criminals* 19-23.

⁵ See *Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991*, SC Res 827, 48 UN SCOR (3217th mtg), UN Doc S/RES/827 (1993); 32 ILM 1203 ('Statute of the ICTY'); *Statute of the International Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Violations Committed in the Territory of Neighbouring States, Between 1 January 1994*

Concepts currently accepted in all areas of international law, that individuals have international duties which transcend their national obligations, were extremely radical in the 1940s. Commentators on the consequences of international criminal proceedings expressed grave fears; 'What the prosecution is doing ...in the name of the world community ...is destroying the spirit of the State'⁷

The spirit of the State is alive and well, and the debate has moved on from 'if' the international community is able to trump state sovereignty to when and to what degree? These issues relate back to the essence of why the international community sees the need for international criminal trials.⁸ I want to very briefly examine this area of the debate.

2. A CASE FOR WAR CRIMES TRIBUNALS

There is a plethora of legal, intellectual and emotional arguments as to why international criminal proceedings are important.⁹ Perhaps the most obvious argument is the assistance international criminal law provides as a deterrent for unlawful behaviour during conflict and to break cycles of violence and reprisals. These arguments correlate with the *raison d'etre* for domestic criminal jurisdictions and for that reason it is unnecessary for me to expand upon them.

A second reason often cited is the role international criminal trials play in developing international humanitarian law. As Professor Theodor Meron asserts; 'the reaction of the international community to the appalling abuses in the former Yugoslavia has brought about certain advances –in international criminal and humanitarian law.'¹⁰

Many international legal norms are currently articulated but not tested and trials allow practical application. The argument that the norms of international humanitarian law are discredited if they are never enforced, has some validity (ie there has never been a

and 31 December 1994, UN Doc S/RES/955 (1994), 49 UN SCOR (3453rd mtg); 33 ILM 1598 ('Statute of the ICTR').

⁶ *Rome Statute of the International Criminal Court*, adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998; 37 ILM 1002. The whole of the Statute can also be accessed at <<http://www.un.org/icc/romestat.htm>> ('*Statute of the ICC*').

⁷ H King, 'The Limitations of Sovereignty from Nuremberg 10 Sarajevo' (1994) 20 *Canada- United States Law Journal* 167, 167.

⁸ In this context, Draper asserts, '[T]he enthusiasm to bring war criminals, as newly defined, to trial may so increase that jurisdiction will be seen as a matter not of competence or legal power but of legal obligation to exercise it': G I A D Draper, 'The Modern Pattern of War Criminality' in Yoram Dinstein and Mala Tabory (eds) *War Crimes in International Law* (1996) 141, 147.

⁹ See, eg, *ibid*; Theodor Meron, 'Is International Law Moving Towards Criminalization?' (1998) 9 *European Journal of International Law* 18; Lyal S Sunga, *The Emerging System of International Criminal Law: Developments in Codification and Implementation* (1997); Timothy L H McCormack, 'From Sun Tzu to the Sixth Committee: The Evolution of an International Criminal Law Regime' in Timothy L H McCormack and Gerry J Simpson (eds), *The Law of War Crimes: National and International Approaches* (1997) 31. See also, 'Report of the Working Group on the Question of an International Criminal Jurisdiction,' (1992) *Report of the International Law Commission on its Forty-Fourth Session*, 47 UN GAOR, UN Doc A/47/10 (Supp 10) (1992) [419]-[424] ('*ILC Report 1992*').

¹⁰ Theodor Meron, 'War Crimes in Yugoslavia and the Development of International Law' (1994) 88 *American Journal of International Law* 76, 87.

prosecution for genocide contrary to the Genocide Convention¹¹ since that Convention was concluded¹²). So, the capacity to give international law teeth and application other than mere academic validity is vital.

Another argument is the role that international criminal proceedings play in the healing of both individual victims and the healing or reconciliation of States ravaged by war. There is no doubt that many survivors of war crimes (be it rape, torture, ill treatment in camps) and families of those who are killed demand justice. This is not necessary for individual revenge but for acknowledgment of the crime suffered and to work against the apathy, disbelief and complacency that is rampant in the world today.

Whatever the Nuremberg and Tokyo Trials did or did not do, they created a mass of documented history in minute detail which now makes it difficult to deny the atrocities that occurred during World War II.¹³ One wonders whether Pol Pot's reign of terror, or the Afghan conflict or even the events in East Timor could have become part of the daily dialogue of international humanitarian law if they had been the subject of detailed prosecutions. Gerry Simpson has cautioned us against the development of this argument too far, particularly in view of the post World War II scenario. He illustrates this by identifying the 'complexity and precariousness of th[e] process by which good and evil are sharply defined.'¹⁴ This is an important caution. The use of precise legal documentation, provided it has been taken from all sides in the conflict, may assist in the accurate representation of historical events. In the construction of history, there is still a need to view international criminal jurisdiction beyond the strict legal parameters and through the eyes of psychologists, historians and politicians.

The issue of national reconciliation is strongly recognised as another pointer to enhance the case for international criminal jurisdiction. The Rwandan Government, during debates at the creation of the *ad hoc* Tribunal, stated that it is impossible to build a state of law and arrive at true national reconciliation without eradicating the culture of impunity.¹⁵ The need to not only stop revenge but to help construct a new society based on issues of social justice and respect for fundamental human rights is advanced greatly through international criminal jurisdiction. However, such proceedings must be undertaken with integrity and due process.

Another example of the range of roles that international criminal law plays in re-constructing society after conflict is the case of the Former Yugoslavia. Diplomats advise of the dramatic impact of the indictments of certain Serbian politicians and one can witness people carrying around placards in the streets of Belgrade stating that 'X is a war criminal, send him to The Hague'. This gives validity to the voices of people wishing to change the domestic *status quo*. Rather than one country's isolated attempts to deal with its past, there are some over-arching international legal institutions involved in the process. These are very complex matters.

¹¹ *Convention on the Prevention and Punishment of the Crime of Genocide*, opened for signature 9 December 1948, 78 UNTS 277, (entered into force 12 January 1951) ('*Genocide Convention*'), art 2. As at 17 March 1999, there were 129 States Parties.

¹² ILC Report 1992, [419].

¹³ 'The public trials of [Nazi] criminals have played an important role in educating the public regarding the Holocaust and undermining the propaganda of the Holocaust deniers'; Efraim Zuroff, *Occupation: Nazi-Hunter - the Continuing Search for Perpetrators of the Holocaust* (1994) 224.

¹⁴ Gerry Simpson, 'War Crimes: A Critical Introduction' in McCormack and Simpson, above n 9,1,22

¹⁵ Payam Akhavan, 'Current Developments' (1996) 90 *American Journal of International Law* 204.

However, they must be considered when dealing with the enforcement of international humanitarian law, if such enforcement is to be truly valid.

3. CASE AGAINST WAR CRIMES TRIBUNALS

Of course, there are also arguments against international criminal courts and tribunals. Some commentators' claim that such cases are stumbling blocks in potential efforts to create peace. It cannot be ignored that many perpetrators are those in government or heads of state. Thus, potential defendants may be the only ones with the control to cease violations. The instigation of proceedings against such individuals may not cease the problem but rather entrench the conflict.¹⁶

Other arguments raised against international criminal jurisdiction include very large number of technical difficulties involved. Issues such as a fear of erosion of State sovereignty, the political will to implement such jurisdiction and the requirement of large economic resources are all raised. Former Air Commodore, Geoff Skillen, also deals with many of these issues, vital to the success of international criminal law in the following chapter .

4. THE ICTY AND ICTR

I would now like to move on to an examination of the current *ad hoc* Tribunals with a particular focus upon their establishment. The ICTY was established by the Security Council pursuant to Resolutions 808 of February 1993 and 827 of May 1993.¹⁷ These resolutions were adopted pursuant to Chapter VII of the United Nations Charter and accordingly create a binding obligation on all member States to assist and cooperate fully with the Tribunal, if so requested.¹⁸ The Tribunal has attempted to balance States' concerns over issues of sovereignty, against responding appropriately to the international outcry of the violations of international humanitarian law committed in the former Yugoslavia. Thus, the Tribunal has concurrent jurisdiction with the national courts in relation to war crimes and crimes against humanity committed in their territory since 1991.¹⁹ However, whilst such concerns have been attempted to be dealt with within the structure of the Tribunal, there are criticisms from many States of the process used to create this Tribunal. The decision of the Security Council represents the opinion of only a very few States. To impose such a Tribunal, to which all States are technically bound to assist, raises a number of concerns. Furthermore, in appropriate circumstances, the Tribunal can exercise primacy over national courts.²⁰ It is also important to note that the Federal Republic of Yugoslavia (Serbia and Montenegro) and other key parties to the Balkan conflict strongly oppose the establishment of the Yugoslav Tribunal.

In November of 1994, pursuant to Security Council Resolution 955, a similar international criminal Tribunal was created to try breaches of international law in Rwanda.²¹ Although the Security Council established separate Tribunals for these two regions, it recognised the need

¹⁶ Anthony D' Amato, 'Peace vs. Accountability in Bosnia' (1994) 88 *American Journal of International Law* 500, 502.

¹⁷ See above n 5.

¹⁸ Statute of the ICTY, aft 29.

¹⁹ Statute of the ICTY, aft 91.

²⁰ Statute of the ICTY, aft 92.

²¹ See above n 5.

to make institutional and organizational links. Thus, the Appeals Chambers of both Tribunals are the same and the Prosecutor for the ICTY also serves as the Prosecutor for the ICTR, although extra staff are available and Rwanda has a separate Deputy Prosecutor. The two International Criminal Tribunals also share the same Rules of Procedure and Evidence.²² It is interesting to note that, unlike, with the former Yugoslavia, the Rwandan Government supported, at least initially, the establishment of an *ad hoc* international criminal jurisdiction within its own territory. Rwanda eventually voted against the creation of the ICTR in the Security Council due to the institution's non-inclusion of the death penalty. Here rises another irony in the, inter-face between domestic and international war crimes prosecutions. In countries like Rwanda, those prosecuted and found guilty by domestic courts are eligible to receive the death penalty, whilst those convicted by the ICTR are eligible to face life imprisonment at the most.

Prior to the creation of both Tribunals, the Security Council had mandated a Commission of Experts to examine the evidence of international humanitarian law violations on the ground.²³ This Commission assisted in ascertaining whether or not there was enough documentation to proceed with the development of the International Tribunals. Due to the method of drawing up the *ad hoc* Tribunals through the speedy process of Security Council resolutions rather than the drafting of a treaty, there were limited opportunities for lengthy debate on much of the legal technicalities. The vast bulk of drafting for both the Tribunals was done by the United Nations Department of Legal Affairs, thus accounting for the greater influence of the Common Law rather than the Civil Law.²⁴

Perhaps an area where the Tribunals differ most is with regard to subject matter jurisdiction. Both Tribunals have the capacity to try individuals for genocide, and the definition is reproduced from the Genocide Convention.²⁵ They can try individuals who perpetrate crimes against humanity, although it is interesting to note that the Statute of the ICTR does not require a nexus with armed conflict. Whilst the ICTY also has jurisdiction over grave breaches of the Geneva Conventions and war crimes, the fact that the Rwandan conflict is not characterised as an international conflict has resulted in the exclusion of these two crimes from its Statute. Instead, Article 4 of the Statute of the ICTR deals with violations of Article 3 common to the Geneva Conventions²⁶ and of Additional Protocol II.²⁷

²² See, eg, *International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991*, 'Rules of Procedure and Evidence', as amended. UN Doc IT/32 Rev 11 (1997).

²³ See *Final Report of the Commission of Experts Pursuant to Security Council Resolution 780 (1992)*, 47 UN SCOR (3119th mtg), UN Doc S/Res/780 (1992): 31 ILM 1476. UN Doc S/674/1994 Annex (1994) ('*Final Report*').

²⁴ Paul Tavernier, 'The experience of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda' (1997) 321 *International Review of the Red Cross* 605.609.

²⁵ Genocide Convention, art 2 requires:

An intention to destroy, in whole or in part, a national, ethnical, racial or religious group through the commission of such acts as killing or causing serious bodily or mental harm to members of the group; deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; imposing measures to prevent births within the group; forcibly transferring children of the group to another group.

²⁶ See *Geneva Convention for the Amelioration of the Condition of the Wounded and the Sick in Armed Forces in the Field*, 75 UNTS 31 ('*First Geneva Convention*'); *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, 75 UNTS 85 ('*Second Geneva Convention*'); *Geneva Convention Relative to the Treatment of Prisoners of War*, 75 UNTS 135 ('*Third Geneva Convention*'); *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, 75 UNTS 287

At this stage in the proceedings the ICTY has indicted 56 individuals and has 26 accused in its custody.²⁸ The ICTR has indicted 37 accused and has 31 accused in custody.²⁹ Both Tribunals have indicted a range of actors, including extremely powerful individuals such as the Bosnian Serb President, Radovan Karadzic, and General Ratko Mladic of the Former Yugoslavia. Perhaps, the most significant developments of late have been the first ever convictions for the offence of genocide. The ICTR has recorded the convictions of two high-profile individuals, the *Bourgmestre* of Taba, Jean Paul Akayesu,³⁰ and the former Prime Minister of Rwanda, Jean Kambanda.³¹

The ICTR found Akayesu guilty of the offences of genocide (including, commission of genocide and direct and public incitement to commit genocide), crimes against humanity (including extermination, murder, torture, rape and other inhumane acts). The Tribunal however, found that he was not guilty of the violations of Common Article 3 of the Geneva Conventions (including, murder and cruel treatment), and Article 4(2)(e) of Additional Protocol II (including, outrage upon personal dignity, in particular rape, degrading and humiliating treatment and indecent assault). It was deemed that the Prosecutor had not proven beyond a reasonable doubt that the acts perpetrated by Akayesu in the commune of Taba, at the time of the events alleged in the Indictment, were committed in conjunction with the armed conflict or that he had acted either for the Government or as a member of the armed forces under military command.³² Akayesu has appealed his conviction.

On 5 March 1998, the trial chamber of the ICTY sentenced Drazen Erdemovic to 5 years' imprisonment after he pleaded guilty to violations of the laws or customs of war.³³ In May of

('Fourth Geneva Convention'). All these conventions entered into force on 21 October 1950, and as at 17 March 1999, there were 188 States Parties.

²⁷ *Protocol Additional to the Geneva Convention of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts*, 1125 UNTS 609; 16 ILM 1442 (entered into force on 7 December 1978), ('Additional Protocol II'). As of 17 March 1999, there were 145 States Parties.

²⁸ Information accessed from the ICTY Website (18 November 1998) located at the following URL: <<http://www.un.org/icty/glance/fact.htm>>.

²⁹ Information accessed from the ICTR Website (18 November 1998) located at the following URL: <<http://www.ict.rw.org/english/factsheets/Detainees.html>>.

³⁰ *Prosecutor v Jean-Paul Akayesu* [1996] ICTR-96-4-T. The decision dated 2 September 1998 can be accessed at <<http://www.un.org/ict/eng/judgements/akayesu.html>>.

³¹ *Prosecutor v Jean Kambanda* [1997] ICTR-97-23-S. The decision dated 4 September 1998 can be accessed at <<http://www.ict.rw.org/english/judgements/kambanda.htm1>>. The accused had pleaded guilty to the four counts of genocide (including the commission of genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, complicity in genocide), and to two counts of crimes against humanity (murder and extermination). He was sentenced to life imprisonment.

³² See above n 29, 259.

³³ *Prosecutor v Drazen Erdemovic (Sentencing Judgment)* [1996] Case IT-96-22-S. The judgment is accessible at: <<http://www.un.org/icty/erdemovic/trialc/judgment/80305ms2-e.htm>>. In this case, an earlier Trial Chamber, having accepted the accused's plea of guilty to the count of a crime against humanity sentenced him on 29 November 1996 to ten years' imprisonment: *Prosecutor v Drazen Erdemovic*, 108 ILR 180. Subsequently on 23 December 1996, he lodged an appeal against the Sentencing Judgment. The Appeals Chamber delivered its judgment on 7 October 1997. The Appeals Chamber remitted the case to a new Trial Chamber, holding, *inter alia*, that: (a) in the circumstances of the case, the accused's plea of guilty was not informed; and (b) duress does not afford a complete defence to a soldier charged with a crime against humanity and/or a war crime involving the killing of innocent human beings: it is admissible in mitigation, *Drazen Erdemovic v. Prosecutor* [1996] Case IT-96-22-A, [18]. In view of the above, the Appeals Chamber directed that the accused be allowed to re-plead with full knowledge of both the nature of the charges against him and the consequences of

1997, the ICTY handed down a judgment in relation to *Tadic*.³⁴ The trial had begun exactly a year before and the defendant was charged with thirty-four counts, including, crimes against humanity, grave breaches of the Geneva Conventions and violations of the laws or customs of war. The Chamber found *Tadic* guilty on eleven counts of violations of the laws or customs of war and crimes against humanity.³⁵ *Tadic* was found not guilty on eight counts and all charges laid against him pursuant to the grave breaches of the Geneva Conventions were dismissed.³⁶ He was sentenced to 20 years imprisonment and both the Defence and Prosecution have appealed.³⁷

It is interesting to note in relation to the previous discussion on the role that international criminal trials play in the development and clarification of international criminal law, why the Trial Chamber in the *Tadic* Case chose not to consider any charges under grave breaches of the Geneva Conventions. Even though the purpose of this article is not to conduct an in-depth examination into the *Tadic* decision, I believe that it is important to note that two of the three trial judges, constituting the majority, concluded that the status of victims as protected persons pursuant to the Geneva Conventions was not satisfied in this case.³⁸ Article 4 of the Fourth Geneva Convention supplies the definition of protected persons as those being persons who find themselves in the case of conflict in the hands of a party to the conflict or occupying powers of which they are not nationals.³⁹ Whilst other elements of this definition were satisfied, the majority of the Chamber concluded that the victims were nationals of the occupying power and thus were not protected persons. Where this will lead us in relation to further developments of international law is unsure, particularly considering the strong dissenting judgment rendered by Judge Gabrielle Kirk McDonald.⁴⁰ Judge McDonald opined

his plea before another Trial Chamber, [20]. It was against this background that the 5 March 1998 sentence was pronounced.

³⁴ *Prosecutor v Dusko Tadic* (Decision of Trial Chamber II. 7 MG.'1997) IT-94-1-T: 36 ILM 908 ('*Tadic Judgment*').

³⁵ *Tadic Judgment* [693]-[765].

³⁶ *Tadic Judgment* [577]-[608].

³⁷ *Prosecutor v Dusko Tadic* (Sentencing Judgment, 14 July 1997) IT-94-I-S [74]-[75].

³⁸ *Tadic Judgment*, [608] (Stephen and Vohrah 11). This conclusion was arrived at by the Trial Chamber pursuant to the earlier finding by the Appeals Chamber in *Prosecutor v Dusko Tadic (Jurisdiction)* 105 ILR 420, 453 ('*Appeals Chamber Decision*') to the effect that, 'in the present state of development of the law, Article 2 of the Statute, (which gives the Tribunal jurisdiction in respect of grave breaches of the Geneva Conventions) only applies to offences committed within the context of international armed conflicts,' [499].

³⁹ *Tadic Judgment*, [607]. During trial, the Trial Chamber was called upon to decide whether at 'all relevant times the victims of the accused were in the hands of "a Party to the conflict or Occupying power of which they are not nationals' [578]. The Trial Chamber, on an analysis of the factual position and the circumstances surrounding the conflict, found that the conflict at the relevant time was an 'internal conflict' and thereby the victims of the accused enjoyed protection of the prohibitions contained in common art 3, 'rather than the protection of the more specific grave breaches regime applicable to civilians in the hands of a party to an armed conflict of which they are not nationals'.

⁴⁰ In this regard mention must be made of the observation of the Appeals Chamber with regard to the United States *Amicus Curiae* brief, which submitted that the grave breaches provisions of art 2 of the Statute of the ICTY apply to armed conflicts of a non-international character as well as to those of an international character. Noting this submission with satisfaction, the Appeals Chamber remarked:

This statement, unsupported by any authority, does not seem to be warranted as to the interpretation of Article 2 of the Statute. Nevertheless, seen from another viewpoint, there is no gainsaying its significance: that statement articulates the legal views of one of the permanent members of the Security Council on a delicate legal issue; on this score it provides the first indication of a possible change in *opinio juris* of States. Were other States and international bodies to come to share this view, a change in customary law concerning the scope of the "grave breaches" system might gradually materialize.

that the victims of the accused were persons protected by the Geneva Conventions because the conflict, on the evidence that was presented, was sufficient to classify it as an international armed conflict.⁴¹ The pending appeals will be interesting. More recently, the ICTY pronounced its judgment in the case of *Prosecutor v Zejnil Delalic et al.*⁴² This is only the second judgment upon trial to be rendered by the ICTY, and the third judgment which imposed sentences upon the accused. For the first time since the decisions of the Nuremberg and Tokyo Military Tribunals the concept of command responsibility has been addressed.⁴³ On the question of the legal classification of the conflict in Bosnia and Herzegovina, the Trial Chamber concluded by stating that the conflict 'in Bosnia and Herzegovina must be regarded as an international armed conflict throughout 1992.'⁴⁴ This finding thus being in conformity with the dissenting opinion of Judge McDonald in the *Tadic* Judgment.⁴⁵ Pursuant to this critical finding the ICTY convicted an accused person for rape as torture. Rape as torture is charged as a grave breach of the Geneva Conventions and a violation of the laws and customs of war .

The final matter I would like to address is the practical difficulty involved in the gathering of evidence for international criminal proceedings. Here I will focus upon the ICTY as it is further advanced in proceedings in relation to this matter. Unlike the Nazi paper-chain, the ICTY has experienced problems with accessing vital evidence. Unlike the post-World War n scenario with investigators having access to mass graves and other sites -in many of the instances investigators associated with the ICTY have not been granted visas to visit the areas under question. Indeed the *Tadic* Judgment actually acknowledged that access to evidence in the territory of the Former Yugoslavia is difficult 'due in no small part to the unwillingness of the authorities of the Republika Srpska to cooperate with the International Tribunal.'⁴⁶ It is interesting to note that with the Rwandan experience not only is there assistance from the current Government, but many of the leaders of the massacres are no longer in power and are hiding in refugee camps. Thus it is more likely for them to be captured than those still in power in the former Yugoslavia.

Other challenges facing the Tribunals include the fear of many witnesses giving evidence, particularly those with family or friends still caught up in conflict. Testament to the newness of such a trial, decisions have had to be made in relation to the protection of witnesses as well

Appeals Chamber Decision, above n 38, 498.

⁴¹ *Tadic* Judgment, [979]. Judge McDonald in a well-reasoned opinion differed from the majority on the issue of the status and role of the Bosnian Serb Army (VRS), the perpetrators of the atrocities in the area of Prijedor, vis-à-vis the Federal Republic of Yugoslavia (Serbia and Montenegro) (FRY). The majority had concluded that the latter had not exercised 'effective control' over the VRS, whereas, Judge McDonald found there was sufficient dependence by the VRS on the FRY and that the high threshold requirement set by the majority was not justified in the context of international humanitarian law.

⁴² [1996] IT-96-21-T (Judgment of 16 November 1998). The four accused indicted in this case were tried together for grave breaches of the Geneva Conventions and violations of the laws and customs of war, including superior responsibility for murder, torture, causing great suffering or serious injury , inhumane acts and participation in the unlawful confinement of civilians in inhumane conditions. The Trial Chamber's official summary of the judgment is currently available at: <<http://www.un.org/icty/pressreal/statcel.htm>>. However, the first accused *Zejnil Delalic* was found not guilty of grave breaches and war crimes and acquitted of the count charging him as a direct participant in the unlawful confinement of civilians. The other 3 accused received sentences of imprisonment ranging from 7 to 20 years.

⁴³ The Trial Chamber emphasised that 'not only military commanders. but also civilians holding positions of authority, are encompassed by the doctrine', *ibid*.

⁴⁴ *Ibid*

⁴⁵ See above n 34

⁴⁶ *Tadic* Judgment, [530].

as rules developed in relation to the use of video conference linkages.⁴⁷ In particular there have been robust debates in relation to the process of preserving the anonymity of witnesses and how far this protection can go.⁴⁸ Consideration in such proceedings also had to be given to the role played by pre-trial media with the potential for the infection of testimonial evidence due to the mass publication of the event. Many of these issues, which appear challenging at the moment, will no doubt become an integral part of international criminal jurisdiction in the future.

The world is watching the *ad hoc* Tribunals -the development of the Statute for an International Criminal Court in Rome in June/July 1998, relied heavily upon these two international legal institutions. Not only did the ICTY and ICTR provide strong legal precedents in a technical sense during the Rome debates, the Tribunals' proceedings also proved that international criminal trials can work. The combination of demonstrating the legal capacity to try those accused of atrocities, as well as the political will of the majority of the international community to assist in this process, was a powerful driving force in creating the ICC. It is indeed fortunate that many of the matters that the ICTY and ICTR are currently grappling with, might be resolved by the time the ICC gets up and running. It will be naïve to assume that the development of the ICC will result in the eradication of breaches of international humanitarian law or revolutionise human behaviour. On the other hand, the creation of such a court reflects the truism that crimes are not committed by abstract entities, but rather by individuals and that it is thus essential to develop an international system that punishes individuals. More than anything -the creation of the ICC is a symbolic first step towards a civilisation that cannot and will not tolerate devastating acts committed with impunity.

⁴⁷ See *Prosecutor v Dusko Tadic (Protective Measures for Victims and Witnesses Decision, 10 August 1995)* 105 ILR 599, [48] ('*Protective Measure's Decision*').

⁴⁸ See, eg, Christine Chinkin, '*Amicus Curiae* Brief on Protection Measures for Victims and Witnesses' (1996) 7 *Criminal Law Forum* 179,182.

GERRY J. SIMPSON

War Crimes: A Critical Introduction*

All sorrows can be borne if you put them into a story or tell a story about them." The story reveals the meaning of what would otherwise remain an unbearable sequence of sheer happenings. ...All her stories are actually anecdotes of destiny, they tell again and again how at the end we shall be privileged to judge.¹

I had dreamed, we had always dreamed, of something like this, in the night at Auschwitz: of speaking and not being listened to, of finding liberty and remaining alone. After a while I remained alone with the lawyer; a few minutes later he also left me, urbanely excusing himself.²

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¹ H. Arendt, *Isak Dinesen* in MEN IN DARK TIMES 104 (1968).

² P. Levi, IF THIS IS A MAN (1979).

INTRODUCTION

During the trial of Adolf Eichmann in Jerusalem in 1960, Hannah Arendt's moral certainty about both the defendant's unsurpassable evil and the rectitude of the trial itself gave way to a debilitating array of jurisprudential doubts, ethical quandaries and emotional ambivalences.³ For Arendt, what began, with some excitement, as "an obligation I owe my past" was transformed into a feeling that "the whole thing is *stinknormal*, indescribably inferior, worthless".⁴ Fourteen years earlier, In 1946, when a team of SIX army lawyers was appointed defence counsel for the Japanese General Yamashita prior to his trial for war crimes in the Philippines, these lawyers were indignant.⁵ For them, Yamashita was the ultimate war criminal, a man responsible for the dreadful and literally indefensible atrocities that had taken place in Manila at the end of the war. Slowly, however, Yamashita was transformed in their eyes from the "Beast of Bataan" to an Innocent victim of American Injustice. This perception of injustice took them, at some risk to their careers, to the Supreme Court. There, Supreme Court Justice Rutledge, in a moving dissenting opinion, described Yamashita 's trial as the "uncurbed spirit of revenge and retribution, masked in formal legal procedure for purposes of dealing with a fallen enemy commander".⁶ Yamashita was hanged, but thirty years later defence counsel and legal experts continue to assert his innocence.⁷

Similar ambiguities have attended more recent war crimes prosecutions. The trial and subsequent acquittal of John Demjanjuk in Israel forced a review of U .S. Department of Justice extradition procedures.⁸ In Australia, the acquittal of Ivan Polyukhovich led to the disbanding of the Australian War Crimes Investigation Bureau in 1993.⁹ Even successful prosecutions cause cultural upheaval and unease. Klaus Barbie, for example, was put on trial and eventually convicted of having committed crimes against humanity in occupied France in 1944. His trial, however, became an ordeal for the French nation. At times, France itself appeared to stand beside Barbie as a co-defendant accused of having collaborated with the Nazis during the occupation or of having carried out crimes against humanity in Algeria during the colonial struggle there.¹⁰ Finally, even Nuremberg, the war crimes trial *par excellence*, is shadowed by its morally and legally defective twin at Tokyo, by the continuing sense that here, again, was victor's justice and by the spectral presence of those crimes against humanity left unpunished since. This journey from certainty to doubt, experienced by Arendt and others since, may be the price paid by all those who examine individual war crimes trials critically and closely. The accused is often monstrous, sometimes banal, but

³ This process is documented in Arendt's controversial study of the Eichmann Trial, H. Arendt, *EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL* (1963) (ed. 1994).

⁴ See E. Young-Bruehl, *HANNAH ARENDT: FOR THE LOVE OF THE WORLD* 329-31 (1982). Arendt came to regard the trial with less distaste as the proceedings continued, see H. Arendt *supra* note 3, at 331.

⁵ See Prevost, *Race and War Crimes: The 1945 War Crimes Trial of General Tomoyuki Yamashita*, 14 HUM. RTS. Q. 303, 305 (1992).

⁶ *In re Yamashita*, 327 U.S. 1.41 (1946) (Rutledge, J., dissenting, Murphy, J., concurring).

⁷ Prevost, *supra* note 5, at 337.

⁸ *Israel v. Demjanjuk*, Criminal Case (Jerusalem) 373/86 (1988), *reprinted in* THE DEMJANJUK TRIAL (Landau ed. 1991), *rev'd*, *Israel v. Demjanjuk*, Crim. App. No. 347/88 (Supreme Ct. of Israel, Jul. 29, 1993). *See also infra* Chapter 4.

⁹ *Polyukhovich v. Commonwealth*, 172 C.L.R. 501 (1991). *See* McCormack & Simpson, *The International Law Commission's Draft Code of Crimes against the Peace and Security of Mankind: An Appraisal of the Substantive Provisions*, 5 CRIM. L.F. 1, 8 n.16 (1994). *See also infra* Chapter 5

¹⁰ See Binder, *Representing Nazism: Advocacy and Identity in the Trial of Klaus Barbie*, 98 YALE L.J. 1321 (1989).

always human.¹¹ The trials are most often well-intentioned, occasionally transformative but always fraught with the gravest moral implications for the accusers. Meanwhile, the law is usually an accomplice to ideology, sometimes an enemy of justice and always the narrator of a series of complex and deeply ambiguous stories.

In this introductory chapter, I intend to explore some of the philosophical, cultural and jurisprudential dimensions of war crimes trials and international criminal law generally.¹² I consider some of the rationales advanced for war crimes trials both in international and domestic law, the philosophical doubts surrounding such trials and, finally, their historical and cultural significance. While this chapter is predominantly critical of the war crimes experience since 1945, my purpose is constructive. Ultimately, I argue that an international war crimes regime founded on a concern for consistency, legality and impartiality would be a valuable addition to the international legal system.

The main body of the essay considers four serious difficulties with the concept of war crimes trials and international criminal law generally. These I group, somewhat artificially, under the headings of *partiality*, *legality*, *definitions of criminality* and *war crimes as history*. Here, I intend to locate the war crimes trial in their cultural and historical settings. I will ask a number of questions, such as what conception of justice is being pursued here? Is there a social system idealised in all war crimes trials? Is there a notion of individual responsibility or state responsibility common to these various war crimes regimes? Or is it that a diffuse set of standards is being affirmed throughout these cases? The failure of traditional models of justice to explain the nature of war crimes trials will be explained with reference to the cultural significance of these trials. What messages are being transmitted from the court room to the wider society in a war crimes trial? Is the didactic function of a war crimes trial compatible with its judicial purpose? Do war crimes trials serve an ideological role in domestic legal and social systems? Do they serve an integrative function for the international community by positing an eternal outsider failing to conform to the basic norms of that society? And, finally, what are the juridical consequences of the fact that while some war criminals are prosecuted, most are not?

In a final section, I evaluate whether war crimes trials as a legal genre can be justified in the face of these objections and on what grounds. I examine the possibility of recovering the idea of "war crimes" trials sufficiently for them to play the historical role of morality plays -the stories of destiny and justice that Arendt speaks of in the quotation that begins this chapter. The question in the end becomes not whether we are privileged to judge but whether we have the tools, the capacity and the will to do so consistently and fairly.

WAR CRIMES TRIALS : SOME PROBLEMS

A. *The Problem of Partiality*

¹¹ "Number of Fingers: Ten. Number of Toes: Ten. Intelligence: Medium. What did you expect? Talons?": L. Cohen, *All There Is to Know about Adolf Eichmann* in *SELECTED POEMS 1956-1968* 122 (1969). See also Arendt's famous description of Eichmann as banal and her decision to provide *EICHMANN IN JERUSALEM* with the sub-title *A REPORT ON THE BANALITY OF EVIL: ARENDT*, *supra* note 3.

¹² I use the term "war crimes trial" to denote any judicial proceedings, domestic or international, in which war crimes, crimes against humanity or crimes against peace are part of the charge. Elsewhere, I have made more explicit the difference between these three categories and the confusion over definitions in each of these categories. Generally, my use of the term "war crimes" is generic and broad rather than technical.

On August 8, 1945, the Allies signed the London Charter establishing an international tribunal to try the major German war criminals.¹³ This was to presage a new era in which the requirements of justice and the concerns of universal human rights were to guide the conduct of international relations. Acts of criminality during war were declared intolerable and the wholesale destruction of civilian populations was condemned as a crime against humanity. On the same day in 1945, the United States dropped its second atomic bomb on Japan devastating the city of Nagasaki and immediately killing at least 70,000 of its largely civilian inhabitants.¹⁴ The history of war crimes is a history suffused with irony but the conjunction of these two acts -one, a manifesto declaring the subordination of force to law, the other, an unprecedented act of violence contrary to a basic requirement of the laws of war¹⁵ -is perhaps the most tragically ironic of all. For some observers, Nagasaki is viewed as the symbol of the death of an idea at its birth: the idea of universal application of international criminal law to all offenders regardless of affiliation, status or nationality. Systematic and consistent regulation of international crime remains chimerical despite the efforts of the International Law Commission and various publicists.¹⁶

In the absence of a uniform and global approach, there is a widespread assumption that the trials of war criminals have generally occurred only where defeat and criminality coincide. This was undoubtedly the case at Nuremberg and Tokyo. The phrase "victor's justice" as applied to such trials is by now a truism. The victorious allied powers tried their German and Japanese adversaries without even considering the possibility of applying these same laws to their own war-time behaviour. There is little doubt that some allied actions would have proved amenable to the laws of Nuremberg even if the jurisdictional and political barriers to prosecution were inevitably insurmountable. Indeed, the defence attorneys at Nuremberg invoked the *tu quoque* principle several times pointing to the bombing of Dresden, for example, as evidence that the Allies had not come to Nuremberg with clean hands. The most successful use of this argument occurred in the case of Admiral Donitz who argued, with some justification, that the "crime" of failing to pick up enemy survivors of submarine attacks was in fact the policy of U.S. forces in the Pacific under the command of General Nimitz.¹⁷

Regardless of how well-founded these *tu quoque* objections are, it is important to recognise that the Nuremberg and Tokyo proceedings are not typical of war crimes initiatives before or since. If they are models of victor's justice they are not models of war crimes trials generally.

¹³ Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, Aug. 8, 1945, 8 U.N.T.S. 279.

¹⁴ "Immediate deaths totalled at least 70,000 at Nagasaki. These include bomb-related fatalities in the ensuing weeks. Another 130,000 inhabitants of Hiroshima and Nagasaki died during the next five years, and deaths whose cause can be traced back to the atomic explosions are still being reckoned." Meyrowitz, *The Laws of War and Nuclear Weapons*, in NUCLEAR WEAPONS AND LAW 19, 32 (A. Miller & M. Feinrider ed. 1984).

¹⁵ Norms embodying proportionality, unnecessary suffering, the distinction between combatant and non-combatant and necessity are all offended by this action unless one takes a view of international humanitarian law that places no limits on the suffering that can be inflicted on a civilian population in the name of military necessity. See now the application by the WHO to the I.C.J. for an Advisory Opinion on the Legality of Nuclear Weapons: *Health and Environmental Effects of Nuclear Weapons*, WHO Res 46.40 (May 14 1993). See also Rostow, *The WHO, the ICJ and Nuclear Weapons*, 20 YALE J. INT'L L. 151 (1995).

¹⁶ The ILC's various drafts and proposals from 1954 to the present day are discussed in Chapter 2. See, generally McCormack & Simpson. *supra* note 9. The majority of the academic work in this area has been completed by M. Cherif Bassiouni. See, e.g., M. C. Bassiouni, A DRAFT INTERNATIONAL CRIMINAL CODE AND DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL TRIBUNAL (1987). See also B. Ferencz, AN INTERNATIONAL CRIMINAL COURT. A STEP TOWARDS WORLD PEACE: A DOCUMENTARY HISTORY AND ANALYSIS (1980).

¹⁷ 22 I.M.T. 559 (1949).

There are several respects in which this is true. First, the classical war crimes trials both prior to and since 1945 have generally occurred in domestic settings under national rather than international law. This was the case in Leipzig in 1919 where German nationals were tried under German law for crimes committed during the First World War.¹⁸ Here, the defeated themselves prosecuted and tried their fellow-nationals though with little zeal. Similarly, national laws have been employed in the trials of war criminals in France (Barbie and Touver), Australia (Polyukhovich), Turkey (the trial of those accused of having committed genocide against the Armenians in 1921), Israel (Eichmann and Demjanjuk), Canada (Finta) and Germany (both immediately following the war and more recently in the case of Yugoslav war criminals).¹⁹ Each of these cases is at best an equivocal illustration of the victor's justice criticism. In some instances the Link between the accusers and the accused is only barely a victor/Vanquished" relationship. This is the case with the Australian trials of former Baltic nationals and it is certainly true of the Israeli trials where the relationship becomes exceedingly complex. In the Eichmann trial it was the *defence* that argued that the trial did not represent victor's justice since Israel had not been in existence during the Second World War, and, furthermore, had yet to come into existence when the alleged crimes took place. This, according to Eichmann's attorney, broke the jurisdictional link between Israel and the accused.²⁰ In the Touver, Finta and Polyukhovich cases, the state tried its own nationals in an exercise of, primarily, territorial jurisdiction very different from the trials at Nuremberg which took place under universal jurisdiction and international law.²¹

There is another sense in which the Nuremberg model is misleading. The vast majority of cases in which sanctions are imposed on violators of the laws of wars take place under military jurisdiction. This is yet another irony of the area -that, for all their supposedly educative function, most war crimes trials are confidential and usually remain so.²² Here, again winners and losers alike try their own military personnel for breaches of the laws of war or war crimes²³. The most notorious of post-1945 trials, that of Lt. Calley, took place Initially under martial law and was only heard in U.S. Federal courts on appeal.²⁴ The use of martial law is both unsurprising and perfectly appropriate in many circumstances. The Geneva Conventions and Protocols envisage sanctions along these lines in cases of war crimes or grave breaches of their provisions.²⁵ Similarly, in the absence of a permanent

¹⁸ See C. Mullins, THE LEIPZIG TRIALS (1921): Garver, *Punishment of Offenders against the Laws and Customs of War*, 14 AM. J. INT'L L. 70 (1926).

¹⁹ These national laws have varied quite widely with some aimed at suppressing genocide (Germany), others war crimes (Australia) and others crimes against humanity (France). See *infra* Chapters 3 and 4. There were also numerous trials of war criminals in the States of the Eastern Bloc after the end of the Second World War. However a great many of these war criminals were in fact collaborators or simply enemies of the new Communist dictatorships in these countries.

²⁰ For the response of the District Court to this argument, see the Eichmann Trial: *In re Eichmann*, 36 INT'L L. REP 5,53-57 (1968).

²¹ See *infra* Chapters 4, 5 and 6.

²² Of course, most often these trials are not war crimes trials but simply court martials for offences against military discipline.

²³ For example, the Bosnian government put Borislav Herak and Sretko Darrijanovic on trial on 12 March 1993 for war crimes including genocide, murder, rape and looting. See Beres, *Prosecuting Iraqi Crimes under International Law : American Constitutional Imperative*, 15 HOUS. J. INT'L L. 91,92 n.2 (1992). See also *infra* Chapter 3.

²⁴ U.S. v. Calley, 46 C.M.R. 1131 (1971), *aff'd*, 22 U.S.C.M.A. 534,48 C.M.R. 19 (1973).

²⁵ Each of the four Geneva Conventions of 1949 provide words to the effect that "Each High Contracting Party shall be under an obligation to bring such persons [accused of having committed grave breaches] regardless of their nationality before its own courts". See Geneva Convention for the Amelioration of the Condition of the

international penal tribunal, the Genocide Convention permits domestic enforcement of the Convention against both nationals and aliens on a territorial basis.²⁶

Finally, even in the area of international criminal law where Nuremberg is thought to serve as an exemplar, the victor's justice model is unhelpful and inaccurate. The three major initiatives in this area since Nuremberg each involve the creation of tribunals designed to try war criminals generally rather than defeated war criminals.²⁷ The much-vaunted Tribunal for the Former Yugoslavia has jurisdiction over all the adversaries in the Balkans conflict. Indeed, even if one does regard the tribunal as essentially directed at the Serbs, it is impossible to conceive of them as the vanquished in this conflict.²⁸ The same is true for the Rwanda Tribunal designed to punish both Hutus and Tutsis guilty of crimes against humanity and crimes of genocide. These tribunals are different from the Nuremberg and Tokyo courts in another significant, related way. Neither the conflict in the former Yugoslavia nor the war in Rwanda are as unambiguously international in dimension as the Second World War. The Rwandan tragedy was essentially a civil armed conflict which the Security Council has deemed a threat to international peace and security.²⁹ In the case of the former Yugoslavia, the Tribunal has jurisdiction over crimes committed when the general conflict was civil and retains jurisdiction over crimes committed in the ongoing civil war in Bosnia-Herzegovina.³⁰ The proposed international criminal court makes no distinction between war's winners and losers and is designed to be operative during times of peace when such distinctions become meaningless.³¹

In the remainder of this section, then, I want to discuss a problem of partiality which goes much deeper than the mere invocation of the victor's justice argument and is not restricted to the Nuremberg or Tokyo trials nor to cases where the line between the victorious party and the defeated party is clear. In the sphere of international criminal law there is a regularised tension between the retributive urge and the realist demand, between the necessary and the possible, the visceral and the pragmatic.³² Each new atrocity brings in its train a fresh call for war crimes prosecutions. This, in turn, is routinely met -with reluctance and caution from

Wounded and the Sick in Armed Forces in the Field, Aug. 12, 1949, art. 49, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, art. 50, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 129, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 146, 75 U.N.T.S. 287.

²⁶ Convention on the Prevention and Suppression of the Crime of Genocide, Dec. 9, 1948, art. VI, 78 U.N.T.S. 277.

²⁷ See *infra* Chapters 8 and 9.

²⁸ See *Tribunal to Cite Bosnian Serb Chief as War Criminal*, N.Y. Times, Apr. 24, 1995, at A1.

²⁹ S.C. Res. 955/49 U.N. SCOR (3453d mtg.), U.N. Doc. S/RES/955 (1994), reprinted in 33 I.L.M. 1600.

³⁰ See reference to temporal jurisdiction of the Tribunal, Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law committed in the Territory of the Former Yugoslavia since 1991: Report of the Secretary-General Pursuant to Paragraph 2 of the Security Council Resolution 808 (1993), U.N. Doc. S/25704 (1993), reprinted in 32 I.L.M. 1159. See also S.C. Res. 827/48 U.N. SCOR (3217th mtg.), U.N. Doc. S/RES/827 (1993) reprinted in 32 I.L.M. 1203.

³¹ Proposals for *ad hoc* tribunals tend to be more obviously directed at pariah or defeated States. Here the taint of victor's justice is much clearer. See for example discussion of proposed tribunals in the case of Iraq and Cambodia, *infra* note 33. Nevertheless, at the time of writing, indictments had only been made against Serbs suspected of having committed war crimes.

³² This latter pair of terms are used by Alan Ryan in his report to the Attorney-General of the United States when he discusses the options considered by the U.S. secret service in post-war Germany, of releasing Barbie to the French for trial or continuing to use him to spy on the Soviet Union. See A. Ryan, KLAUS BARBIE AND THE U.S. GOVERNMENT 191-92 (1983) (U.S. Dept. of Justice).

those with the power to set in motion the mechanics of such a trial. Justice and diplomacy are engaged in a perpetual *pas de deux* over whether to prosecute or rehabilitate. It is only an unexpected confluence of events that leads to the establishment of such tribunals. One need only think of the apparent inevitability of prosecutions of Khmer Rouge leaders in Cambodia or the Iraqi military elite following the Gulf War and the ultimate decision not to hold these trials as examples of the unexpected, results of this conflict. Ultimately, war crimes law will be hostage to realpolitik whether it be the need to negotiate with the Khmer Rouge or the desire to maintain a strong anti-clerical government in power in Baghdad. This will always occur and will leave war crimes law as practiced through the creation of ad hoc tribunals, open to accusations of bias, selectivity and partiality. In anarchical societies, like the international legal order, powerful private and state interests will not readily yield to the dictates of legality. The price of peace must often be a promise not to begin war crimes proceedings.³³ So each war crimes trial is an exercise in partial justice to the extent that it reminds us that the majority of war crimes remain unpunished. If Yugoslavia, why not Somalia; if Rwanda, why not Guatemala?

This area of law is partial and selective in other less obvious ways. War crimes jurisprudence generally -that is, the practice of courts and tribunals since 1945- reveals an obsession with the trial and punishment of Nazi war criminals. This bias may have a number of explanations but it is particularly curious given the absence of any prosecutions involving Japanese war criminals after 1947 (it is significant, in this regard, that the Tokyo trials themselves have almost disappeared from history).³⁴

The metaphorical equation of war crimes with Nazis is inscribed on the culture. Most of the war crimes trials held since 1945 has been a restatement of this relationship. The Nazi regime remains the epitome of absolute evil in Western culture and each successive war crimes trial owes as much to this doctrine as to the tenacious efforts of Nazi hunters like Beate Klarsfeld and Simon Weisenthal. Why has there been a tendency to equate war crimes and the Nazi regime in Western jurisprudence and culture? Any answer to this question is likely to be complex and inconclusive. One way to approach the problem is to remember that war crimes trials (especially successful ones) have exculpatory effects as well as retributive consequences. As well as trying alleged war criminals, these trials serve as vindication of Western progress, they maintain the idea that National Socialism was an aberration in Western culture, they function as moral demarcations between the accused and the accusers, they avert attention from war crimes closer to home and, finally, they contain the message that the untried crimes are not of this magnitude or order. The eternal pariah is Nazi Germany serving as a lesson not only that it must not happen again but that perhaps it is *not* happening again. It is argued below that many of the war crimes trials held since 1945 have transmitted cultural messages like these.³⁵ Here, I want to examine the legal implications of this focus.

³³ See Wedgwood, War Crimes in the Former Yugoslavia: A Comment on the International War Crimes Tribunal, 34 VA. J. INT'L L. 267,275 (1994) on the need for amnesty provisions. The most obvious current examples have taken place in the former Yugoslavia where Karadzic and Mladic have been cast in the roles of war criminals or diplomats depending on the state of the conflict.

³⁴ At least this was certainly the case in 1971 when Richard Minear published his study, R. Minear, VICTOR'S JUSTICE: THE TOKYO WAR CRIMES TRIAL (1971). See *id.* at ix-xv. But see *infra* note 42 for recent international legal scholarship focussing on the trial of Japanese War Criminals. "

³⁵ See generally Binder. *supra* note 1010. See also A. Finkelkraut, REMEMBERING IN VAIN: THE KLAUS BARBIE TRIAL AND CRIMES AGAINST HUMANITY (R. Lapidus trans. 1992); K. Reid, War Crimes Trials and Cultural Mythology, Honours Thesis, Melbourne University Law Faculty (1992).

The singular focus on Nazi war criminals has a curious legal consequence. The Nazis are taken as an exemplification of evil in the world and also an exception to universal humanism. This is why war crimes trials hover endlessly between upholding a universal morality and particularising the crime in question as an historical exception. Ultimately, the performance of a war crimes trial is both situated in a history and yet seeks to transcend it. The trial confines a historical moment in its abnormality but wishes to make its lesson universal and timeless. Consider three examples. First, the Australian War Crimes legislation under which Polyukhovich was tried was enacted as an exercise of universal jurisdiction. The Australian Commonwealth, in defending a High Court challenge to the constitutionality of the legislation. Argued that the War Crimes Amendment was an exercise of an exceptional sovereign power to try war criminals regardless of territory or nationality. Such crimes v transcended territory, time and nation. However, the legislation included temporal limitations in order that it not be universal in its application.³⁶ Thus in a piece of legislation resting on a foundation of universalism there was a narrowing of the definition of war crime to acts committed in Europe between September 1, 1939 and August 8, 1945.³⁷ Second, in the trial of Klaus Barbie the indictment was narrowed to exclude acts carried out by the French military in Algeria.³⁸ Third, in the trial of Adolf Eichmann, the Israeli state asserted its right to exercise universal jurisdiction over the defendant's crimes against humanity but having founded jurisdiction concentrated on the more specific charge of crimes against the Jewish people.³⁹ The District Court of Jerusalem, despite the universalist and internationalist rhetoric surrounding the trial, was unprepared to examine the statute under which Eichmann was tried for its conformity to international law, saying, "we cannot entertain the contention that this law conflicts with the principles of international law".⁴⁰ In short, States will invariably adopt a universalist rhetoric based on international law principles to legitimize their legal manouevres but will rarely apply the principles of universal application in their war crimes legislation.

Issues of race, gender and culture also anse III the context of war crimes trials resulting in subtle biases in favour of dominant groups. These are each discussed with impressive detail and insight elsewhere.⁴¹ Three brief examples will suffice here. A major problem with some war crimes trials is that they are often preceded by a torrent of racial stereotyping. Indeed proposals for trials tend to focus on the exotic foreigner, such as the Arab terrorist, the Asian communist or the African despot. This environment of racial labelling can effect the conduct of the trial itself to the great detriment of the accused. The imperfect justice meted out after

³⁶ War Crimes Act 1945 (Cth) as amended by War Crimes Amendment Act 1988 (Cth), ss. 5 & 9. *See also* Polyukhovich v. Commonwealth, 172 C.L.R. 501 (1991).

³⁷ For a perceptive analysis of some of these historical currents and ideological relationships *see* K. Reid, War Crimes Trials and Cultural Mythology, *supra* note 35.

³⁸ *See* Binder, *supra* note 10, at 1335.

³⁹ The two categories were not always treated separately. For example a great many crimes against the Jewish people were included in the indictment based on crimes against humanity. *ee* Nazi and Nazi Collaborators (Punishment) Law 5710/1950, Section 1.

⁴⁰ *In re Eichmann*, 36 INT'L L. REP.5, 10 (1968).

⁴¹ On race, *see* Prevost, *supra* note 5. On gender *see*, Pratt & Fletcher, *Time for Justice: The Case for International Prosecutions of Rape and Gender-Based Violence in the Former Yugoslavia* (1994) 9 BERKELEY. WOMEN'S L.J. 77 (1994). *See also* Copelan, *Surfacing Gender: Re-engraving Crimes Against Women in Humanitarian Law*, 5 HASTINGS WOMEN'S L.J. 243 (1994); Koenig, *Women and Rape in Ethnic Conflict and War*, 5 HASTINGS WOMEN'S L.J. 129 (1994); Krass, *Bringing the Perpetrators of Rape in the Balkans to Justice: Time for an International Criminal Court*, 22 DEN. J.INT'L L. & POL'Y 317 (1994). On the legitimization of military strategies, *see* af Jochnick & Normand, *The Legitimation of Violence: A Critical Analysis of the Gulf War*, 35 HARV.INT'L L.J. 387 (1994).

World War Two itself revealed a curious racial bias against the Japanese and in favour of the German war criminals at Nuremberg where the procedural safeguards accorded the accused were infinitely greater.⁴²

Nor is the substance of war crimes law free from prejudices based on gender and culture. Rape, for example, is only now being accepted as a crime against humanity when committed on the scale found in the Former Yugoslavia.⁴³ There is also a tendency to humanise technologically advanced weaponry at the expense of more primitive implements of warfare. This bias in favour of sophisticated technologies can be seen in the attempts to prohibit chemical weapons but not nuclear devices and the characterisation of scud missile attacks as illegal and cruise missile attacks as surgical.⁴⁴ Some of the impetus for trying Saddam Hussein arose out of his use of weapons whose destructive capacity was limited compared to the millennial capabilities of the modern advanced industrial arsenal.

B. *The Problem of Legality*

War crimes trials have been impugned on many grounds over the last half century. Perhaps the most serious group of objections concern the legality or procedural fairness of these trials from Nuremberg to Barbie and beyond. Judith Shklar, for example, has argued that war crimes trials bear an uneasy resemblance to the political or show trials regarded as the antithesis of the Western tradition of legalism.⁴⁵ There is no question that war crimes trials raise delicate matters of procedure and jurisdiction.

In this section I focus on four issues of legality -the question of generality, the principle, *nullem crimen sine lege* (including definition and retroactivity), procedural fairness and, finally, the problems associated with the various defences to war crimes accusations.

Generality

A fundamental requirement of the rule of law is generality -that is, the principle that laws shall be applied generally and uniformly to all activities regardless of the status of the actor. War crimes prosecutions have tended to suffer from defects in this regard also. Prosecutions are often limited to a certain group (the Nazis), a certain time period or a particular locus (see the Australian Legislation⁴⁶). The problems related to partiality are obviously linked closely to this concern for the legality of the individual trial. The selective application of international criminal law is a serious flaw in the international legal system itself (partiality) and, also an impediment to the just application of these laws to individual defendants (legality).

Nullem Crimen Sine Lege

⁴² For an excellent discussion of this neglected aspect of the Tokyo-Nuremberg relationship see Prevost, *supra* note 5. See also, Kopelman, *Ideology and International Law: The Dissent of the Indian Justice at the Tokyo War Crimes Trial*, 23 N.Y.U. J. INT'L L. & POL. 373 (1991).

⁴³ See MacKinnon, *Rape, Genocide and Women's Human Rights*, 17 HARV. WOMEN'S L.J. 5 (1994). Note that rape is not regarded as a grave breach under the Geneva Conventions or Protocols, but see Wedgwood, *supra* note 33, at 273 where she suggests that art. 3 of the Geneva Convention might be extended to cover systematic rape. See also Pratt & Fletcher, *supra* note 41, at 95.

⁴⁴ See the discussion of nuclear weapons, *supra* note 15.

⁴⁵ J. Shklar, *LEGALISM* (1964).

⁴⁶ See *supra* note 36 and accompanying text.

War crimes also suffer from vagueness deficiencies. The lack of any systematic definition of international criminal law (only now being remedied by the International Law Commission but still at the reform stage) means that categories such as crimes against humanity or crimes against peace remain underdeveloped.⁴⁷ Meanwhile, the notion of war crime itself has given rise to a proliferation of meanings. These include (1) the generic everyday usage of the term to signify abhorrent acts carried out in war or peace and including genocide and crimes against humanity, (2) the legalistic definition of war crime as a technical breach of the laws of war, (3) the grave breaches enumerated in the Geneva Conventions and Protocols, (4) the category "violations of the laws and customs of war" contained in the Statute for War Crimes Tribunal for the Former Yugoslavia and (5) the term "exceptionally serious war crimes" used by the International Law Commission in its Draft Code on Crimes Against the Peace and Security of Mankind.⁴⁸ Each of these definitions may or may not mean something different but the variable terminology leads to real difficulties. Similarly, confusion continues to exist over the definition of crimes against humanity and their relationship to war crimes and aggression. Does the category possess an independent existence?⁴⁹ The Nuremberg tribunal tried only Julius Streicher exclusively on this ground and even then it was made clear that crimes against humanity could only be carried out in the context of an aggressive war. Yet, in the Eichmann trial, it was suggested that this link was not necessary to sustain a conviction on the count of crimes against humanity. Meanwhile, in the Barbie trial, the defendant, himself, in a rare outburst accused the Tribunal of blurring the distinction between war crimes and crimes against humanity.⁵⁰

The absence of clear standards or precedents is another ground for suggesting that war crimes prosecutions have the potential to offend the principles *nullem crimen sine lege* and *nullem poena sine lege*. This is particularly the case in international criminal law where the laws are rarely self-applying. As I discuss below in part C, the definition of international crime itself in a generic sense remains in dispute. The ILC's definition in Article 19(2) is too imprecise to offer much guidance in this area.⁵¹ On the other hand, as Ruth Wedgwood has recognised, this lack of precision can work to the advantage of the accused. Indeed nearly all applicable war crimes law is hedged with problems of definition that need to be resolved. The major categories of war crimes remain somewhat blurred.⁵² Crimes against humanity were defined in the International Military Tribunal Charter as wartime acts; genocide requires an intent that may be difficult to show; war crimes are hedged by military necessity defences; and international humanitarian law has not been fully extended to cover civil wars -the major sources of war crimes in the contemporary world. Each of these factors makes enforcement more difficult.

⁴⁷ This is the subject of part C of this section, *infra* pp. 16-19.

⁴⁸ *Report of the International Law Commission of its Forty-Third Session*, 46 U.N. GAOR. Supp. (No.10) at 198, U.N. Doc. A/46/10 (1991) [hereinafter Draft Code].

⁴⁹ For a book-length argument in favour of the proposition that it should, see M. C. Bassiouni's comprehensive study, *M. C. Bassiouni. CRIMES AGAINST HUMANITY* (1992).

⁵⁰ Finkelkraut, *supra* note 35, at xxvi. The irony of Barbie offering a rigorous definition of the distinction is not lost on Finkelkraut.

⁵¹ Article 19(2) provides that "Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group as such: (a) killing members of the group; (b) causing serious bodily or mental harm to members of the group; (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) imposing measures intended to prevent births within the group; (e) forcibly transferring children of the group to another group".

⁵² Wedgwood, *supra* note 33, at 271. See also Pratt & Fletcher, *supra* note 41, at 89-100.

War crimes trials are also quite often criticised as an *ex post facto* application of alien law to acts whose criminality was not at all obvious at the time these acts were carried out. Indeed, this problem was fully exploited by the defence in the Nuremberg trial who argued that the absence of an international criminal law regime prior to 1945 meant that the Nazi defendants could not possibly know that they had offended any universal principles of criminality. These defences were rejected but only after a rather unconvincing trawl through pre- War international law for evidence of an incipient criminal law system. The retroactivity problem is likely to be less acute in future war crimes trials given the various developments in the law since 1945. However, even recent trials of suspected Nazi War criminals have prompted defences on the basis of the rule of law prohibition on retroactive application of law.⁵³

Procedural Fairness

The vast majority of war crimes trials which have occurred since 1945 have involved prosecutions of those accused of atrocities during the Second World War. Even recent cases such those of Barbie, Touvier, Polyukhovich, Demjanjuk and Pinta have focused on events taking place in that war. Two issues of procedural fairness arise out of this fact. First, prosecutions for crimes committed 30-50 years ago (as in the above cases) will very often offend Statute of Limitations provisions designed to prevent unjust gaps between commission of a felony and prosecution.⁵⁴ The second and associated issue concerns the capacity of witnesses to testify accurately so long after the events in question have occurred. In the Australian trial of Ivan Polyukhovich, this difficulty proved insurmountable for the prosecution when witnesses failed to remember critical events or misidentified the accused.⁵⁵

Defences

Questions of legality have arisen in connection to the two most common substantive defences to war crimes indictments: superior orders and act of state. At Nuremberg these defences were disposed of simply by decreeing that they were not available to the defendants.⁵⁶ Yet each poses special problems for international criminal law and together they threaten to undo the project altogether. A system that denies either of these defences applicability may well successfully convict more "war criminals" but there are costs to justice and order in such an approach. Interestingly, there has been something of an oscillation between trials for those who commit war crimes under orders and those who do not engage in the commission of these crimes but order them. This is a recurring theme of war crimes jurisprudence, with one set of defendants claiming superior orders and the other set claiming act of state or lack of knowledge. Much was made in the Barbie trial of the need to punish the human beings who were personally involved in the commission of -crimes and therefore to re-establish the link

⁵³ For example, the War Crimes case at the High Court, Australia: Polyukhovich v. Commonwealth, 172 C.L.R. 501, 572-76 (1991) (Brennan, J.); id. 686-92 (Toohey, J.).

⁵⁴ An interesting combination of retroactivity and statute of limitations problems arose in the Barbie hearings. The normal period stated in the French Statute is 10 years. However in a French Statute of 1964 an exception was made for crimes against humanity which were not subject to statute of limitations. See J.O. (Fr.) 11788, Law No.64-1326 (26 Dec. 1964). The question then arose whether that statute was itself retroactive to crimes committed prior to 1964. The Court resolved the issue in favour of prosecution with a rather unsatisfactory reference to the Nuremberg precedent. See Reid, *supra* note 35, at nn. 322-25. See also the Convention on the Non-Applicability of Statutory Limitations to Crimes Against Humanity and War Crimes, Nov. 26 1968, 754 U.N.T.S.

⁵⁵ See D. Bevan, A CASE TO ANSWER (1994).

⁵⁶ Superior orders were admitted as a mitigating factor to sentence but did not operate as a full defence. See the ILC's Report on Principles of the Nuremberg Tribunal, Jul. 29, 1950, U.N. Doc. A/1316 (1950). Principle IV.

between the man and his crimes. On the other hand, General Yamashita was tried and hanged on a doctrine of command responsibility that has since been repudiated because of the injustice of convicting an individual for crimes they did not, and could not, know were being carried out by their subordinates.⁵⁷

In the case of superior orders, there is an awkward conflict involving military discipline, criminal deterrence and fairness to the accused. Military personnel undergo a training regimen that emphasises above all the need to obey and not to question military orders. Meanwhile, the laws of war impose an obligation to question those very same orders. Prosecutors have attempted to escape this dilemma by detaching reasonable orders from clearly aberrant ones, though this itself assumes that some notion of reasonableness or moral choice persists in war-time conditions in the face of an often brutal, degrading and dehumanising process of military indoctrination. In *U.S. v. Calley*,⁵⁸ the defence made the point that the reasonable person no matter how defined had long since left the battlefield by the time Calley and his platoon entered My Lai and began the notorious massacre.⁵⁹

The removal of an act of state or sovereign immunity defence is also fraught with problems. In a state system in which the actions of state representatives and officials are deemed to be immune from prosecution in foreign courts, the attachment of criminal responsibility to war-time leaders is incongruous and potentially troubling. There is no doubt that those who perpetrate human rights violations in an official capacity are entitled to sovereign immunity in peace-time.⁶⁰ Equally, however, the I.M.T. Charter at Nuremberg expressly repudiated the act of state defence.⁶¹ States will need to be careful in deciding whether to suspend this protection in cases involving war crimes. There is a long-standing rule of international law that a sovereign state may not sit in judgment of another sovereign state.⁶² War crimes courts have declined to apply this rule for the obvious reason that it is the negation of much war crimes jurisprudence. However, their reasoning has rarely been satisfactory and usually relies on the naturalistic assumption that some state acts are simply too evil to be immunised. This was the position adopted in the Eichmann trial where the Court in rejecting the act of state doctrine said, "A state that plans and implements a 'final solution' cannot be treated as *par in parem* but only as a gang of criminals".⁶³ This begs the question since it is state "criminals" who claim sovereign immunity. Having said this, there is little doubt that the

⁵⁷ See also Statute for the Yugoslav War Crimes Tribunal in *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)* U.N. Doc. S/25704 (1993), reprinted in 32 I.L.M. 1159 (1993) art. 7(3): "The fact that any of the acts was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof."

⁵⁸ *U.S. v. Calley*, 46 C.M.R. 1131 (1971), *aff'd*, 22 U.S.C.M.A. 534, 48 C.M.R. 19 (1973).

⁵⁹ Even in the trial of Adolf Eichmann where superior orders was most explicitly rejected the Court felt obliged to inquire as to Eichmann's moral guilt. Had he acted under compulsion? As an automaton? Or as the prosecution sought to prove, did he identify with the content of the orders and carry them out with enthusiasm. See *In re Eichmann*, 36 INT'L L. REP. 5,259 (1968).

⁶⁰ See, e.g., *Lafontant v. Aristide*, 844 F. Supp. 128, 140 (1994): "Congress continued head-of-state immunity even where claims are brought under the Torture Victim Protection Act".

⁶¹ Charter of the International Military Tribunal, Annex to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945. art. 7, 8 U.N.T.S. 279, reprinted in 39 AM. J. INT'L L. 257 (1945) [hereinafter Nuremberg Charter]. See also the Genocide Convention. *supra* note 26, art. IV.

⁶² See, e.g., Kelsen, *Collective and Individual Responsibility in International Law, with particular regard to the Punishment of War Criminals*, 31 CALIF. L. REV. 530 (1943).

⁶³ *In re Eichmann*, 36 INT'L L. REP. 5,46 (1968).

sovereign immunity problem is more tractable in cases where international courts sit in judgment in place of national bodies. In such cases States are no longer sitting in judgment of each other but are instead being judged by an organ of the international community.

It is clear that in an area of law so thoroughly politicised, culturally freighted and passionately punitive as war crimes there is a need for even greater protections for the accused. "Never again" contains more than one meaning when applied to the trial of Yamashita. A man cannot be executed on the basis of hearsay evidence and propaganda film, no matter what the political imperatives. As the dissenting Justice Rutledge said in *In re Yamashita*, quoting Thomas Paine: "He that would make his own liberty secure must guard even his enemy from oppression; for if he violates this duty he establishes a precedent that will reach to himself".⁶⁴

*C. Conceptual Difficulties Associated with International Criminality*⁶⁵

The problem of definition creates due process difficulties related to vagueness but is also endemic to international criminal law at a deeper conceptual level. The attempt to develop a more general notion of criminality in international law has proved troublesome given the structure of the system itself. The international legal order was traditionally conceived as the private law between equal legal persons -the equivalent of tort and contract law in municipal systems. According to this once dominant, positivistic, reading of international law, the system lacks a public law dimension because there is no public enforcement instrument and no substantive public law. International law is seen simply as the contractual relations between States. When States commit wrongs they become delictually liable to other States and not to some transcendent public administrative organ. This idea of horizontal responsibility exhausts the possibilities of punishment in the eyes of the classical scholars.⁶⁶ According to them, crime is a concept alien or unknown to such a system.

However, there are many definitions of "crime" and the distinction between civil and criminal liability is not one that can be made with much confidence even in municipal systems where the distinction has been operative for centuries. Generally, it is thought that criminal law is an expression of a community's moral sense. As such, it is public, punitive, retributive and moral in ways that civil law is not. Consequently, violations of criminal law are said to have graver social consequences for the whole society which demands, in turn, that the community acts through its public enforcement agencies to suppress these breaches.⁶⁷

Given this, the international legal order seems unsuited for a criminal role. There are at least three reasons why the notion of crime may not be readily transposed from municipal to international settings. First, there is no public system of sanction which might enforce such law. Criminal law seems, to require the presence of an Austinian sovereign to carry out its dictates. Such a public centre of power is lacking in the statist order. This position has been forcefully put by George Schwarzenberger who argues that "an international criminal law that is meant to be applied to the world powers is a contradiction in terms. It presupposes an

⁶⁴ See, THE COMPLETE WORKS OF THOMAS PAINE. 588 (Foner ed. 1945) quoted in *In re Yamashita*, 327 U.S. 1.81 (1946) (Rutledge, J., dissenting. Murphy, J., concurring).

⁶⁵ A discussion of this problem appears in McCormack & Simpson, *supra* note 9, at 12.

⁶⁶ For a very powerful defence of this voluntarist position combined with a critique of "international crime" see Weil, *Towards Relative Normativity in International Law ?*, 77 AM. J.INT'L L. 413 (1983).

⁶⁷ See, e.g., Williams, *The Definition of Crime*, 8 CURRENT LEGAL PROBLEMS 107 (1955).

international authority which is superior to States".⁶⁸ Second, international law, *pace* Austin, may be more positivistic than domestic legal orders. The moral or naturalistic orientation of much criminal law depends on a system of shared social ethics or an underlying natural law. Conversely, the international law regime is morally pluralistic and nonnatively consensual. Third, and very much associated with this point, the commission of crime often requires an element of intention or moral turpitude that States as corporate bodies may not possess. Certainly, States are less easily viewed as moral persons than human beings.⁶⁹

Whatever one thinks of these doubts, they have not proved fatal to the development of embryonic forms of criminal law within -the international system. The nomenclature, and probably the substance, of criminality has now been introduced, most notably by the Nuremberg Tribunal and. More recently, by the International Law Commission, even if these two bodies have defined crime in two radically divergent ways. However. the questions as to whom it should apply and who should enforce it remain unresolved.

Turning to the first question. there appear to be three different ways of understanding the relevant subject of international criminal law. These are reflected in the different formulations of the Nuremberg Tribunal,⁷⁰ the International Law Commission in its Draft Articles on State Responsibility⁷¹ and the International Law Commission in its Draft Code on Crimes Against the Peace and Security of Mankind.⁷²

First, international crimes may simply be illegal state acts of a particularly serious nature such as aggression. This seems to comport with the ILC's somewhat obscure and circular definition in its Draft Articles on State Responsibility Article 19(2) which defines crime as,

[a]n internationally wrongful act which results from a breach by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole.⁷³

It is important to recognise that on this view the State is the relevant juridical personality for the purpose of attributing responsibility. This is certainly in line with classical notions of responsibility but does not seem to add a great -deal to them. Responsibility still appears to exist on a private State to State basis. The alternative is to permit States to enforce international criminal law against other States on the basis of unilateral public guardianship regardless of standing or interest. Some view this as an invitation to re-establish anarchical relations among States.⁷⁴ The ILC's own view is that international crimes give rise to special responsibilities of all other States not to, for example, "recognize as legal the situation

⁶⁸ See Schwarzenberger, *The Problems of International Criminal Law*. 3 CURRENT LEGAL PROBLEMS 263 (1950) quoted in Cavicchia. *The Prospects for an International Criminal Court*, 10 DICK. J. INT'L L. 223 (1992).

⁶⁹ It is hard to imagine a State having the mens rea necessary to carry out serious crime. This is a point made by Gilbert, *The Criminal Responsibility of States*, 39 INT'L CRIM. L.Q. 345 (1990) (arguing that the idea of an international crime remains incoherent).

⁷⁰ Nuremberg Charter. *supra* note 61.

⁷¹ [1979] 2 (pt. 2) Y.B. INT'L L. COMM'N 90 and [1980] 2 (pt. 2) Y.B. INT'L L. COMM'N 14,70.

⁷² Draft Code. *supra* note 48.

⁷³ *Supra* note 71, art. 19(2). For a comprehensive analysis of this Article see Weiler, Cassese & Spinedi, INTERNATIONAL CRIMES OF STATE: A CRITICAL ANALYSIS OF THE ILC's DRAFT ARTICLE 19 ON STATE RESPONSIBILITY (1989).

⁷⁴ See Gilbert, *supra* note 69

created by such a crime. ..".⁷⁵ However, there is no duty or even right to intervene actively to prevent the commission of the crime. The better view may be that international criminality gives rise to collective action under the Security Council's Chapter VII mandate. Thus, Iraq's criminal aggression in Kuwait led to the temporary dismemberment of its territory and suspension of its full rights to political sovereignty. Sanctions on this scale and on a collective basis may ultimately be the best indicator of state criminality the system possesses.

This first version of international crime, then, imputes criminality to States and punishes the state as a corporate actor. The second and third versions concentrate on the role of the individual and seek to punish the individual as a subject of international legal regulation. In the second version, State actions deemed criminal may give rise to individual as well as state responsibility. It was this form of criminality that found favour at Nuremberg where the individual defendants were prosecuted in their capacity as state representatives. Here, we have State crimes giving rise to individual responsibility on the part of those officials who effect State policy. A large part of the ILC's Draft Code on Crimes is directed at such behaviour.⁷⁶

In the third and final version of international criminal law, we have individual acts giving rise to individual responsibility in international fora under international criminal law.⁷⁷ The State, then, is removed from the equation altogether on this view. Classically, such acts would have little relevance to international law.⁷⁸ Prosecution and punishment of individuals acting in their private capacity would normally remain a matter for the domestic courts possessing jurisdiction and custody. This third interpretation of international crime, therefore, marks a significant and unprecedented shift in the way we understand the international legal order. Yet, the International Law Commission appears to be moving towards this view in its Draft Code on Crimes by including the crimes of drug trafficking and mercenarism which are capable of being carried out by private individuals with no involvement on the part of the State.⁷⁹

The issues of definition discussed in this section (as well as others I have omitted⁸⁰) have yet to be fully resolved by the international community. The implications of state and individual criminality are enormous and bode ill for those who continue to see international law as a consensual, statist and conservative order. For consensualists international crime as a concept offers a kind of disruptive justice at best. For supporters, the development of such a system

⁷⁵ See Draft Code, *supra* note 48, art. 14 of Part Two.

⁷⁶ *Id.* See for example, art. 16 (Threat of Aggression): "An individual who as a leader or organizer commits or orders the commission of a threat of aggression shall, on conviction thereof, be sentenced [to. ..]."

⁷⁷ International crimes have of course, been suppressed by municipal courts in furtherance of international treaty obligations. See e.g., Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, *adopted* Dec. 19, 1988, U.N. Doc. E/CONF. 82/15 1988, *reprinted in* 28 I.L.M. 493.

⁷⁸ The obvious exceptions being slavery and piracy which were nevertheless suppressed in national courts. See also conventions which call for the domestic suppression of international crimes, e.g. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, G.A. Res. 39/46, 46 U.N. GAOR (93d Mtg), U.N. Doc. A/RES/39/46 (requiring States to enact legislation to punish perpetrators of torture).

⁷⁹ See Draft Code, *supra* note 48, art. 23 (Recruitment, Use, Financing and Training of Mercenaries), and art. 25 (Illicit Traffic in Narcotic Drugs). See also B. Ferencz, *An International Code and Court: Where They Stand and Where They're Going*, 30 COLUM. J. TRANSNAT'L L. 375 (1992); S. Gardner, *A Global Initiative to Deter Drug Trafficking: Will Internationalizing the Drug War Work?*, 7 TEMP. INT'L & COMP. L.J. 287 (1993) and McCormack & Simpson, *supra* note 9. See also, e.g., Draft Code, *supra* note 48, arts. 23 and 25.

⁸⁰ See, e.g., the relationship between norms of *jus cogens* and obligations *erga omnes* and international crimes generally.

represents a moral advance for the international legal order by beginning the process by which individuals can be made responsible for massive violations of humanitarian law.⁸¹

D. War Crimes and History: Ideological Dimensions

The cultural, historical and ideological uses and dimensions of war crimes trials offer, perhaps, the richest opportunities for analysis and critique. This section will merely indicate the nature of some of these issues. I want to focus, in particular, on the didactic, legitimization and dissident functions of war crimes proceedings and their complex relationship to history generally.

Teaching History'

Alice Kaplan in her introduction to Alain Finkelkraut's book on the Barbie trial, *Remembering in Vain*, describes the trial as a "pedagogical event"⁸² which she claims "resuscitated history and made it into a current event".⁸³ Finkelkraut, himself, remarks that the "historical past [was] transmuted into a judicial present".⁸⁴ This indeed is a continual and relentless theme of all war crimes commentary and rhetoric. Robert G. Storey, executive trial counsel at Nuremberg, spoke of the need to make "a record of the Hitler regime which - would withstand the test of history".⁸⁵ Before the Eichmann trial began, Israeli Prime Minister Ben-Gurion reminded Israelis that "it is necessary that our youth remember what happened to the Jewish people. We want them to know the most tragic facts of our history".⁸⁶ The District Court, itself, acknowledged, "the great educational values implicit in the very holding of a trial",⁸⁷ The Australian war crimes legislation came into force with Senators speaking of the need to tell the story of the holocaust to future generations.⁸⁸ Most recently in advocating a war crimes trial in the Persian Gulf Anthony D' Amato warned the Congressional Committee on Foreign Relations that "a war crimes trial should not be today's news forgotten tomorrow. Rather, it should be one of the most fundamental lessons in civics that can be taught to the people of the world, especially the young people".⁸⁹

The purpose of the typical war crimes trial is as much to enlighten the present-day innocents as it is to punish the historical criminals. The war crimes trial, then, is exemplary performance, classical retribution and historical vindication all at once.⁹⁰ The problems occur when art, history and law begin to encroach on each other's territory. In particular, the commemorative function of a war crimes trial is rarely entirely consistent with its judicial

⁸¹ See, e.g., Hobe & Tietje, *Government Criminality and Human Rights*, 37 GER. Y.B.INT'L L. 386, 406-21 (1994).

⁸² See Finkelkraut, *supra* note 35, at xvi.

⁸³ *Id.* at xvii.

⁸⁴ *Id.* At 2.

⁸⁵ Arendt, *supra* note 3, at 252

⁸⁶ *Id.* At 10

⁸⁷ *Id.* At 19

⁸⁸ Australia. Parliamentary Debates. Representatives, Vol. H. Of R, 158, 23 Nov-Dec 1987. 35th Print. 1st Sess, 7th Period. Speaker: Mr Reith. War Crimes Amendment Bill. 1987. 2nd Reading -26th Nov 1987, 2735: "If we are to learn from the lessons of those times we must ensure that justice, which is the corner-stone of our democracy, is not tainted"

⁸⁹ See *Persian Gulf' The Question of War Crimes. 1991: Hearings before the Committee on Foreign Relations*, 102d Cong.. 1st Sess. 17-20 (1991) (statement by Professor Anthony D' Amato)

⁹⁰ This idea is explored in a fascinating article by Edward Morgan. See E. Morgan. *Retributory Theatre*, 3 AM. U.J.INT'L L. & POL'y I (1989). See also K. Reid, *supra* note 35.

purposes. This tension between the production of history and the maintenance of judicial propriety is a recurrent motif of war crimes proceedings. The relocation or displacement of history into legal settings has a distorting effect on the story. Law must discriminate between relevant history and irrelevant or inadmissible history. Criminal proceedings tend to focus on the accused and regard evidence unconcerned with this individual as marginal or irrelevant. But for the story-teller the production of history or the story of an event like the Holocaust is dedicated to a different mission.

For example in the Eichmann trial, the prosecution (and the State) saw the case as an opportunity to chronicle the Holocaust and the suffering of its remaining witnesses. The judges were reluctant to abbreviate the testimony of these survivors, and even the defence failed to object when obviously extraneous evidence was presented. Instead, a picture of the Holocaust was offered for the education of the people, of Israel and the international community. It was this tendency which so enraged Barbie's lawyer on several occasions and produced the mountains of reportage on the Nuremberg trials.⁹¹ History is (sometimes) about remembering where law is about resolving or vindicating and even forgetting. In the Eichmann trial, for example, the judges were under a duty to *forget* the facts of the Holocaust and their knowledge of Eichmann.⁹² It seems that war crimes trials can only meet the requirement of legality if the crimes themselves are extinguished from memory prior to the trial. The trial, as it were, retells the story from scratch.

The relationship of the war crimes trial to history is deeply problematic at another level.⁹³ The performance of a war crimes trial is both situated in a history and yet seeks to transcend it. The trial confines a historical moment in its abnormality but wishes to make its lesson universal and a temporal. The convening of a war crimes trial must take place in conditions of surprise rather than routine. It cannot be admitted that history is the history of crimes against humanity. Instead, the history of genocide must be viewed as an aberrant and unique series of disparate events detached from the progress of history itself. One writer, for example, discussing war crimes in the former Yugoslavia is careful to maintain this sense of surprise and, in turn, distance war crimes from the progress of Western civilisation by consigning them to "a dark and seemingly remote past" only to have them "once again haunt the conscience of humankind".⁹⁴ But humankind has been "haunted" in the recent past by 187 million dead as result of human decision since 1900.⁹⁵ In the end, the trial of a war criminal is undoubtedly an act of remembrance but it is also an attempt at closure or resolution and, as we shall see, an inducement to extinguish other crimes of history .

Legitimation

The legitimation function of a war crimes trial is obviously closely linked to that of its pedagogical function but the lesson is different. War crimes trials are edifying in at least two

⁹¹ The Court speaks at one point of the need to exclude foreign material and yet also permit an exhaustive account of the Holocaust. See *In re Eichmann*, 36 INT'L. REF. 5,18-19 (1968).

⁹² "It is very true that the memory of the Holocaust shakes every Jew to the depths of his being, but once this case has been brought before us it is our duty to subdue even these emotions as we sit in judgment": *id.* at 17.

⁹³ This relationship is explored in Alain Finkielkraut's incisive account of the Barbie Trial. See *supra* note 35. See also K. Reid. *supra* note 35.

⁹⁴ Akhavam, *Punishing War Crimes in the Former Yugoslavia: A Critical Juncture for The New World Order*, 15 HUM. RTS. Q. 262-89 (1993).

⁹⁵ This figure is an estimate taken from Brzezinski, *OUT OF CONTROL: GLOBAL TURMOIL ON THE EVE OF THE 21ST CENTURY*, (1993).

senses. First, they narrate a historical episode in which good and evil are clearly identified and delineated. Indeed, very often, one of the purposes of the trial is to associate the prosecuting States with absolute good just as surely as the accused become synonymous with ultimate evil. Louis Rene Beres, in an article calling for the punishment of, as yet unconvicted, Iraqis, remarks that "the Nuremberg obligations reflect perfect convergence of International Law and the enduring foundations of our American Republic".⁹⁶ Similarly, Payam Akhavam regrets that the atrocities in the Balkans, "puts into question the most fundamental Norms of civilized human behaviour which have been painstakingly won and reaffirmed since the Second World War".⁹⁷ These quotes are essentially a historical in the sense that they remove from the frame a sequence of crimes stretching unbroken from Nuremberg to the Hague and implicating each of the major powers.

The legitimization strategies of the State in the Eichmann and Barbie trials illustrate the complexity and precariousness of this process by which good and evil are sharply defined. David Ben-Gurion, the Israeli Prime Minister at the time of the Eichmann trial saw the Eichmann proceedings as part pedagogy, part legitimization. The trial was a history lesson to Israeli youth, a story about the tragedy that had befallen the Jewish people of Europe in the Nazi period. However, for Ben-Gurion, there were other functions. First, the trial was an accusation against the Western nations who had failed to save the Jews from the Final Solution or give them refuge prior to its enactment. Second, the trial, by retelling the story of the Holocaust, reaffirmed the legitimacy of Israel's existence and any measures the State deemed necessary to ensure that continued existence. Third, and most controversially, Ben-Gurion's statements prior to the trial indicate that he intended the lesson to be one salutary not just to Jews, Israelis and Europeans but also to Arabs: "They should be taught the lesson that Jews are not sheep to be slaughtered but a people who can hit back -as Jews did in the [1948] War of Independence".⁹⁸ Hannah Arendt argues that Ben-Gurion was attempting to establish through the trial a link between the Jews' Nazi oppressors and Israel's contemporary enemies. For a period in the history of the Israeli state, Eichmann would come to symbolise not just European Nazism but Palestinian terrorism and Arab anti-Zionism.⁹⁹

In the trial of Klaus Barbie, the legitimization process is almost impossibly opaque. At its most culturally explicit, the Barbie prosecution was intended simply to present Barbie as the Nazi embodiment of evil and a moral counter-point to French humanism. However, the trial was also intended to celebrate the struggle of the French nation against the Nazis and atone for the collaborationist history of the Vichy Regime. More specifically, and by no means compatible with this story, there was the decision to narrate the history of the French resistance as a tale of leftist/socialist struggle at a time when Francois Mitterand was the first Socialist President of the Fifth Republic. Further complicating the motives of the actors was the fact that Barbie was implicated in indirectly assisting the killing of Che Guevara whose companion at the time of his capture was Regis Debray, Mitterand's adviser at the time of the trial. Straightforward revenge cannot, then, be dismissed as a possible impetus for the trial. The trial was important not just for France as a possible legitimization tool, but also for Israel. The Israeli Ambassador to France, Ovidiah Sofer, did not miss the opportunity to recall Ben Gurion when he said, on the steps of the Court house, "terrorists are today's Nazis and

⁹⁶ Beres, *Iraqi Crimes and International Law: The Imperative to Punish*. 21 DENV. J. INT'L L. 335,347 (1993).

⁹⁷ Akhavam, *supra* note 94, at 264.

⁹⁸ E. Young-Bruehl, *supra* note 4, at 341.

⁹⁹ See H. Arendt, *supra* note 3, at 9-12. See also K. Reid, *supra* note 35 at Part III.

S.S."¹⁰⁰ Guyora Binder, in a complex and iconoclastic assessment of the Barbie trial shows how these various strategies were not only at odds with each other but came into conflict with the Jewish narrative of their role in the Barbie saga.¹⁰¹

Second, however, these trials are intended to legitimate or, as I have argued above, exculpate the culture which tries the criminal.¹⁰² The highly disruptive tactics of Jacques Vergès, Barbie's defence counsel which included accusing France of having committed crimes against humanity in Algeria gave rise to this legitimisation strategy. As Binder states, "[e]very noble ideal attributed to France in such a trial served to distinguish France's repression of Algeria as mere crimes of war because, after all, the French were not Nazis".¹⁰³ Perhaps all war crimes trials are saying this of the prosecuting state.

It is important to recognise that exculpation may not be the primary purpose of the trial, will rarely be a stated purpose and may not even be an ancillary intention. Nevertheless there is a sense that war crimes trials, in revealing to us what are war crimes, also tell us that other acts are not in this category. In this way, Nuremberg tells us that Nagasaki was not a war crime and that the Soviet invasion of Finland in 1941 was not aggression. Similarly, a message of the Barbie trial is that torture in Algeria is not a war crime or that Vichy France was not as anti-semitic as Nazi Germany. The Australian legislation in *Polyukhovich* excludes Indonesian brutalities in East Timor from its definition of war crimes. Earlier, the singular nature of the Calley case implies that U.S. military action in Vietnam was generally legal; and, more recently, the proposals to try Saddam Hussein imply that the Allied bombing of electrical facilities in Iraq complied with the laws of war.

These are not merely rhetorical functions. There is a growing body of scholarship which links the conduct of the Gulf War to the sense that it was a just war and that the adversaries were war criminals.¹⁰⁴ This politics of principle resulted in a war that was infinitely more brutal than it would otherwise have been had pragmatism rather than morality been invoked in its defence. This apparent need to equate war crimes trials with moral action is of course interesting. In the case of the tribunal for the Former Yugoslavia, political impotence and diplomatic incompetence is at least partially obscured by this decisive moral action. The failure to act politically can be remade as conscious decision to act morally. Paul Szasz uses this language when he describes the attitude of the co-chairs of the Council for Security and Cooperation in Europe on a possible court claiming that theirs was a "deeply held conviction that the solution to the Yugoslav crises must be found at the highest moral level".¹⁰⁵ However, if Nuremberg and Tokyo were attempts to vindicate the superiority of Western civilisation and the conduct of the Allied war the purpose of the trials in Rwanda and for the Former Yugoslavia may be less ambitious. Here, the West and the United Nations may simply want, to salvage some scrap of dignity from what remains of Western prestige.

¹⁰⁰ Binder, *supra* note 10, at 1343. Note one of the main arguments of Binder's article is that Jewish national identity has been impoverished by its obsession with the Nazi period and the creation of a culture of historical victimhood. This legitimisation function backfires because it tends to suggest that the Holocaust destroyed the idea of a Jewish cultural identity in the absence of genocide. *See id.* at 1345.

¹⁰¹ *See id.* at 1372.

¹⁰² René Giraud sees this as a process of identifying scapegoats in order to affirm group identity. *See* R. Giraud, *Violence and the Sacred* (1972), and Binder, *supra* note 10, at 1371. *See also* K. Reid, *supra* note 35.

¹⁰³ Binder, *supra* note 10, at 1339.

¹⁰⁴ *See* af Jochnick & Normand, *supra* note 41.

¹⁰⁵ Szasz, *The International Conference on Yugoslavia and the War Crimes Issue*, PROC. AM. SOC. INT'L L. 29 (1993).

Our reliance on war crimes trials may be misplaced. War crimes trials are accepted as authoritative interpretations of the laws of war but these interpretations may not necessarily humanise war itself. In an insightful pair of articles for the *Harvard Journal of International Law*, Chris af Jochnick and Roger Normand demonstrate how the laws of war have served to justify acts of violence as much as to prevent them.¹⁰⁶ The application of these laws at Nuremberg, for example, served to legitimise both German and Allied bombings directed at civilian populations by failing to define such acts as war crimes. The Nuremberg Tribunal vested legality on military tactics which had previously been declared illegal by the laws of war. The consequences of this process can be seen in the reaction of international lawyers to the Gulf War bombings which led to the deaths of thousands of Iraqi citizens. Here, there was widespread acceptance that the Coalition's air bombardment of Iraq had fallen squarely within the laws of war. No greater indictment of our moral descent in this area of law can be found than in a comparison between the reactions of the world community to the destruction of Guernica in 1937 and Baghdad in 1991, with horror displaced by complacency and acceptance.¹⁰⁷

As late as 1939, Neville Chamberlain could still remind the world that, "it is against international law to bomb civilians as such".¹⁰⁸ It is hard to imagine this language being employed today.¹⁰⁹

In one sense, academics, for all their good intentions, have participated in this legitimization process by loyally proposing war crimes trials in cases where obvious enemies are the intended defendants but remaining silent where the crimes (no less abhorrent in content) are committed by ideological friends. The enormous output of articles, draft indictments and proposals in the case of the Second Gulf War can be contrasted here with the remarkable absence of such industry in the case of crimes committed in Guatemala, East Timor, South Africa or El Salvador.¹¹⁰ There is a stock response to this complaint which argues that while

¹⁰⁶ af Jochnick & Normand, *supra* note 41. and *The Legitimation of Violence: A Critical History of the Laws of War*, 35 HARV.INT'L L.J. 49-95 (1994). For a view that seems to suggest that the laws of war as applied to the aerial destruction of civilian populations have mainly rhetorical functions. see Schachter. *The UN Law in the Gulf Conflict*. 85 AM. J. INT'L L. 452, 465-467 (1991).

¹⁰⁷ Though the ground was being prepared as early as 1921. Then. military planners were conspiring to undermine the humanizing influence of the laws of war and the post-WWI war crimes trials. The British Rules of Bombardment is most notable for its cynicism in the face of this 'progress': "It may be thought better, in view of the allegations of "barbarity" of air attack to preserve appearances by formulating milder rules and by still nominally confining bombardment to targets which are strictly military in character. ..to avoid emphasizing the truth that air warfare has made such restrictions obsolete and impossible. It may be some time until another war occurs and meanwhile the public may be educated as to the meaning of air power", See Charles Townsend. "Civilization and Frightfulness: Air Control in the Middle-East between the Wars." in C. Wrigley ed. (1986) quoted by E. Hobsbawm, *THE AGE OF EXTREMES* (1994) at 21.

¹⁰⁸ Schachter, *supra* note 106, at 86.

¹⁰⁹ See, e.g., id. A late 19th Century example of this was Frederick Engels outrage at the explosion of an IRA bomb at Westminster Hall on the basis that such action. even if revolutionary in nature, was unprincipled because it failed to distinguish between combatants and non-combatants. See E. Hobsbawm. *supra* note 109 at 13.

¹¹⁰ See, e.g., Beres, *Iraqi Crimes and International Law: The Imperative to Punish*, 21 DENY. J. INT'L L. & POL'Y 335 (1993); Beres, *Prosecuting Iraqi Gulf War Crimes: Allied and Israeli Rights under International Law*, 16 HASTINGS INT'L & COMP. L. REV. 41 (1992); Mayk, *Crimes Against Peace: An Analysis of the Nuremberg Prohibition on Planning and Waging Aggressive War and its Applicability to the Gulf War*, 24 RUTGERS L.J. 253 (1992); *Symposium on the Gulf War*, 66 ST. JOHN'S L. REV. 559 (1992); *Symposium: War and the Law*, 23 U. TOLEDO L. REV. 227 (1992); Greenberg, *Creating an International Criminal Court*, 10 BOSTON U. INT'L L.J. 119 (1992); Williams, *The Iraqi-Kuwait Crisis: An Analysis of the Unresolved Issue*

international criminal law tends to be applied selectively it is important to begin somewhere. The problem is that too often beginnings have not been followed by anything and after a while this argument begins to sound like bad faith. Needless to say, the great majority of writers and commentators arguing for war crimes prosecutions in the case of the Gulf War were careful not to suggest that these might be brought against the Allies.¹¹¹ Yet, former U.S. Attorney-General, Ramsey Clark has documented in some detail the numerous crimes carried out by Coalition for the Gulf.¹¹²

War crimes trials do not necessarily play a benign role in the development of the laws of war and may, in fact, sometimes inhibit or retard the progress of the humanitarian spirit in warfare. The distinction between combatant and non-combatant that provides us with the clearest moral basis for this distinction has been blurred by a half -century of total war against civilians in various regions of the world. It is the absence of even a suggestion that such actions constitute grave breaches, punishable through war crimes prosecutions, that creates the environment in which these acts can be undertaken without moral or legal inquiry. The law and discourse of war crimes may well serve to legitimate this process.

Dissidence

Very often, however, the authorised version of a war crimes trial has its dissident narrative or "discordant notes".¹¹³ Sometimes these are supplied by individuals such as Verges in the Barbie trial or Arendt in the case of Eichmann's trial. In other cases they are the work of historical analogy. One might say that the official story of Nuremberg has its dissenting presences in Dresden and Vietnam. The prosecution of Polyukhovich in Australia is haunted by the phantoms of earlier genocide in Australia itself and nearby in East Timor. Tokyo has its Nagasaki and the trial of John Demjanjuk, its Sabra and Chatila.

The proposed legitimization functions can backfire more explicitly when the participants in trials invoke these competing or dissident ideologies to challenge the dominant story of the case. In the Barbie trial, proceedings intended to document the superiority of Western liberal culture over Nazi totalitarianism were converted by a clever, opportunistic defence counsel into a conflict between Third World anti-colonialism and French imperialism.¹¹⁴ This counter-narrative challenged and eventually threatened to undo the main thread of the story. The possible lessons of the trial could not be contained in the face of this strategy. Barbie's defence attorney, Jacques Verges, attempted to undermine the prosecution strategy by suggesting painful analogies between Nazi rule in France and the French occupation of Algeria. As a consequence, the authorised historical lessons were tainted by stories of French collaboration in occupied France and torture in occupied Algeria. This tactic was so successful that it led the former resistance leader and National Assembly President, Jacques

of *War Crimes Liability*', 19 BROOKLYN J. INT'L L. 385 (1992); *Draft Indictment of Saddam Hussein*, 20 DENY. J. INT'L L. 91 (1991).

¹¹¹ See examples, *id.* The interesting aspect of such proposals is not that they focus on the crimes of the Iraqis but that they do not even feel the need to justify the destruction from the air of a nation's civilian infrastructure.

¹¹² R. Clark, *THE FIRE THIS TIME: U.S. WAR CRIMES IN THE GULF* (1994); R. Clark et al., *WAR CRIMES: A REPORT ON UNITED STATES WAR CRIMES AGAINST IRAQ* (1992).

¹¹³ This was the phrase used by the District Court in the Eichmann trial to describe elements of Dr Servatius's concluding speech to the bench on behalf of the defence: *In re Eichmann*, 36 INT'L L. REP. 5,21 (1968).

¹¹⁴ Indeed Verges went further still in implicating the "crimes" of the Israeli state in his defence of Barbie. For an excellent analysis of the case see Reid, *supra* note 35.

Chaban-Delmes to declare, "France will be acquitted before the Tribunal of the World",¹¹⁵ as if Barbie were no longer the defendant-. Similarly, the Eichmann trial produced a dissident text, that of Hannah Arendt's, in which the role of the Jewish leadership in wartime Europe and the various purposes behind bringing Eichmann to trial are revealed. These embarrassing disclosures and polemics were powerful and necessary antidotes to the official version of the trial.¹¹⁶

Invocations of universal justice themselves attempt to obscure the counter-narrative which threatens the coherence of these invocations. In the case of Barbie, Guyora Binder notes that the French reaffirmed an amnesty for all French military infractions committed in the Algerian war only days before enacting a statute declaring crimes against humanity imprescriptible under the Statute of Limitations. Similarly, when President Menem released files on known Nazi war criminals who had fled to Argentina after the Second World War in 1992, it was quickly pointed out that he had two years previously granted a pardon to the military elites responsible for the brutal dirty war against the Argentinian population.¹¹⁷ Years after the Eichmann trial had ended, the lessons drawn from it by Hannah Arendt were used in opposition to the bureaucratised killings of the Vietnam War.¹¹⁸

The Hague War Crimes trials for the Former Yugoslavia are threatened by similarly dissident voices. The negotiation process and the trial process are on a collision course. Men whose participation is vital to the success of the peace talks are now being implicated in the commission of war crimes.¹¹⁹ Meanwhile, the dissident story that international law has proved irrelevant in the conflict continues to threaten the authorised voice, which affirms the renewed significance of international *criminal law*.

The tension between the judicial, didactic, legitimisation and dissident functions of war crimes trials is likely to be an ongoing theme in the development of international criminal law.¹²⁰ Equally, the conflict between the universalist and local modes must inevitably continue in the absence of more systematic efforts at regulation. War crimes trials commemorate singular, incommensurable evils in the style of universal application. The tension between these forms is often replicated in the position of prosecution and defence, the former emphasising the singular nature of the criminal acts, the defence engaging in comparative genocide.

In this chapter I have focussed on the many justifications offered for holding war crimes trials or establishing an international criminal regime. These include justifications on the basis of punishment and justice (Nuremberg/Tokyo), retribution and deterrence (Eichmann), historical education (Demjanjuk) and peace and security (the Former Yugoslavia). These underlying rationales have been analysed in the light of their historical context, their capacity

¹¹⁵ See Binder, *supra* note 10, at 1343. The logical position one reaches by adopting the Verges view is to describe every crime as a crime against humanity and it is surely one of the unfortunate side-effects of the war crimes visibility that the Nuremberg language has been severely debased by careless usage.

¹¹⁶ See H. Arendt, *supra* note 3. Ironically, Arendt's work has itself virtually replaced the official version as the accepted story of the trial.

¹¹⁷ See Reid, *supra* note 35, at n.346.

¹¹⁸ "Think of all the men who engineer that war [in Vietnam], those who study the maps, give the commands, push the buttons, and tally the dead: Bundy, McNamara ...the President himself. They are not moral monsters. ..They are all liberals". Speech by Carl Oglesby at the 1965 S.A.N.E. march on Washington, *quoted in* E. Young-Bruehl, *supra* note 4 at 360.

¹¹⁹ See N.Y. Times Report on Cedomir Mihailovic, Apr. 13, 1995, at 1, 11.

¹²⁰ In the words of Jacques Verges, speaking of the Court in the Barbie trial, "You are not here to condemn an ideology. ..you are here to judge a man". See Binder, *supra* note 10, at 1339.

to explain the meaning of the trials as well as the influence they have on the shape of the trials. It has been suggested that the reasons given for holding war crimes trials only partially explain their meaning in the culture and that these trials have an effect or significance beyond the trial itself and beyond traditional conceptions of justice or punishment. I might equally have chosen to focus on functions brought out by other trials, e.g. law as vindication (Nuremberg), law as revenge (Justice Pal's view of the Tokyo Trials¹²¹), law as restoration and deterrence (War Crimes Tribunal for the former Yugoslavia), law as theatre,¹²² and law as nazification (the Soviet Show trials).

In the concluding section of this essay, I ask whether justice, itself, has any role in the law of war crimes. More generally, can international criminal law be salvaged from the various critiques I have presented?

CONCLUSION: PRIVILEGED TO JUDGE?

War crimes are committed every day. Those largest in scale have cast a ghastly spectre over our century. Whole races have been defined by their experience of genocide or crimes against humanity. Meanwhile, national and international laws designed to punish these acts are invoked only when there exists an unusually propitious constellation of political factors. In international law this has only resulted twice in major initiatives: in 1945 at Nuremberg and Tokyo and in 1993 in the Former Yugoslavia.¹²³ Domestic laws have been applied in an irregular and often dubious manner to a very small number of suspected war criminals -all of whom committed their crimes in the European sector during World War Two. Municipal tribunals have proved unsatisfactory, subjective and selective in their definitions of war crimes and crimes against humanity,¹²⁴ while the task of identification and apprehension has often been undertaken by investigators acting in their personal capacity. The absence of enforcement is perhaps less surprising than the lack of acknowledgment that some crimes have taken place at all. While many commentators and lawyers in the West have lamented the absence of war crimes prosecutions in Cambodia and Iraq, the record is less impressive where atrocities are carried out by ideological allies. The outpouring of indignation has been selective at best.

An international enforcement mechanism may be the preferable strategy to cure this defect in the system. However, only some recognition of the limitations of international criminal law will ensure it even a modicum of success. Too often, each new development has been hailed as the harbinger of justice and global harmony. The establishment of a war crimes trial often coincides with the commitment to a new world order as if the trial, itself, will provide the moral and legal impetus to propel us, properly cleansed, into the new order. It is important to be modest about the potential of war crimes trials and international criminal law generally.

¹²¹ See Kopelman, *supra* note 42.

¹²² Morgan, *supra* note 42, and sometimes comedy, too, "The greatest political criminals must be exposed and exposed especially to laughter". See B. Brecht, *THE RESISTIBLE RISE OF ARTURO UI: A PARABLE PLAY* (1976).

¹²³ I have included the Rwandan War Crimes Tribunal as part of the 1993 initiative since it so obviously grew out of it and the tribunal is the same in both cases. Nuremberg obviously spawned a number of war crimes trials under the Control Council Law in post-war Germany. These assertions of jurisdiction were, however, broadly speaking territorial and national rather than international with courts deriving their jurisdiction from the Allied powers surrogate sovereignty over Germany.

¹²⁴ See, e.g., Bridges, *The International Criminal Court*, in *INTERNATIONAL COURTS FOR THE TWENTY-FIRST CENTURY* (Janis ed. 1992).

The level of compliance with human rights law or international humanitarian law (even in its present, imperfect form) is unlikely to be transformed overnight by a new international criminal law regime.

Between 1945 and 1993, the national and particular appeared to prevail over the international and universal. War crimes trials were held in municipal courts under domestic legislation. It was only in these national contexts that the political will could be found to convene such proceedings. And, yet, there is a continuing sense that national legal systems are poorly equipped and inappropriate fora for such trials. Indeed, impartiality has come to be equated with the international. There is a sense that the international domain will be untainted by the biases and partialities of the municipal sphere. So, history is again turning to the international tribunal as a means of vindicating a universal notion of justice and global humanism. However, in the light of Nuremberg and Tokyo, there is no guarantee that the international or cosmopolitan will necessarily be free of the preferences, prejudices and biases of the national.

Nevertheless, and despite the many doubts expressed in this chapter, international war crimes trials maybe Justified when they take place in conditions of fairness, and when they are legitimised by claims to justice rather than political utility or expediency. This chapter has been an argument against the complacent assumptions that the history of war crimes trials is an edifying one and that future trials will necessarily be exercises in justice. However, it is not an argument against the idea of international criminal law itself. An independent international criminal court has the potential to make abstract justice concrete. The trial of those indicted for war crimes and crimes against humanity may also help us think historically by universalising the experience of suffering. It is obvious that recent history, if it tells us anything, warns us that we forget at our peril. The object of a functioning international criminal court, and indeed, an *ad hoc* tribunal, is not to prevent history from repeating itself (we are, after all, condemned to repetitious exercises of violence in a world of sovereign States), but rather to tell us when we do. There is a need to convert the current interest in war crimes prosecution into a methodical and systematic judicial framework to replace efforts at a national and international level. The Tribunal for the Former Yugoslavia can either continue an old tradition of systemic bias or inaugurate a new tradition in which war crimes are prosecuted regularly, consistently and fairly. It is fitting, surely, that crimes against humanity should be prosecuted and tried in the courts of humanity.¹²⁵

War crimes trials may ultimately be our judgment on history, but history will also judge both the conduct of the trials and our readiness to apply international criminal law universally, consistently and systematically. Hannah Arendt and Primo Levi speak of law's promise and law's paralysis –its capacity to tell stories and its failure to do so. Too often when we have been privileged to judge, there has been instead an urbane turning away.

¹²⁵ As Finkelkraut notes, "The very monstrousness of the events is minimized before a tribunal that represents one nation only": Finkelkraut, *supra* note 35, at 10.

The new International Criminal Court
A preliminary assessment
by Marie-Claude Roberge

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This article reflects the views of the author and not necessarily those of the ICRC.

After years of relentless effort and five weeks of intense and difficult negotiations, the Statute of the International Criminal Court (ICC) was adopted and opened for signature in Rome on 17 July 1998. This historic event represents a major step forward in the battle against impunity and towards better respect for international humanitarian law. For too long it has been possible to commit atrocities with total impunity, a situation which has given perpetrators *carte blanche* to continue such practices. The system of repression established by international law clearly has its shortcomings, and the time has come to adopt new rules and set up new institutions to ensure the effective prosecution of international crimes. A criminal court, whether at the national or international level, does not put a stop to crime, but it may serve as a deterrent and, consequently, may help reduce the number of victims. The results achieved in Rome should thus be welcomed, in the hope that the new Court will be able to discharge its mandate to the full.

The purpose of this article is to offer a preliminary assessment of the outcome of the Rome Conference in the light of existing international humanitarian law and the ICRC's activities in behalf of war victims.

The ICRC is, of course, intensively involved in conducting relief and protection operations in the midst of armed conflicts. Moreover, it has a mandate conferred on it by the States party to the 1949 Geneva Conventions to work towards greater respect for international humanitarian law on the part of all those under an obligation to comply with it, and to encourage its development. Accordingly, the ICRC welcomes all steps taken with a view to meeting the obligations arising under humanitarian law, whether preventive activities such as education and training or measures of repression. Through its Advisory Service the ICRC provides States with technical assistance for the adoption of legislation necessary for the investigation and prosecution of suspected war criminals, as required by the Geneva Conventions.

For this reason, representatives of the ICRC took an active part in the negotiations conducted in New York and Rome on the establishment of an international criminal court. They made statements before the Preparatory Committee (PrepCom), the United Nations General Assembly and the Rome Diplomatic Conference on matters directly linked to the ICRC's mandate to act as guardian of international humanitarian law, and submitted a working paper at the February 1997 meeting of the PrepCom listing the war crimes the ICRC considered should come under the jurisdiction of the Court. Subsequently, a written commentary was prepared to explain and substantiate the structure and content of this working paper. The ICRC also prepared a document entitled "State consent regime vs. universal jurisdiction" [1], which set out in point form the precedents and developments which led to recognition of the principle of universal jurisdiction over war crimes, crimes against humanity and genocide, thus making a concrete contribution to the negotiations.

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A first assessment of the Statute adopted by the Rome Conference

At first glance, the results of the Rome Conference are positive. There can be no doubt that the adoption of the Statute of the International Criminal Court is a milestone in the history of international humanitarian law and makes a decisive contribution to its implementation. However, it is important to look beyond this overall assessment and to examine more closely the results obtained in Rome in the light of the concerns expressed in the ICRC's position paper, since not all of these were addressed [2]. Accordingly, the present assessment of the Statute will concentrate on the definition of war crimes, including the proposal to establish a threshold in that respect, the ICC's automatic jurisdiction, and the role of its Prosecutor.

Jurisdiction of the ICC over war crimes committed in both international and non-international armed conflicts

Although not all serious violations of international humanitarian law appear on the list of war crimes given in Article 8, it does contain a large number of offences [3]. The major accomplishment in this regard is certainly the inclusion — despite some resistance — of a paragraph on war crimes committed during non-international armed conflicts.

As regards particular offences, it is worth noting that the Statute specifies rape, sexual slavery, enforced prostitution, forced pregnancy and enforced sterilization as war crimes. Conscripting or enlisting children under the age of fifteen years into national armed forces (or, in the case of internal armed conflicts, into armed groups) or using them to participate actively in hostilities is also recognized as a war crime falling within the jurisdiction of the Court.

(a) The exclusion of some war crimes from the list adopted in Rome is regrettable [4]. To mention but a few examples, there are no provisions on unjustifiable delay in the repatriation of prisoners of war or civilians or on the launching of indiscriminate attacks affecting the civilian population or civilian objects. The provision on the use of particularly cruel weapons was kept to a minimum as it proved difficult to reach a consensus, largely because of the desire expressed by some States to see nuclear weapons included on the list of prohibited weapons and the resistance of others to such a move. Accordingly, nuclear, biological and blinding laser weapons, as well as anti-personnel mines, were omitted. The ICRC favoured the inclusion of a generic clause stating the long-standing rule regarding the prohibition of means and methods

of warfare of a nature to cause superfluous injury or unnecessary suffering, or which are inherently indiscriminate. It is hoped that the list of prohibited weapons will be extended at the first Review Conference.

(b) As regards war crimes committed during non-international armed conflicts, the Statute sadly fails to include a ban on intentionally starving the civilian population, using certain weapons or wilfully causing widespread, long-term and severe damage to the natural environment. We believe that a greater effort should be made to complete the list of war crimes during the Review Conference due to take place seven years after the Statute comes into force. This should be possible, as the number of States party to 1977 Protocols I and II additional to the Geneva Conventions (to date 151 and 143 respectively) has continued to grow and these States should have less difficulty in accepting a more comprehensive list of war crimes. [5]

(c) The question as to whether the Court should have jurisdiction only over war crimes committed on a large scale or also over single criminal acts was the subject of protracted negotiations. The Statute at present provides that the Court shall have jurisdiction in respect of war crimes “in particular” when committed as part of a plan or policy or on a large scale. In other words, a threshold was introduced, but not an exclusive one. The Court still has the authority to investigate individual criminal acts — a commendable solution.

(d) The most serious disappointment lies in a provision relating specifically to war crimes. Article 124 of the Statute provides that on becoming party to the Statute a State may declare that it does not accept the jurisdiction of the Court for a period of seven years after the entry into force of the Statute with respect to war crimes alleged to have been committed by its nationals or on its territory. This, in fact, creates a regime for war crimes which is different from that relating to other crimes within the jurisdiction of the Court, and appears to send out the message that war crimes are not as serious as the other core crimes mentioned in the Statute. However, international law already recognizes the obligation of States to prosecute war criminals, irrespective of their nationality or the place where the crime was committed. States should be encouraged not to make the above declaration and the provision should ultimately be removed by the Review Conference.

Automatic jurisdiction over the four core crimes

After intense debate, States finally agreed to accept the principle that when a State becomes party to the Statute it accepts the jurisdiction of the Court over the four core crimes: genocide, crimes against humanity, war crimes and acts of aggression. Thus the Court may exercise its jurisdiction if the State on whose territory the act or omission in question occurred, or the State of which the person being investigated or prosecuted is a national, is bound by the Statute or has accepted the jurisdiction of the Court. If, in view of the above conditions, the consent of a State which is not a party to the Statute is necessary, that State may make a declaration to the effect that it accepts the jurisdiction of the Court with respect to a particular crime.

No consent is required from a State when the Security Council refers a situation to the Prosecutor under Chapter VII of the Charter of the United Nations. The Security Council may also require that no investigation or prosecution commence or proceed for a renewable period of 12 months. This can only be done once a resolution to that effect is adopted under Chapter VII of the Charter.

It is regrettable that the proposal to give the Court automatic jurisdiction if the custodial State is bound by the Statute was not accepted. In practice, custodial States can play an important role in the prosecution of war criminals. This may be illustrated by the following imaginary scenario. A person who is suspected of having committed a war crime during an internal armed conflict on the territory of State X, and who is a national of that same country, has fled to State Y. State X is not party to the Statute and refuses to accept the ICC's jurisdiction over the suspect. In the absence of automatic jurisdiction, the Court would not be able to take action and prosecution would be possible only if the Security Council referred the situation to the Prosecutor or if State Y were willing and able to bring the suspect before its own courts [6]. Once again, only broad acceptance of the Statute by States would break the deadlock.

The issue of jurisdiction was certainly among the most difficult and important questions to be resolved. Although the outcome is positive it will not have any clear, practical impact until a large number of States has ratified the treaty, thus allowing the Court to exercise its jurisdiction whenever necessary.

An independent Prosecutor

Agreement was reached in Rome to give the Prosecutor the power to initiate *proprio motu* (on his/her own initiative) an investigation with respect to the four core crimes. Once the Prosecutor decides that there is a reasonable basis for proceeding with an investigation, he or she must submit a request to the Pre-Trial Chamber for authorization. If the Pre-Trial Chamber authorizes an investigation the Prosecutor has to notify all States Parties and States concerned. Within one month of receipt of notification a State may inform the Prosecutor that it is investigating or prosecuting the case at the national level and that the Prosecutor should therefore defer the proceedings to the State's authority. The Prosecutor may, however, decide to seek a ruling of the Court on a question of jurisdiction or admissibility.

The solution found in Rome with regard to the power of the Prosecutor to initiate proceedings reflects a compromise between States that feared having an overburdened and "politicized" Prosecutor and those that hoped an independent Prosecutor would guarantee a non-political and efficient Court. Only time will tell whether or not the supervisory role played by the Pre-Trial Chamber will permit speedy investigations.

The ICRC's role after Rome

Now that the Statute of the International Criminal Court has been adopted, a vast amount of work remains to be done before the Court will be fully established and operational, as some issues remain to be resolved. One of the tasks still to be accomplished is the drafting of an Annex to the Statute outlining the elements of the various crimes, to assist the Court in the interpretation and application of Articles 6, 7 and 8 relating to genocide, crimes against humanity and war crimes [7]. ICRC jurists will take an active part in this process, in particular with respect to the elements of war crimes.

Clearly, for the Court to be truly effective a large number of States must ratify the Statute, and the ICRC will no doubt play an important role in encouraging governments to do so. National Red Cross and Red Crescent Societies have also been invited to promote ratification of the Statute by their respective governments.

Furthermore, in the light of the principle of complementarity between the ICC and national criminal courts, efforts must be intensified to develop national legislation implementing the universal obligation to prosecute suspected war criminals wherever they may be. Despite the establishment of the ICC, States will continue to have a duty to exercise their criminal jurisdiction over persons alleged to have committed international crimes, as the Court has jurisdiction only when a suspected criminal has not been tried in a national court. This is likely to encourage States to put in place national implementation measures. In this context, the ICRC Advisory Service will continue to offer its technical assistance to States in adopting legislation necessary for the investigation and prosecution of suspected war criminals.

Concluding remarks

It is to be hoped that the new Court will make a significant contribution to improving respect for international humanitarian law and hence will help reduce the number of victims. States are invited to become party to the Statute of the International Criminal Court and to take all necessary steps to ensure that the Court will have a successful start and will function effectively.

Annex 1

Statute of the International Criminal Court

Adopted by the United Nations Diplomatic Conference
of Plenipotentiaries on the Establishment
of an International Criminal Court on 17 July 1998
(extract)

Article 8 — War crimes

1. The Court shall have jurisdiction in respect of war crimes in particular when committed as a part of a plan or policy or as part of a large-scale commission of such crimes.
2. For the purpose of this Statute, "war crimes" means:
 - (a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:
 - (i) Wilful killing;
 - (ii) Torture or inhuman treatment, including biological experiments;
 - (iii) Wilfully causing great suffering, or serious injury to body or health;
 - (iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
 - (v) Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;
 - (vi) Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;
 - (vii) Unlawful deportation or transfer or unlawful confinement;
 - (viii) Taking of hostages.
 - (b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:
 - (i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;

- (ii) Intentionally directing attacks against civilian objects, that is, objects which are not military objectives;
- (iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;
- (iv) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or 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;
- (v) Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives;
- (vi) Killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion;
- (vii) Making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury;
- (viii) The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;
- (ix) 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;
- (x) Subjecting persons who are in the power of an adverse party to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;
- (xi) Killing or wounding treacherously individuals belonging to the hostile nation or army;
- (xii) Declaring that no quarter will be given;
- (xiii) Destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war;
- (xiv) Declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party;
- (xv) Compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war;
- (xvi) Pillaging a town or place, even when taken by assault;
- (xvii) Employing poison or poisoned weapons;
- (xviii) Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;
- (xix) Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions;
- (xx) Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to this Statute,

by an amendment in accordance with the relevant provisions set forth in articles 121 and 123;

(xxi) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;

(xxii) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions;

(xxiii) Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations;

(xxiv) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;

(xxv) Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions;

(xxvi) Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.

(c) In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause:

(i) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(ii) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;

(iii) Taking of hostages;

(iv) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.

(d) Paragraph 2 (c) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.

(e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts:

(i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;

(ii) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;

(iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the law of armed conflict;

(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;

(v) Pillaging a town or place, even when taken by assault;

(vi) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions;

- (vii) Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities;
 - (viii) Ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand;
 - (ix) Killing or wounding treacherously a combatant adversary;
 - (x) Declaring that no quarter will be given;
 - (xi) Subjecting persons who are in the power of another party to the conflict to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;
 - (xii) Destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict;
- (f) Paragraph 2 (e) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. 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.

3. Nothing in paragraphs 2 (c) and (d) shall affect the responsibility of a Government to maintain or re-establish law and order in the State or to defend the unity and territorial integrity of the State, by all legitimate means.
(The text adopted on 17 July 1998 may be slightly amended.)

Annex 2

International criminal court: A reality at last

On 17 July, after years of relentless effort and five weeks of intense and sometimes arduous negotiations, the Statute of the permanent International Criminal Court was finally adopted.

The ICRC welcomes this historic event. It sincerely hopes that the Statute will allow the Court to take effective action against criminals who defy the international community and whose impunity is an invitation to crime.

It should be emphasized, however, that the Statute's substantial rules can be further improved. It is regrettable, for instance, that States becoming party to it will have the possibility to opt out, for a period of seven years, from the Court's jurisdiction over war crimes. Furthermore, war criminals who have committed crimes on the territory of States that do not adhere to the Statute or who are nationals of those States cannot be prosecuted by the Court.

It is therefore essential that a very large number of States sign and ratify this treaty, and that the Court be provided with adequate funding and high-quality staff.

The road ahead of us is still long, and war criminals must be swiftly and relentlessly prosecuted so as to ensure that the law does have a deterrent effect for the benefit of all potential victims of massacres, looting, rape and torture.

International Committee of the Red Cross

Notes:

1. These working documents can be found on the ICRC Website: www.icrc.org.
2. See *supra*, note 1.
3. For the complete list of war crimes see Article 8 of the Statute (Annex 1).
4. See Article 8, para. 2 (b) (xx) in Annex 1.
5. The effect of the exclusion of some war crimes from the list, or the departure from texts agreed upon in the 1977 Protocols, may, however, be limited. Article 10 of the Statute provides specifically that “[n]othing in this Part [which includes the definition of war crimes] shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.”
6. This would imply that the domestic legislation of State Y allows for the prosecution of a foreign national for crimes committed in a foreign country before its own courts. To date, only a limited number of States has adopted such legislation.
7. A proposal containing the elements of these crimes will be prepared by a Preparatory Commission comprising representatives of States having signed the Final Act of the Conference and of other specially invited States. A draft text is to be finalized before June 2000.

The International Criminal Tribunal for the former Yugoslavia and the Kosovo conflict

by Sonja Boelaert-Suominen

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The purpose of this article is to discuss the legal basis for the activities of the International Criminal Tribunal for the former Yugoslavia (ICTY) in relation to Kosovo. The article starts with an account of the general background against which the Tribunal was established in 1993. The events which led to the Tribunal's involvement with Kosovo in 1998/99 in particular are summarized in the second part. The third part discusses in detail the Tribunal's mandate in respect of Kosovo, and highlights some of the jurisdictional prerequisites that need to be met under various provisions of the ICTY Statute. The article ends with observations on the division of labour between the Tribunal and the judicial authorities in Kosovo.

The ICTY and the conflict in the former Yugoslavia from 1991 to 1995

Unlike the International Military Tribunals of Nuremberg and Tokyo, which were established after the defeat and surrender of the Axis countries, the ICTY was set up in 1993 at a time when the conflict in the Socialist Federal Republic of Yugoslavia (SFRY) was still ongoing. It will be recalled that the outward disintegration of the SFRY began when Slovenia and Croatia proclaimed their independence on 25 June 1991 [1]. The Yugoslav People's Army (JNA) forces moved against Slovenia on 27 June 1991. A peace agreement was reached on 8 July 1991. This was followed by fighting in Croatia, which started in July 1991 between Croatian military forces on the one hand, and the JNA, paramilitary units and the "Army of the Republic of Srpska Krajina" on the other. Major assaults on Vukovar and Dubrovnik took place before the end of 1991. Macedonia sought international recognition as an independent republic from December 1991 onwards, but because of difficulties over its name, it was not admitted to the UN until April 1993 under the provisional name of FYROM (the 'Former Yugoslav Republic of Macedonia') [2]. It is the only former Yugoslav republic that has thus far not been the scene of any fighting.

Bosnia and Herzegovina proclaimed its independence on 6 March 1992. This was challenged militarily by JNA forces and their allies who had withdrawn from Croatia. Initially, they were opposed by Croats and Muslims who fought side by side in Bosnia and Herzegovina. On 27 April 1992, Serbia and Montenegro [3] declared that they continued the legal personality of the former Yugoslavia, and would henceforth be known as the Federal Republic of Yugoslavia (FRY) [4]. In response to international pressure, the JNA ostensibly withdrew from the territory of Bosnia and Herzegovina, a process which was allegedly completed by 19 May 1992. Soon after, the erstwhile alliance between Croats and Muslims broke down and the first clashes between these two parties were reported in Central Bosnia.

In the summer of 1992, news about the establishment of concentration camps started to reach the outside world. By the end of that year, 6,000 UNPROFOR troops had been sent to Bosnia. The Vance-Owen plan was agreed in January 1993. Shortly thereafter, the ICTY was established via the mechanism of Security Council resolutions, adopted under Chapter VII of the UN Charter, as a measure aimed at restoring international peace and security [5]. Barely three months later the Security Council, by Resolution 827 (1993) of 25 May 1993, adopted a statute for the Tribunal. The first judges were elected on 17 September 1993, and the Tribunal commenced its work in The Hague on 17 November 1993. On 4 November 1994, the Tribunal issued its first indictment [6]. However, the establishment of the Tribunal failed to deter further atrocities [7]. Active hostilities in Bosnia and Herzegovina ceased only with the signing of the Dayton peace agreement in December 1995.

Since its establishment, the ICTY has become a fully-fledged international criminal institution, with the infrastructure, prosecutorial, judicial and administrative procedure necessary to the fulfilment of its mandate as set out in Security Council Resolution 827 (1993) of 25 May 1993. The Tribunal consists of three organs: the Chambers, the Office of the Prosecutor and a Registry. It now has three Trial Chambers each made up of three judges, and an Appeals Chamber, made up of five judges. It currently has a budget of nearly \$100 million and employs more than 700 staff members. [8]

The Office of the Prosecutor has a dual role: investigating violations of international humanitarian law and prosecuting cases of such violations in court. Since its inception in 1993, 91 individuals have been publicly indicted [9]. Additional undisclosed indictments may also have been confirmed [10]. A deliberate effort was made to devote resources to investigate alleged offences in an even-handed manner [11]. Of the publicly named indictees, a small number were Muslim, around fifteen were Croats and the largest number were Serbs. Up until the beginning of 1998, the investigative and prosecutorial activities of the ICTY concerned crimes committed in Croatia and in Bosnia and Herzegovina from 1991 to 1995. As will be explained in the next section, the Tribunal's public involvement in Kosovo began in 1998, when the Prosecutor established a first investigative team focusing on Kosovo.

Chronology of the ICTY's involvement in Kosovo

While the wars were being waged in Slovenia, Croatia, and Bosnia and Herzegovina, the situation in Kosovo was tense. In the mid-1990s a faction of the Kosovo Albanians formed the Kosovo Liberation Army (KLA, or UCK), which fought the Serbian police forces from mid-1996 on. The Tribunal's public focus on Kosovo can be traced back to March 1998, when the then Chief Prosecutor, Justice Louise Arbour, publicly confirmed that the territorial and temporal jurisdiction of the Tribunal covered any serious violations of international humanitarian law taking place in

Kosovo, emphasizing that she was empowered to investigate such crimes [12]. The immediate cause for this public statement was the marked intensification, from February 1998 onwards, of the conflict between the KLA and the FRY forces.

According to the Prosecutor's information at that time, a number of Kosovo Albanians and Kosovo Serbs were killed or wounded, whilst the FRY forces engaged in a campaign of shelling of predominantly Kosovo Albanian towns and villages, widespread destruction of property and expulsions of the civilian population from areas in which the KLA was active. [13]

Also in response to the intensifying conflict, the UN Security Council passed Resolution 1160 on 31 March 1998 "condemning the use of excessive force by Serbian police forces against civilians and peaceful demonstrators in Kosovo" and imposed an arms embargo on the FRY. Acting under Chapter VII of the UN Charter, the Security Council agreed that the Prosecutor should begin gathering information related to violence in Kosovo that may fall under the Tribunal's jurisdiction. The Prosecutor proceeded to request information from States and organizations about violent incidents in Kosovo. Subsequently the General Assembly, in May 1998, approved a budget request enabling the Prosecutor to recruit a team to undertake preliminary investigations. [14]

During the next six months, the ICTY conducted investigations in Kosovo against the backdrop of a steadily worsening situation. On 7 October 1998, the Belgrade authorities suddenly declared that they would no longer issue visas to the ICTY investigators whose activities the FRY considered a violation of its sovereignty.¹⁵ The Prosecutor's reaction to this refusal was firm. In a public statement she said that the jurisdiction of the Tribunal was not conditional upon the consent of the Belgrade authorities, but that it was up to the ICTY Judges to interpret such jurisdiction and for the Security Council to modify or to expand it. She forwarded a letter to President Milosevic informing him that it was her intention to resume investigations in Kosovo and to personally visit the areas where some of the alleged crimes had been committed. [16]

This was underscored by Resolution 1203 adopted on 24 October 1998, in which the Security Council called for prompt and complete investigation of all atrocities and full cooperation with the ICTY. Yet on 4 November 1998, the FRY authorities again refused [17]. In response, the Security Council passed Resolution 1207 on 17 November 1998, calling upon the authorities of the FRY and the leaders of the Kosovo Albanian community to cooperate fully in such an investigation. Meanwhile, in an attempt to defuse tensions in Kosovo, negotiations were conducted between the President of the FRY, representatives of NATO, and the Organization for Security and Co-operation in Europe (OSCE). It was agreed, in addition, that the OSCE would establish a Kosovo Verification Mission (KVM) to observe compliance on the ground and that NATO would establish an aerial surveillance mission. The establishment of the two missions was endorsed by UN Security Council Resolution 1203. On 16 October 1998 an "Agreement on the OSCE Kosovo Verification Mission" was concluded, pursuant to which "verifiers" were deployed throughout Kosovo in the autumn and winter of 1998/99. However, the deployment of OSCE verifiers failed to halt even the escalation of hostilities. In one incident, on 15 January 1999, 45 unarmed Kosovo Albanians were murdered in the village of Racak [18]. The Tribunal's Chief Prosecutor travelled to Skopje (Macedonia) with the intention of proceeding to Kosovo to investigate the reported atrocities in Racak, but was refused entry by the FRY authorities. [19]

The six-nation Contact Group established by the 1992 London Conference on the Former Yugoslavia met on 29 January. It was agreed to convene urgent negotiations between the parties to the conflict, under international mediation. These led to initial negotiations in Rambouillet, near Paris, from 6 to 23 February, followed by a second round in Paris, from 15 to 18 March. At the end of the second round of talks, the Kosovar Albanian delegation signed the proposed peace agreement, but the talks broke up without a signature from the FRY delegation. Thus, the intense peace negotiations conducted under international auspices ended in failure. On 20 March, the OSCE Kosovo Verification Mission was withdrawn from the region. On 24 March 1999, NATO began launching air strikes (Operation Allied Force) against the FRY. According to the ICTY Prosecutor, the FRY and Serbia reacted by intensifying their systematic campaign of persecutions, deportation and murder waged against the ethnic Albanians in Kosovo [20]. On 26 March 1999, the Prosecutor of the ICTY took the unusual step of addressing herself directly to President Milosevic and other senior officers, reminding them of their obligations under international law. [21]

On 22 May 1999, the ICTY issued its most significant indictment thus far, when it charged a sitting head of State and several other high-level officials of the governments of the FRY and Serbia with war crimes and crimes against humanity in relation to the conflict in Kosovo.²² According to an announcement made on 27 May 1999 by the ICTY Chief Prosecutor, an indictment [23] and arrest warrant [24] had been issued against five individuals: Slobodan Milosevic, the President of the FRY, Milan Milutinovic, the President of Serbia, Nikola Sainovic, Deputy Prime Minister of the FRY, Dragoljub Ojdanic, Chief of Staff of the Yugoslav Army and Vlatko Stojiljkovic, Minister of Internal Affairs of Serbia. This indictment and the ensuing arrest warrant are notable on several counts. The indictment is the first in the history of this Tribunal to charge a head of State during an ongoing armed conflict with the commission of serious violations of international humanitarian law. Furthermore, the indictment and the arrest warrants were sent simultaneously to the Federal Minister of Justice of the FRY, to all UN member States, and to Switzerland [25]. In an equally unprecedented move, the United Nations member States were also ordered to make inquiries to discover whether any of the accused had assets located in their territory and, if so, to freeze such assets until the accused are taken into custody [26]. Moreover, it is the first indictment issued in relation to the conflict that engulfed Kosovo in 1999. The indictment alleges that, between 1 January and late May 1999, forces under the control of the five accused persecuted the Kosovo Albanian civilian population on political, racial or religious grounds.

By the date of the indictment, it was reported that approximately 740,000 Kosovo Albanians, that is about one-third of the entire Kosovo Albanian population, had been expelled from Kosovo. Thousands more were believed to be internally displaced. An unknown number of Kosovo Albanians have been killed in the operations by FRY forces and by the Republic of Serbia [27]. Specifically, the five indictees are charged with the murder of over 340 persons identified by name in an annex to the indictment. Each of the accused is charged with three counts of crimes against humanity (persecutions, murder and deportation) and one count of violations of the laws or customs of war. The Prosecutor gave the clarification that whilst the present indictment was based exclusively on crimes committed since the beginning of 1999 in Kosovo, she would be able to expand on the charges, suggesting that incidents committed in Croatia and Bosnia might well be added, as well as charges against other suspects of crimes in Kosovo. [28]

On 3 June 1999, the FRY accepted the terms brought to Belgrade by EU envoy Ahtisaari and Russian envoy Chernomyrdin. NATO suspended air strikes over the FRY on 9 June 1999, the day on which the "international security force" (KFOR) and

military representatives of the FRY and the Republic of Serbia signed a Military Technical Agreement (MTA). This agreement immediately entered into force; the FRY forces and their allies thereupon ceased hostilities in Kosovo and commenced a phased withdrawal. On 20 June 1999 FRY forces were certified as being out of Kosovo and NATO declared a formal end to its bombing campaign against the FRY. On 21 June 1999 KFOR and the KLA concluded a Demilitarization Agreement whereby the KLA undertook to cease hostilities immediately (including firing of all weapons, attacking, detaining or intimidating civilians in Kosovo, and reprisals), and to demilitarize itself within 90 days. [29]

On 10 June the UN Security Council passed a resolution (1244) welcoming the acceptance by the FRY of the principles on a political solution to the Kosovo crisis, including an immediate end to violence and a rapid withdrawal of its military, police and paramilitary forces. This resolution, adopted by a vote of 14 in favour and none against, with one abstention (China), made known the Security Council's decision to deploy "international civil and security presences" in Kosovo, under UN auspices. The Security Council thus authorized member States and relevant international organizations to establish the international security presence and decided that its responsibilities would include deterring renewed hostilities, demilitarizing the KLA, and establishing a secure environment for the return of refugees and displaced persons and in which the international civil presence could operate. The Security Council also authorized the UN Secretary-General to establish the international civil presence and requested him to appoint a Special Representative to control its implementation. On 12 June 1999, Secretary-General Kofi Annan presented to the Security Council an operational concept of what has since come to be known as the United Nations Interim Administration Mission in Kosovo (UNMIK). The FRY officially lifted the state of war on 26 June 1999.

Six months after these events, Kosovo has undergone profound changes, and most of Kosovo's Albanians are no longer suffering from the repressive FRY regime. However, the international community is now gravely concerned about the plight of Kosovo's current non-ethnic-Albanian minorities, especially the Serb and Roma (gypsy) populations. According to the United Nations High Commissioner for Refugees, more than 164,000 have left Kosovo, whilst others have moved to enclaves under the protection of KFOR [30]. As will be discussed later on in this article, several of these minorities are now being subjected to revenge attacks.

In a briefing to the Security Council on 10 November 1999, the newly appointed Chief Prosecutor for the Tribunal, Carla del Ponte, reported that after five months of investigation by forensic specialists from 14 countries, the Tribunal has received reports of 11,334 bodies in 529 gravesites, including sites where bodies were found exposed. Approximately 195 of those sites, she reported, had been examined to date, and 2,108 bodies had been exhumed from gravesites. The Chief Prosecutor added that this figure did not necessarily reflect the total number of actual victims from the sites so far investigated because there was evidence of tampering with graves. There were also a significant number of sites where the precise number of bodies could not be counted. She announced that 300 mass graves would need to be examined in the year 2000. [31]

Legal basis for the ICTY's involvement in Kosovo

1. Mandate

The jurisdiction of the ICTY over serious violations of international humanitarian law committed in Kosovo is indisputable under the mandate established by UN Security

Council Resolution 827, and has been repeatedly reaffirmed by the UN Security Council in its resolutions on Kosovo, as well as by the Tribunal itself.

The legal basis for the Security Council's involvement in Kosovo is formed by Security Council resolutions adopted under Chapter VII of the UN Charter. The most important of these is Resolution 827 (1993) of 25 May 1993, on the establishment of the ICTY and the adoption of its Statute, which was preceded by a series of resolutions taken under the same chapter [32]. In one of these, Resolution 808 (1993) of 22 February 1993 [33], the Security Council requested the UN Secretary-General to prepare a draft Statute for an International Tribunal for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991. The Security Council did not indicate how such an international tribunal was to be established. It was left to the Secretary-General to examine the options. In his report to the Security Council, the Secretary-General explained that the treaty approach would not be suitable: it would require considerable time to establish an instrument and then to achieve the required number of ratifications for entry into force. Even then, there could be no guarantee that ratifications would be received from those States (read: the successor States of the SFRY) and which should be parties to the treaty if the treaty were to be truly effective. The Secretary-General then suggested that the International Tribunal should be established by a decision of the Security Council on the basis of Chapter VII of the Charter of the United Nations. He argued in his report that such a decision would constitute a measure to maintain or restore international peace and security, following the requisite determination of the existence of a threat to the peace, breach of the peace or act of aggression. [34]

Establishing an international criminal tribunal by way of a Security Council resolution was an unprecedented move, and not without legal risks. Unsurprisingly, the legitimacy of the Tribunal's establishment has been widely commented upon [35], and was challenged in the very first case which the Tribunal had to examine on its merits [36]. In *Prosecutor v. Dusko Tadic* the Defendant argued, *inter alia*, that the Security Council had exceeded its powers under Chapter VII, because that Chapter did not authorize the Council to create a judicial tribunal as a measure to address a threat to international peace and security. In reply, the Appeals Chamber held that Chapter VII in general and Article 41 of the UN Charter in particular conferred on the Security Council a broad, although not unlimited, discretion regarding the measures which are appropriate to address a threat to international peace and security. It further reasoned that since the Council had already determined that the war crimes perpetrated in the former Yugoslavia were exacerbating a threat to international peace and security and the concept of individual criminal responsibility has long been seen as one of the means by which international law seeks to deter, or prevent repetition of, war crimes, the establishment of the Tribunal could not be said to have been manifestly outside the scope of the Council's powers under Chapter VII [37]. It is not certain, however, whether the matter of the legality of the establishment of the Tribunal by way of a Chapter VII resolution has therefore been laid to rest. [38]

In the light of the mandate of the Tribunal, and in view of its jurisdictional competence, which will be discussed below, there was no need for a separate Security Council resolution authorizing the Tribunal's involvement in Kosovo. Nevertheless, in view of the steadily worsening situation in Kosovo in the year leading up to NATO's Operation *Allied Force*, the Security Council repeatedly confirmed the ICTY's (and in particular, the Prosecutor's) jurisdiction over that territory. In Resolution 1160 of 31 March 1998, mentioned above, the Council requested the Prosecutor to begin gathering information related to violence in Kosovo that may fall under the Tribunal's jurisdiction [39]. In Resolution 1203 of

24 October 1998, the Security Council called “for prompt and complete investigation, including international supervision and participation, of all atrocities committed against civilians and full cooperation with the International Criminal Tribunal for the former Yugoslavia, including compliance with its orders, requests for information and investigations”. When on 4 November 1998, the FRY authorities reiterated their refusal to let the Prosecutor conduct investigations in Kosovo [40], the Security Council passed Resolution 1207 on 17 November 1998, calling upon the authorities of the FRY and the leaders of the Kosovo Albanian community to cooperate fully with the Prosecutor in the investigation of all possible violations within the jurisdiction of the Tribunal.

Under Article 25 of the UN Charter, all UN member States are obligated to “accept and carry out the decisions of the Security Council”, including, of course, those taken under Chapter VII in matters affecting international peace and security. Furthermore, Article 103 of the Charter stipulates expressly that in “the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement”, the Charter obligations prevail. In addition, Article 2 (7) of the UN Charter makes clear that intervention by the Security Council under Chapter VII of the Charter cannot be opposed by member States on the ground that the matters concerned would fall within their domestic jurisdiction [41]. Therefore, since the ICTY was established under Chapter VII of the UN Charter with power to prosecute serious violations in the (entire) territory of the former Yugoslavia, the FRY could not legitimately oppose the conduct of investigative activities by the ICTY Prosecutor in relation to Kosovo. In addition, any UN member State, including the FRY, is obligated to arrest suspects and surrender them to the Tribunal for trial. No State may rely upon its internal law as a justification for failing to comply with its international obligations in this respect. For instance, if the ICTY has made a request for assistance to a State, the latter is bound to comply, regardless of whether it has enacted the necessary legislation and whether or not its municipal laws, for example, authorize extradition or surrender of suspects in the subject matter at hand. [42]

In this connection it should be noted, however, that the legal status of the FRY under international law is still controversial [43]. On 27 April 1992 the two remaining SFRY republics, Serbia and Montenegro, declared that they were the legal successor to the SFRY and would henceforth be known as the “Federal Republic of Yugoslavia”. In addition, a formal declaration was adopted to the effect that the “Federal Republic of Yugoslavia, continuing the State, international legal and political personality of the Socialist Federal Republic of Yugoslavia, shall strictly abide by all the commitments that the Socialist Federal Republic of Yugoslavia assumed internationally” [44]. Most UN member States, however, officially dispute that the FRY would simply be the continuation of the SFRY. They take the view that the SFRY has ceased to exist and claim that the FRY needs to apply afresh to the UN for membership. Since it has not done so, it has been claimed that the FRY is not a member of the UN. In recent legal proceedings before the International Court of Justice, several NATO countries put forward similar claims arguing that the FRY could not be considered a party to the ICJ Statute since it was not a UN member [45]. The ICJ decided, once again, that there was no need for it to decide this question, in view of its earlier finding that the declaration by which the FRY accepted the ICJ's jurisdiction did not apply *ratione temporis*. Only two judges addressed the issue of Yugoslavia's UN membership, arguing against it, whereas the FRY Judge *ad hoc* believed that Yugoslavia is a member of the United Nations. [46]

The present author is of the view that the legal basis for denying the FRY lack of status within the United Nations is tenuous. In addition, because the Chapter VII

powers of the Security Council are mandatory only for UN member States, one wonders how the imposition of Chapter VII measures on a State which is supposedly no longer a UN member could possibly be justified. Furthermore, it should be noted that while the FRY is currently barred from participating in the activities of the General Assembly and the work of the UN, the Economic and Social Council and many other subsidiary organs, it has not been formally expelled or suspended from the UN organization, and continues to be listed as a UN Charter party. Finally, it needs to be stressed that the uncertain status of the FRY as a UN member should not be confused with its status under multilateral treaties, nor with its obligations under international humanitarian law. "Yugoslavia" continues to be mentioned as party to all conventions, and it has repeatedly confirmed, in response to explicit questions, that it considers itself bound by these. [47]

2. Jurisdictional aspects

The Tribunal's mandate is to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 in order that such violations be halted and effectively redressed, that an end be put to such crimes, that their perpetrators be brought to justice and that peace be restored and maintained. Pursuant to Article 1 of the Statute the Tribunal has jurisdiction in respect of four categories of "serious violations of international humanitarian law" committed by individuals in the territory of the former Yugoslavia since 1991: grave breaches of the Geneva Conventions (Article 2); violations of the laws and customs of war (Article 3); genocide (Article 4) and crimes against humanity (Article 5).

Territorial jurisdiction

World War II engulfed many nations and ultimately extended throughout much of the world. There was no obvious restriction to the competence *ratione loci* of the International Military Tribunals established after the Second World War. By contrast, the ICTY's competence is geographically limited. Articles 1 and 8 of the Statute confer jurisdiction to try offenders for crimes committed in the territory of the former Yugoslavia only [48]. Before it disintegrated, the SFRY was made up of six republics. What is now known as the Federal Republic of Yugoslavia (FRY) comprises only the rump of what used to be the Socialist Republic of Yugoslavia (SFRY), namely Serbia and Montenegro. Regardless of the legal status that Kosovo may have enjoyed under domestic law prior to -- and during -- the break-up of the SFRY, there is no doubt that it is covered by the ICTY's geographical jurisdiction provision.

During NATO's Operation *Allied Force*, there were several press reports speculating on the spread of the Kosovo crisis to Macedonia (Former Yugoslav Republic of Macedonia -- FYROM). Since Macedonia used to form part of the SFRY, the ICTY would undoubtedly be competent to try any violations of the laws of armed conflict committed in the territory of the FYROM, had the Kosovo crisis spread to that territory. Similar conclusions would be drawn if the Kosovo conflict had spread to the other republics which emerged after the collapse of the SFRY, i.e. the Republics of Croatia and Slovenia and of course the Republic of Bosnia and Herzegovina.

Temporal jurisdiction

Articles 1 and 8 of the ICTY Statute indicate that there is also a temporal limitation to the jurisdiction of the ICTY. The Tribunal can be seized only of cases involving offences committed in the SFRY since 1 January 1991. The *dies a quo* mentioned in the Statute therefore left enough leeway for the Prosecutor to start investigating

potential crimes in Kosovo, three years after the conclusion of the Dayton accords which signified the end of hostilities in Bosnia and Herzegovina [49]. It should be noted that there is no express end to the competence *ratione temporis* of the Tribunal in its Statute: Articles 1 and 8 mention only a *dies a quo*, but not a *dies ad quem*. Paragraph 2 of Resolution 827 (1993) of 25 May 1993, by which the Security Council adopted the ICTY Statute, states that the Tribunal is established "for the sole purpose of prosecuting persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia between 1 January 1991 and a date to be determined by the Security Council upon the restoration of peace". Consequently, since the Tribunal was set up as a measure for the restoration of international peace and security, it would be up to the Security Council to decide that the ICTY has served its purpose [50]. Thus far, the Security Council has not amended the Statute or taken other action to set a date for the end of the temporal jurisdiction. For example, at this point in time there has been no resolution that peace has been restored in the SFRY. Another way in which the Tribunal's jurisdiction might -- conceivably -- end is when there are no longer any serious violations of international humanitarian law that would need to be brought before the ICTY. For the first time since the ICTY's establishment, its Chief Prosecutor has suggested a date for the completion of the pre-indictment investigative activities by her office. In a recent statement she indicated that in addition to the 19 ongoing investigations, another 17 will have to be completed before the Prosecutor can indicate to the Security Council that the Tribunal's investigative mandate is exhausted. These investigations, numbering 36 in total, and involving around 150 suspects, should be completed progressively over the next four years, thus by the end of 2004. [51]

On the other hand, as will be explained below, any decision of the Tribunal on its competence *ratione temporis* is narrowly linked to the definition of armed conflict. Except for the charge of genocide (Article 4), the Prosecutor needs to prove for each other category of charges, i.e. grave breaches (Article 2), violations of the laws or customs of war (Article 3) and crimes against humanity (Article 5), that there was a sufficient nexus between the alleged offence and an armed conflict.

Existence of armed conflict

The test for the existence of armed conflict formulated by the Appeals Chamber in the *Tadic Jurisdiction Decision* was formulated in very broad terms as follows: "... an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organised armed groups or between such groups within a State". [52]

In light of this test there is little doubt that the conflict in Kosovo, which between March and June 1999 involved the FRY, the KLA and NATO countries and was waged mainly in the territory of the FRY, falls within the jurisdiction of the Tribunal. This does not mean that it may be easy to pinpoint the exact date on which the armed conflict in Kosovo started. The FRY claimed before NATO's Operation *Allied Force* that the FRY operations in Kosovo against the KLA were simply aimed at suppressing an internal terrorist movement, and that the ensuing hostilities did not rise to the threshold level of armed conflict required for the application of international humanitarian law [53]. By contrast, in July 1998 the ICTY Prosecutor made clear that she was firmly of the view that the situation in Kosovo represented an armed conflict within the terms of the mandate of the Tribunal [54]. Many of the resolutions adopted by the Security Council before NATO's Operation *Allied Force*, which were discussed above, can be seen as authoritative endorsements of the Prosecutor's view that the conflict in Kosovo reached the requisite level of intensity to be considered an armed

conflict for the purposes of the 1949 Geneva Conventions and under Article 3 of the ICTY Statute. On the other hand, it will be more difficult to deny the status of armed conflict to the hostilities between NATO and the FRY as a result of Operation Allied Force. There is little doubt that these reached the level of intensity necessary to trigger the application of international humanitarian law.

As pointed out by the Appeals Chamber in the *Tadic Jurisdiction Decision*, international humanitarian law applies generally, from the initiation of armed conflicts, and extends beyond the cessation of hostilities until a general conclusion of peace is reached or, in the case of internal conflicts, a peaceful settlement is achieved [55]. The above chronology of the Kosovo crisis shows that there may be some uncertainty as to the precise date of the end of the “armed conflict” in Kosovo. Yet regardless of this difficulty in that some charges under the ICTY Statute must be linked to the existence of an armed conflict, it would be impossible to prejudge the temporal limits to the Tribunal's jurisdiction. Its mandate may include crimes committed against individuals or populations after the formal end of hostilities in Kosovo, and even after the armed conflict, as a matter of law, ceased to exist.

In its decision of 2 October 1995 on jurisdiction in the *Tadic* case, the Appeals Chamber pointed out that the temporal scope of the applicable rules clearly reaches beyond the actual hostilities, in particular insofar as detainees and other protected persons are concerned [56]. This is confirmed by a series of provisions of the 1949 Geneva Conventions for the protection of war victims and of their 1977 Additional Protocols stating that certain categories of persons will continue to benefit from the protection of international humanitarian law for as long as necessary. Article 6 of the Fourth Geneva Convention, on the protection of civilians, stipulates that it applies “from the outset of any conflict or occupation mentioned in Article 2”, and that it shall cease to apply “on the general close of military operations”. However, it also specifies that protected persons whose release, repatriation or re-establishment may take place after such dates shall meanwhile continue to benefit by that convention. Similar provisions relating to the cessation of POW status are included in the Third Geneva Convention on the protection of prisoners of war: Article 5 thereof stipulates that it shall apply to them from the time they fall into the power of the enemy and until their final release and repatriation. Article 6 of the same Convention provides that prisoners of war “shall continue to have the benefit of such agreements as long as the Convention is applicable to them, except where express provisions to the contrary are contained in the aforesaid or in subsequent agreements, or where more favourable measures have been taken with regard to them by one or other of the Parties to the conflict”.

These provisions have been expanded by Article 3 of Protocol I, on international armed conflict, which has abolished the cut-off date of one year after the close of military operations in the case of occupied territory [57]. Without a doubt, the most striking provision in this regard is Article 2 of Additional Protocol II, on non-international armed conflict. It specifies in paragraph 2 that at the end of the conflict all the persons who have been deprived of their liberty or whose liberty has been restricted for reasons related to such conflict, as well as those deprived of their liberty or whose liberty is restricted after the conflict for such reasons, shall continue to benefit from the provisions regarding humane treatment. Consequently, for people who are detained, the thrust of the above provisions is the same: as long as these people are not released, repatriated or re-established, they will continue to benefit from the protection of the Geneva Conventions.

Consequently, once certain persons are protected by the conventions, this protection does not cease merely because of the end of the armed conflict. Together, the above

provisions would enable the ICTY Prosecutor to investigate and prosecute crimes committed against persons who continue to be detained at various locations in Serbia or Kosovo, and even against persons detained after the end of the conflict in Kosovo. For example, there are a great number of ethnic Albanians who were reportedly taken into custody by Serbian forces during the NATO bombing campaign. In August 1999, human rights groups claimed that 2,000 Albanian Kosovars were in detention in Serbia, that at least 1,500 others were unaccounted for, and that the lists were growing daily [58]. On 20 October 1999, the United Nations human rights office revealed that it had asked the government of the FRY for a list of all Kosovar citizens being held in Serbia. The number of detainees cited in this request had risen to more than 5,000. This figure includes not only those detained during NATO's Operation *Allied Force*; the FRY Justice Minister was asked to account for all Kosovars detained in the territory before March 1999, those held in Serbia after that date and all who have been released from Serbian prisons. The FRY government has since acknowledged that approximately 1,900 Kosovar Albanians are being held in 13 different detention facilities in Serbia [59]. Hundreds of those detained during Operation *Allied Force* are now facing terrorism charges in the FRY. [60]

A second example of the potential far-reaching temporal jurisdiction of the Tribunal are atrocities committed against minorities in Kosovo since the end of NATO's Operation *Allied Force*. A senior NATO military official has admitted that nearly six months after NATO's air campaign against Serbia, ethnic violence remains the alliance's biggest headache, calling it a situation of "reverse ethnic cleansing" [61]. According to a recent OSCE report on the human rights situation in Kosovo since the end of NATO's Operation *Allied Force*, the desire for revenge has been the primary motive for the vast majority of human rights violations that have taken place. Kosovo Serbs, Roma, Muslim Slavs and others who are perceived to have collaborated actively or passively with the Serb security forces have been targeted for killing, expulsion, harassment, intimidation, house-burning and abduction. [62]

It is difficult to prejudge in the abstract whether such instances would fall under the jurisdiction of the ICTY. Except for the charge of genocide, the ICTY Statute requires a nexus with the armed conflict in Kosovo, even if the act or acts to which the charge relates would not be a war crime (Articles 2 or 3) but would amount to a crime against humanity (Article 5) [63]. Proving the link with an armed conflict may be difficult, especially when the perpetrators are civilians who are carrying out revenge attacks against the few remaining non-ethnic Albanian citizens of Kosovo. For now, the ICTY is keeping its options open and is investigating reports of atrocities committed after the end of NATO's Operation *Allied Force*. For example, in a reaction to reports of the killings of 14 Serb villagers near Lipljan, around mid-July 1999, the Prosecutor instructed ICTY investigators to begin an investigation in cooperation with KFOR and UNMIK. She explicitly confirmed that the ICTY's jurisdiction covers all serious violations of international humanitarian law committed in the territory of the former Yugoslavia, including Kosovo, since 1991, and that this jurisdiction includes offences committed before and after the formal end of the NATO bombing campaign on 20 June 1999. [64]

The International Criminal Tribunal for the former Yugoslavia and the Kosovo conflict

by Sonja Boelaert-Suominen

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Existence of an international armed conflict

In order to successfully press charges under Article 2 of the Tribunal's Statute in relation to the Kosovo conflict, it would not be sufficient for the Prosecutor to prove that the level of hostilities on that territory reached the intensity of an armed conflict. It would have to be established that the conflict between the parties was international in nature, and that the accused committed one of the crimes referred to in Article 2 of the Statute against victims or property protected by the Geneva Conventions. [65]

Determination of the character of the conflict in the SFRY has generated substantial ICTY jurisprudence. At various times, the following main groups, entities or States have faced each other as belligerents on the territory of the SFRY: (a) the SFRY, which was succeeded on 27 April 1992 by the FRY and was engaged in armed conflict against one or more of the following: Slovenia, Croatia and Bosnia; (b) Croatia was engaged in armed conflict against the SFRY, the so-called Republic of Serbian Krajina (RSK), the FRY and Bosnia; (c) Bosnia was engaged in armed conflict against the SFRY, the FRY, the Republika Srpska (RS), Croatia, the HVO (the Bosnian-Croat entity) and the Bosnian Muslim faction controlled by Fikret Abdic; (d) Slovenia was engaged in armed conflict with the SFRY [66]; after the escalation of the conflict in Kosovo, the following parties need to be added: (e) the FRY engaged in armed conflict against the KLA and NATO.

The starting point for determining the character of the conflict in the former Yugoslavia for the purposes of Article 2 of the ICTY Statute is the *Tadic Jurisdiction Decision*. The Appeals Chamber ruled that the conflicts in the former Yugoslavia had both internal and international aspects, and that the Security Council members who adopted the Statute were well aware of this [67]. In other words, the Appeals Chamber decided that there were potentially several distinct conflicts and refused to accept that all of these should automatically be regarded as a single armed conflict, wholly international in character.⁶⁸ The Chamber went on to lay down a general framework for the classification of the armed conflicts in the former Yugoslavia,⁶⁹ but left it to the various Trial Chambers to determine whether the international nature of the armed conflict was established in the cases where Article 2 charges were brought. [70]

On the basis of the above framework, several Trial Chambers subsequently determined the character of the conflict in the period relevant to the respective indictments [71]. On 15 July 1999, the Appeals Chamber pronounced its judgment on

the appeal lodged by the accused *Duško Tadić* and the cross-appeal lodged by the Prosecution against the Judgment of Trial Chamber II of 7 May 1997. The Appeals Chamber denied *Duško Tadić's* appeal on all grounds. As for the cross-appeal by the Prosecution, the Appeals Chamber held, *inter alia*, that there was an international armed conflict and, in consequence, that the grave breaches regime of the 1949 Geneva Conventions applied. The Appeals Chamber set out a new test, the “overall control test”, for establishing the necessary link between an armed faction in a *prima facie* local conflict waged on the territory of a State and an outside armed force (belonging to a foreign nation) to justify the conclusion that a conflict is international. It also decided that the victims in that case were “protected persons” under the Fourth Geneva Convention.

The decision of the Appeals Chamber is remarkable in that it distances itself explicitly from the decision rendered by the ICJ in 1986 in the Nicaragua case: the ICTY Appeals Chamber holds that in matters of State responsibility, international law does not always require the same degree of control for the purpose of attribution of acts of individuals or groups to a particular State.⁷² After a thorough analysis of international case law and State practice, the Appeals Chamber concluded that the extent of the requisite State control varies, and that international law provides for three tests. The first one is that of specific instructions (or subsequent public approval), applying to single individuals or militarily unorganized groups. The second one is a test of overall control applying to armed groups, whilst the third is one of assimilation of individuals to State organs on account of their actual behaviour within the structure of a State (and regardless of any possible requirement of State instructions). [73]

Furthermore, the Appeals Chamber made a powerful contribution to the cause of international humanitarian law by de-linking the concept of protected persons (in this case civilians) with nationality, stressing the need to look at substantial relations more than formal bonds. The Chamber took into account the fact that in modern inter-ethnic armed conflicts such as that in the former Yugoslavia, new States are often created during the conflict and ethnicity rather than nationality may become the grounds for allegiance. In its own words, “ethnicity may become determinative of national allegiance”. [74]

How this jurisprudence can be applied to the Kosovo conflict remains to be determined. In the first indictment relating to crimes committed in Kosovo, charges were brought under Article 5 of the ICTY Statute (crimes against humanity) and Article 3 of the Statute (violations of the laws or customs of war). Under both these articles the Prosecutor only needs to prove that there was a nexus with an armed conflict, but the question of the character of the armed conflict (international or non-international) is not relevant.

After the *Tadić Appeal Judgment* of 15 July 1999, there are two or three scenarios that can be envisaged to establish the existence of an international armed conflict in relation to the Kosovo crisis: (a) there was a classic inter-State armed conflict between two or more States; (b) there was an internal armed conflict alongside an international armed conflict; (c) there was a *prima facie internal* armed conflict, but one local faction was acting as an agent of another State which exerted “overall control” over this faction. There is little doubt that the conflict between NATO States and the FRY as a result of Operation *Allied Force* was international in character, either because it can be regarded as a “classic” conflict between several States or because NATO States intervened militarily by sending their troops to the territory of the FRY. In the view of the present author, the legal justification for the intervention put forward by NATO States⁷⁵ -- which is in any case immaterial for the ICTY's mandate -- does not affect this characterization. However, whilst the conflict between

the FRY and the NATO countries involved in Operation *Allied Force* was most probably international in nature, the question of the character of the conflict between the KLA and the FRY remains.

On the assumption that the hostilities between the FRY and KLA reached the requisite level of intensity, prior to the NATO intervention in March 1999, this conflict was internal in character, unless one regards the KLA as a national liberation movement under Article 1(4) of Additional Protocol I and therefore as a force fighting against colonial domination, alien occupation or a racist regime. Protocol I does not define what movements are seeking self-determination and would qualify as “national liberation movements”; neither do the two instruments referred to in the provisions, i.e., the United Nations Charter and the Friendly Relations Declaration [76]. The possible status of the KLA as a national liberation movement would require an assessment of the causes for which the KLA purportedly fights, which belong to the realm of *jus ad bellum*. Such an assessment would also imply, *vice versa*, that the FRY government would need to be characterized either as an occupying force (alien or colonial) or a racist regime. It should be noted too that the categories enumerated under Article 1(4) of Protocol I, although they may be subject to some expansive interpretations, are limitative and do not, in principle, include a struggle for secession unless the secession is effective [77]. In the light of the foregoing, it remains unclear whether one could successfully argue before the ICTY that the KLA should be regarded as a national liberation movement under Article 1(4) of Additional Protocol I.

If Article 1(4) of Protocol I does not apply, the question is whether the NATO intervention from March 1999 onwards transformed the character of the conflict between the FRY and KLA into an international armed conflict. In order for the FRY-KLA conflict to be international, it is necessary to establish a link between the KLA and NATO forces. On the assumption that the KLA is an organized military group, and on the basis of the Appeals Chamber decision in the *Tadic* case, it would have to be demonstrated that the KLA acted as an agent of the ten NATO countries involved in Operation *Allied Force* by being under the “overall control of the latter”. The overall control test, in the words of the ICTY’s Appeals Chamber, requires proof of “control by a State over *subordinate armed forces or militias or paramilitary units* (...) of an overall character (and must comprise more than the mere provision of financial assistance or military equipment or training)”. This requirement, however, does not go so far as to include the issuing of specific orders by the State, or its direction of each individual operation. Under international law it is by no means necessary that the controlling authorities should plan all the operations of the units dependent on them, choose their targets, or give specific instructions concerning the conduct of military operations and any alleged violations of international humanitarian law. The control required by international law may be deemed to exist when a State (or, in the context of an armed conflict, the party to the conflict) *has a role in organizing, coordinating or planning the military actions* of the military group, in addition to financing, training and equipping or providing operational support to that group. Acts performed by the group or members thereof may be regarded as acts of *de facto* State organs regardless of any specific instruction by the controlling State concerning the commission of each of those acts.” [78]

Finally, it should be remembered that in judging the merits of the allegations of US involvement in Nicaragua, the ICJ resolved that both bodies of *jus in bello* applied, concurrently but separately, to the different parties in the conflict. In a well-known paragraph the World Court stated: “The conflict between the *contras*’ forces and those of the Government of Nicaragua is an armed conflict which is ‘not of an international character’. The acts of the *contras* towards the Nicaraguan Government are therefore governed by the law applicable to conflict of that character; whereas the

actions of the United States in and against Nicaragua fall under the legal rules relating to international conflicts." [79] This double characterization of the conflict for purposes of *jus in bello* certainly has undesirable consequences. For instance, whilst a NATO soldier captured during Operation *Allied Force* by the FRY forces will be entitled to prisoner-of-war status, a KLA combatant will not: the latter may be prosecuted for having taken up arms against his government.

Personal jurisdiction: nationality of the perpetrator

As an international criminal tribunal, the ICTY is competent only to prosecute individual offenders for serious violations of international law and to impose individual criminal sanctions. Its mandate extends only to "natural persons" and excludes the prosecution of groups, organizations, corporations or States. This is, to a certain extent, a departure from the Statutes of the International Military Tribunals of Nuremberg and Tokyo. Article 9 of the Nuremberg Charter enshrined a procedure under which the IMT could declare certain groups or organizations criminal. If such a declaration was issued, Article 10 allowed the competent national authorities of any signatory State to bring individuals to trial for membership of these groups or organizations. In such cases the criminal nature of the group or organization was considered proven and no further proof was required. In execution of these provisions, the IMT declared the following organizations criminal: the Leadership Corps of the Nazi Party; the Gestapo; the SD (the State Security Service); and the SS [80]. A group of French jurists had suggested that a similar provision, with some safeguards, could be envisaged for the ICTY [81]. The suggestion was rejected by the United Nations Secretary-General [82]. The results are laid down in Article 6 of the ICTY Statute, which provides that the Tribunal has jurisdiction only over natural persons, and in Article 7, which addresses several aspects of the principle of individual criminal responsibility.

Similarly, the Statute does not allow for the prosecution of legal persons other than natural persons, such as corporate entities or States. Again, the latter question is still controversial under current international law [83]. However, it should not be overlooked that other fora or tribunals may be competent to examine the responsibility of States for violations of the laws of armed conflict. A good example are the cases which are currently pending before the ICJ: the Genocide Case brought in 1993 by Bosnia and Herzegovina against the FRY [84], the *Legality of the Use of Force Case*, brought in 1999 by the FRY against ten NATO countries [85], and also the case brought recently by Croatia against the FRY, charging the latter with violations of the Genocide Convention. [86]

An important element of the competence *ratione personae* (personal jurisdiction) of the ICTY, and of international criminal law in general, is the principle of individual criminal responsibility. Article 7 of the ICTY Statute addresses several aspects of this issue. The first subparagraph of this article indicates that all persons who participate in the planning, preparation or execution of serious violations of international humanitarian law in the former Yugoslavia contribute to the commission of the violation and are, therefore, individually responsible. The second subparagraph encompasses the principle that heads of State, government officials and persons acting in an official capacity should not be entitled to rely on the plea of immunity. This provision draws upon the precedents following the Second World War. The text of the article contains two further provisions. First, it affirms that a plea of head of State immunity or that an act was committed in the official capacity of the accused will not constitute a defence, and secondly, that it will not be a factor mitigating punishment.

Under the ICTY Statute, the nationality of the perpetrator is of no consequence. Any person who belongs to a party to the conflict, and commits any of the crimes enumerated or referred to in Articles 2 to 5 of the ICTY Statute, can be prosecuted before the Tribunal. Early on in NATO's Operation *Allied Force*, the Prosecutor acknowledged that she had received requests from persons and groups urging her to indict various NATO and other officials for war crimes in relation to the air strikes conducted in Serbia. She stated that there was no doubt in her mind that the jurisdiction of the Tribunal over Kosovo was "well known to all, and indeed has never been contested by anyone except the FRY". She further reaffirmed that the Tribunal has jurisdiction over genocide, crimes against humanity, grave breaches of the Geneva Conventions of 1949 and violations of the laws and customs of war which have been committed since 1991 or continue to be committed, anywhere in the former Yugoslavia, "by anyone". Finally, she promised to review all information provided to her which may suggest the commission of crimes within the jurisdiction of the ICTY, but that she would disregard unsubstantiated conclusions and political diatribe [87]. The Prosecutor has repeatedly confirmed these intentions publicly. In her introductory statement at the launch of the ICC Coalition's global ratification campaign, on 13 May 1999, she stated more specifically that on 24 March 1999, 19 European and north American countries had "said with their deeds what some of them were reluctant to say with words. They have voluntarily submitted themselves to the jurisdiction of a pre-existing International Tribunal, whose mandate applies to the theatre of their chosen military operations, whose reach is unqualified by nationality, whose investigations are triggered at the sole discretion of the Prosecutor and who has primacy over national courts". [88]

Since taking office the ICTY's new Prosecutor has made several statements clarifying the activities and the priorities of her office in relation to Kosovo. She confirmed, *inter alia*, that apart from the five high-level individuals already indicted, the "Office of the Prosecutor of the ICTY may investigate and prosecute other individuals, on a case by case basis, who may have committed particularly serious crimes during the course of the armed conflict". [89]

Finally, in her recent briefing to the Security Council, the ICTY's Chief Prosecutor rejected accusations that the Tribunal was carrying out investigations only in one direction. While admitting that no data had been issued yet, she confirmed that her office was dealing with cases where the perpetrators were Serbs, Muslims and from the KLA. [90]

The division of labour between the ICTY and national jurisdictions -- the role of UNMIK

Pursuant to Article 9(1) of the Statute, the ICTY and national tribunals have concurrent jurisdiction. However, Article 9(2) stipulates that the ICTY shall have primacy over national courts. Furthermore, since the ICTY was set up under Chapter VII of the UN Charter, all UN member States are required to cooperate with the Tribunal [91]. They are obligated to arrest suspects and surrender them to the Tribunal for trial. Moreover, States may not rely upon their internal law as a justification for failing to comply with their international obligations in this respect. Therefore, if the ICTY has made a request for assistance to a State, the latter is bound to comply, regardless of whether it has enacted the necessary legislation and regardless of whether its municipal laws, for example, authorize extradition or surrender of suspects in the subject matter at hand. [92]

Conversely, in establishing the ICTY it was not the intention of the Security Council to preclude or prevent the exercise of jurisdiction by national courts with respect to such

acts. The Secretary-General believed that national courts should be encouraged to exercise their jurisdiction in accordance with their relevant national laws and procedures. Articles 9 and 10 of the Statute reflect this goal. As mentioned above, Article 9 stipulates that there is concurrent jurisdiction of the ICTY and national courts, subject to the primacy of the International Tribunal. At any stage of the procedure, the ICTY may formally request the national courts to defer a case to its competence.

Article 10 of the Statute reflects the principle of *non bis in idem*. This holds that a person shall not be tried twice for the same crime. Given the primacy of the ICTY, the principle of *non bis in idem* would preclude subsequent trial before a national court. However, Article 10 stipulates also that the principle of *non bis in idem* should not preclude a subsequent trial before the International Tribunal in the following two circumstances: (a) the characterization of the act by the national court did not correspond to its characterization under the Statute; or (b) conditions of impartiality, independence or effective means of adjudication were not guaranteed in the proceedings before the national courts. Should the International Tribunal decide to assume jurisdiction over a person who has already been convicted by a national court, it should take into consideration the extent to which any penalty imposed by the national court has already been served. [93]

When the Security Council adopted the Tribunal's mandate in 1993, it obviously could not predict the Kosovo crisis and the transitional solution devised in Resolution 1244 of 10 June 1999, in which the Security Council decided to allow the establishment of international civil and security presences in Kosovo under Chapter VII of the UN Charter. The resolution reaffirms "the commitment of all Member States to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia and the other States of the region, as set out in the Helsinki Final Act and annex 2". However, this confirmation seems to be far outweighed by other considerations listed in the resolution, such as "the call in previous resolutions for substantial autonomy and meaningful self-administration for Kosovo" and the determination that "the situation in the region continues to constitute a threat to international peace and security". UNMIK, the UN-led "civilian presence", has been given the monumental task of setting up a civilian administration, including a judicial system, in a part of the FRY.

On 12 July 1999, in his follow-up report to the Council, the Secretary-General presented a comprehensive framework of the UN-led international civil operation in Kosovo. The tasks of UNMIK envisaged by the UN are unprecedented and immense. Its principal role is to pave the way for a stable, democratic multi-ethnic and autonomous Kosovo. To this end, the Security Council has vested in the UN Mission authority over the territory and people of Kosovo, including all legislative and executive powers, as well as the administration of the judiciary. Among its key tasks, UNMIK has been assigned the responsibility to promote the establishment of substantial autonomy and self-government in Kosovo; perform basic civilian administrative functions; facilitate a political process to determine Kosovo's future status; support key infrastructure reconstruction and humanitarian and disaster relief; maintain civil law and order; promote human rights; and assure the safe and unimpeded return of all refugees and displaced persons to their homes in Kosovo. UNMIK will conduct its work in five integrated phases and is ultimately geared to the transfer of authority from Kosovo's provisional institutions to institutions established under a political settlement.

It is clear that the ICTY has neither the mandate, nor the resources, to function as the primary investigative and prosecutorial agency for all criminal acts committed on the

territory of Kosovo. Under UNMIK's guidance, judges and court officers are now being established on a multi-ethnic basis in the territory. The ICTY Prosecutor has made clear that the investigation and prosecution of offences, which may fall outside the scope of the jurisdiction of the ICTY described above, would be properly the responsibility of UNMIK, assisted by KFOR [94]. However, even for crimes falling under its Statute, the ICTY would have concurrent jurisdiction with the judicial authorities in Kosovo. It would be up to the Tribunal to decide whether it wishes to exercise its jurisdiction over such crimes or whether it would encourage the local judiciary institutions to exercise their jurisdiction in accordance with their relevant national laws and procedures.

Notes

1. For a chronology of the conflict consult, for instance, L. Silber and A. Little, *Yugoslavia: Death of a Nation*, 2nd ed., Penguin Books, BBC, London, 1996; W. Zimmerman, *Origins of a Catastrophe: Yugoslavia and its Destroyers -- America's Last Ambassador Tells What Happened and Why*, Times Book, New York, 1996; C. Rogel, *The Breakup of Yugoslavia and the War in Bosnia*, Greenwood Press, Westport, Conn., 1998; M. Glenny, *The Fall of Yugoslavia*, revised ed., Penguin Books (USA), 1996, pp. 129-130.
2. See R. Rich, "Recognition of States: The collapse of Yugoslavia and the Soviet Union", *European Journal of International Law*, Vol. 4, 1993, pp. 38-53; I. Janev, "Legal aspects of the use of the provisional name for Macedonia in the United Nations system", *American Journal of International Law*, Vol. 93, 1999, pp. 155-160.
3. Macedonia, as will be explained below, sought to establish its independence from the SFRY as well.
4. However, as will be seen below, the legal status of this claim is still controversial.
5. Resolution 808 (1993) of 22 February 1993. -- The companion tribunal for Rwanda (the ICTR) was likewise established via the mechanism of a Security Council resolution as a measure taken under Chapter VII. However, the ICTR was set up when the armed conflict in Rwanda had largely ended, following the take-over of the country by the former rebels.
6. In the case of *Dragan Nikolic*, alleged commander of a camp at Susica, in north-eastern Bosnia and Herzegovina, set up within one month after the take-over by Serbian forces of the Bosnian city of Vlasenica, in April 1992; Press Release, Registry, CC/PIO/022-E, 4 October 1995.
7. The marketplace bombing in Sarajevo occurred in February 1994; in May 1995, the Croatian army recaptured areas in Slavonia; in July 1995, the safe area of Srebrenica was taken over by the Serbs; the following month, Croatia captured the Krajina area. Serious violations of international humanitarian law were committed in each of these and in other instances.
8. General Assembly, 54th session, Security Council, 54th year, *Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991*, A/54/187, S/1999/846, 25 August 1999, p. 9, para. 2.
9. ICTY Fact Sheet, 17/11/99, PIS/FS-55.

10. Since 1997, the ICTY Prosecutor has pursued a strategy aimed at high-level offenders and at issuing indictments under seal. The first time the use of sealed indictments came to light was in the cases of *Slavko Dokmanovic*, arrested on 27 June 1997, and *Milan Kovacevic*, arrested on 10 July 1997. See P.Tavernier, "The experience of the International Criminal Tribunals for the former Yugoslavia and for Rwanda", *IRRC*, No. 321, November-December 1997, p. 616.
11. W. Fenrick, "The development of the law of armed conflict through the jurisprudence of the International Criminal Tribunal for the Former Yugoslavia", *Journal of Armed Conflict Law*, Vol. 3, 1998, p. 198.
12. Press Release, Office of the Prosecutor, 10 March 1998, CC/PIO/302-E.
13. *The Prosecutor against Slobodan Milosevic, Milan Milutinovic, Nikola Sainovic, Dragoljub Ojdanic and Vlatko Stojiljkovic*, Case No. IT-99-37-I, Indictment of 22 May 1999, para. 25.
14. General Assembly, 53rd session, Security Council, 53rd year, *Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991*, A/53/219, S/1998/737, 10 August 1998, p. 31, para. 118.
15. Press Release, Office of the Prosecutor, 7 October 1998, CC/PIU/351-E.
16. Press Release, Office of the Prosecutor, 15 October 1998, CC/PIU/353-E.
17. Press Release, President, 5 November 1998, JL/PIU/359-E; letter by ICTY President McDonald to the Security Council, 6 November 1998.
18. *Loc. cit.* (note 13), paras 27-28.
19. Press Release, Office of the Prosecutor, 20 January 1999, CC/PIU/379-E.
20. *Loc. cit.* (note 13), paras 23-37.
21. Press Release, Office of the Prosecutor, 26 March 1999, JL/PIU/389-E.
22. *Loc. cit.* (note 13).
23. *Ibid.*
24. Warrants of Arrest and Orders for Surrender against all the accused, Case No. IT-37-I, of 24 May 1999.
25. Pursuant to Sub-Rule 55 (D) of the Rules and Procedures of Evidence of the ICTY.
26. *Ibid.*
27. NATO claimed that by the end of May 1999, over 230,000 refugees had arrived in the Former Yugoslav Republic of Macedonia, over 430,000 in Albania and some 64,000 in Montenegro. In addition, approximately 21,500 had reached Bosnia and over 61,000 had been evacuated to other countries. Within Kosovo itself, an estimated 580,000 people had been rendered homeless. Furthermore, NATO

estimated that by the end of May, 1.5 million people, i.e. 90% of the population of Kosovo, had been expelled from their homes, that some 225,000 Kosovar men were believed to be missing, and that at least 5,000 Kosovars had been executed. Some of these figures are controversial. The ICTY has, as will be seen below, received reports of around 11,000 deaths.

28. Press Release, The Hague, 27 May 1999, JJI/PIU/403-E.

29. Source: NATO website.

30. Human Rights Watch, *Federal Republic of Yugoslavia, Abuses against Serbs and Roma in the New Kosovo*, August 1999, Vol. 11, No. 10 (D).

31. Press Release, SC/6749, 10 November 1999, 4063rd Meeting of the Security Council.

32. For good documentary sources consult S. Trifunovska (ed.), *Yugoslavia Through Documents. From its Creation to its Dissolution*, Martinus Nijhoff Publishers, The Hague, 1994; D. Bethlehem M. Weller, *The Yugoslav Crisis in International Law: General Issues*, Part I, Vol. 5, Cambridge International Documents Series, Grotius/Cambridge University Press, 1997.

33. See Report of the Secretary-General, pursuant to paragraph 2 of Security Council Resolution 808 (1993), 3 May 1993, S/25704, paras 4-11.

34. *Ibid.*, paras 18-30.

35. See for instance, A. Pellet, "Le Tribunal criminel international pour l'ex-Yougoslavie", *Revue Générale de Droit International Public*, Vol. 98, 1994, pp. 12-32; E. David, "Les tribunaux pénaux internationaux", Lecture Notes, San Remo, 28 May 1998 (on file with author), paras 12.16-12.25; Ch. Greenwood, "The development of international humanitarian law", *Max Planck Yearbook of United Nations Law*, Vol. 2, 1998, pp. 99-109; S. Murphy, "Progress and jurisprudence of the International Criminal Tribunal for the former Yugoslavia", *American Journal of International Law*, Vol. 93, 1999, pp. 63-64.

36. *Prosecutor v. Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ("Tadic Jurisdiction Decision"), pp. 5-24.

37. *Ibid.*, paras 28-40.

38. A Croat indictee, whose surrender the Tribunal has sought for years, has recently turned to the European Court of Human Rights in the hope of stalling or preventing his surrender by Croatia to the Hague Tribunal. In his individual petition to the ECHR he challenges, inter alia, the legitimacy of the ICTY's establishment as an ad hoc tribunal under Chapter VII of the UN Charter and its independence from the UN Security Council. He also alleges that its jurisdiction entails unjustified primacy over a national jurisdiction: Application No. 51891/99 of 2 November 1999, *Mladen Naletilic v. Republic of Croatia*, European Court of Human Rights, Strasbourg. The applicant is indicted by the ICTY together with Vinko Martinovic for his alleged involvement in the ethnic cleansing of the Mostar Municipality: Press Release, Registry, 22 December 1998, CC/PIU/377-E.

39. UN Security Council Resolution 1160, 31 March 1998, para. 17.

40. Press Release, President, 5 November 1998, JL/PIU/359-E, and letter by President McDonald to the Security Council, 6 November 1998.
41. The author is of the view that serious violations of human rights and humanitarian law can no longer be regarded as falling exclusively within the sovereignty of States.
42. Greenwood, *op. cit.* (note 35), pp. 106/7.
43. Rich, *op. cit.* (note 2), p. 53. See also S. Rosenne, "Automatic treaty succession", in J. Klabbbers and R. Lefeber, *Essays on the Law of Treaties*, Martinus Nijhoff Publishers, The Hague, 1998, pp. 97-106; M. Craven, "The Genocide Case, The law of treaties and State succession", *British Yearbook of International Law*, Vol. 68, pp. 127-164.
44. As noted by the International Court of Justice, in the *Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia- Herzegovina v. FRY)*, General List No. 91, Decision on Preliminary Objections, 11 July 1999, para. 17.
45. Belgium, Canada, the Netherlands, Portugal, Spain and the United Kingdom all based themselves on resolutions of the General Assembly and the UN Security Council in arguing that the Federal Republic of Yugoslavia is not a member State of the United Nations or a party to the ICJ Statute as a successor State to the former Socialist Federal Republic of Yugoslavia, and that Yugoslavia cannot, therefore, rely on the Court's Statute in establishing jurisdiction in these cases. *Legality of Use of Force*, I.C.J. General List No. 99/25, Request for Provisional Measures, decision of 2 June 1999.
46. *Ibid.* In the Genocide Case the ICJ also decided that it was not necessary to decide the question of the status of the FRY within the United Nations, *loc. cit.* (note 44).
47. For the practice of the UN Human Rights Committee in regard to the ICCPR see M. Kamminga, "State succession in respect of human rights treaties", *European Journal of International Law*, Vol. 7, pp. 469-484.
48. Article 1 of the ICTY Statute reads as follows: "The International Tribunal shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 in accordance with the provisions of the present Statute." This is clarified in Article 8 as follows: "The territorial jurisdiction of the International Tribunal shall extend to the territory of the former Socialist Federal Republic of Yugoslavia, including its land surface, airspace and territorial waters. The temporal jurisdiction of the International Tribunal shall extend to a period beginning on 1 January 1991."
- 49 The Report of the Secretary-General on the establishment of the Tribunal shows that the date of 1 January 1991 was deliberately chosen so as not to prejudge the characterization of the conflict and in order to cover the widest possible range of violations of international humanitarian law. S/25704, para. 16, p. 17. See also Pellet, *op. cit.* (note 35), para. 23, pp. 32/33.
50. Greenwood, *op. cit.* (note 35), p. 106. In fact, some feared that the Security Council would decide that the ICTY's task would come to an end with the conclusion of the Dayton/Paris agreements in December 1995. *Tavernier, op. cit.* (note 10), pp. 653/4.

51. Press Release, Office of the Prosecutor, 22 December 1999, PR/P.I.S./457-E.

52. *Tadic Jurisdiction Decision*, p. 37, para. 70.

53. The FRY views Kosovo as an internal problem and believes it has the sovereign right to use armed force to fight "terrorism" and prevent secession of a part of its territory. Statement to the Security Council, 24 March 1999, Press Release SC/6657. -- Hundreds of ethnic Albanians arrested in Kosovo in the spring of 1999 are now being tried in Serbia, mostly on charges of terrorism: "Kosovo mob kills elderly Serb and beats 2 others", *International Herald Tribune*, 30 November 1999.

54. Communication by the ICTY Prosecutor to the Contact Group (established by Dayton) on 7 July 1998.

55. *Tadic Jurisdiction Decision*, para. 70, p. 37.

56. *Tadic Jurisdiction Decision*, paras 67-70, pp. 36-37.

57. See Y. Sandoz/C. Swinarski/B. Zimmermann, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ICRC/Martinus Nijhoff Publishers, Geneva, 1987, paras 157/8, which mentions (para. 148) that the article was accepted by consensus in the preparatory committee and at the plenary conference.

58. These are estimates cited in the appeal launched on 6 August 1999 by six human rights groups - four from Kosovo and two international. Source: Human Rights Watch website.

59. Human Rights Watch, 8 November 1999.

60. *Loc. cit.* (note 53).

61. Statement by Admiral Guido Venturoni, Chairman of the NATO Military Committee, to AFP, 10 November 1999.

62. "As Seen, As Told", 2nd part, 6 December 1999, Report by OSCE, Mission in Kosovo/Office for Democratic Institutions and Human Rights.

63. Art. 5 of the ICTY Statute is drafted in a manner which is in some respects more restrictive than customary international law, but which also omits reference to some of the previous requirements for acts to constitute crimes against humanity under general international law. As noted in the *Tadic* Opinion and Judgment, the inclusion of the condition that crimes against humanity be committed "in armed conflict" is no longer required by customary international law. *Tadic* Opinion and Judgment, 7 May 1997, pp. 236-237, para. 627.

64. Press Release, Office of the Prosecutor, 24 July 1999, PR/P.I.S./422-E.

65. *Tadic Jurisdiction Decision*, pp. 44-48, paras 79-84; *Prosecutor v. Tadic*, Judgment, Case No.IT-94-1-AR72, App. Ch., 15 July 1999, p. 33, para. 80 (*Tadic Appeal Decision*).

66. Fenrick, *op. cit.* (note 11), p. 220.

67. *Tadic Jurisdiction Decision*, pp. 39-43, paras 72-77.
68. *Ibid.*, p. 39, para. 72.
69. *Ibid.*, pp. 39-43, paras 72-77.
70. *Ibid.*, p. 39, para. 72.
71. For a detailed discussion of this jurisprudence, see W. Fenrick, "The application of the Geneva Conventions by the International Criminal Tribunal for the former Yugoslavia", *IRRC*, No. 834, June 1999, pp. 317-329.
72. *Tadic Appeal Decision*, pp. 50-51, para. 123.
73. *Tadic Appeal Decision*, p. 60, para. 141; p. 69, para. 156.
74. *Tadic Appeal Decision*, pp. 72-74, paras 164-169.
75. Declaration on principles of international law concerning friendly relations and co-operation among States in accordance with the Charter of the United Nations, UNGA Resolution 2625 (XXV).
76. For recent scholarly exchanges on this subject, consult the debates on website <http://www.jurist.law.pitt.edu/academic.htm>.
77. For a doctrinal and prospective analysis of the hypothesis of secession under Additional Protocol I see E. David, *Principes de droit des conflits armés*, 2nd ed., Bruylant, Brussels, 1999, pp. 162-171.
78. *Tadic Appeal Decision*, pp. 58-59, para. 137.
79. Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v. United States*), Merits, I.C.J. Reports 1986, p. 104, para. 219.
80. Judgment of the International Military Tribunal, Nuremberg, 1 October 1946. For a discussion of subsequent national trials see *Law Reports of Trials of War Criminals*, Vol. XV, UN War Crimes Commission, 1949, pp. 150-154.
81. Pellet, *op. cit.* (note 35), pp. 39-40.
82. Report of the Secretary-General, *op. cit.* (note 33), para. 51; Pellet, *op. cit.* (note 35), pp. 39-40.
83. M. Casillo, "La compétence du Tribunal pénal pour la Yougoslavie", *XCVIII Revue Générale de Droit International Public*, Vol. 98, 1994, pp. 77-80.
84. *Loc. cit.* (note 44).
85. *Loc. cit.* (note 45).
86. "Croatia institutes proceedings against Yugoslavia for violations of the Genocide Convention", I.C.J. Press Communiqué 99/38 of 2 July 1999, and I.C.J. General List No. 118.

87. Press Release, Office of the Prosecutor, 31 March 1999, CC/PIU/391-E.
88. Press Release, Office of the Prosecutor, 13 May 1999, CC/PIU/401-E.
89. Press Release, Office of the Prosecutor, 29 September 1999, PR/P.I.S./437-E.
90. Press Release, SC/6749, 10 November 1999, 4063rd Meeting of the Security Council.
91. This follows from Articles 25 and 103 of the UN Charter, and several Security Council resolutions on the matter. See Resolution 827, para. 4.
92. Greenwood, *op. cit.* (note 35), pp. 106/7.
93. Secretary-General's Report, *op. cit.* (note 33), paras 64-68.
94. Office of the Prosecutor, Press Release, 29 September 1999, PR/P.I.S./437-E

Individual, criminal responsibility for violations of international humanitarian law committed -in non-international armed conflicts

by Thomas Graditzky*

Two prominent events that occurred midway through this century had a great impact on international criminal law. The first milestone in this area was the trials of the major war criminals held in Nuremberg and Tokyo in the wake of the Second World War. They highlighted the principle of individual criminal responsibility for certain serious violations of the rules of international law applicable in armed conflict; the terms "crimes against the peace", "war crimes", and "crimes against humanity" found formal recognition. The second event, following closely on the first, was the adoption of the four Geneva Conventions of 12 August 1949 for the protection of war victims. These instruments established a specific framework for the prevention and punishment of the most serious violations of the provisions they contain; the technical term "grave breach" was coined.

However, these well-known developments concerned only international armed conflicts.¹ In 1949 it was generally considered that an extension of the system of grave breaches to cover internal conflicts would be viewed as all unacceptable encroachment on State sovereignty. When the Protocols additional to the Geneva Conventions were adopted on 8 June 1977, States had not changed their stance in this respect. Furthermore, newly independent countries feared that their new partners would take advantage of any potential opening provided by the adoption of Protocol II (relating to non-international armed conflicts) to justify excessive interest in their internal affairs.

Today, however, the majority of armed conflicts are non-international, and there is nothing to suggest that the classification of a conflict as international 'or non.-international under international law has any effect on the conduct of the parties involved. Alas, history offers all too many examples of wantonly destructive behaviour in civil wars, with Cambodia, Somalia, and Rwanda springing to mind. Faced with such events, the international community can no longer turn a blind eye. There is a growing determination to see all perpetrators of atrocities committed in the course of armed conflict held responsible for their acts; and developments in human rights law have already made inroads into the argument of sovereignty which has blocked such aspirations in the past.

The confluence of these trends highlights the pressing need for formal recognition of universal jurisdiction for the repression of serious violations of international humanitarian law applicable in non-international conflicts. But what is the current situation? Does international law as it stands today give States jurisdiction to prosecute and try the perpetrators of such violations? If so, what form does this jurisdiction take and how is it framed?

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Original: French

¹ With the exception of the internal dimension of crimes against humanity.

Among the traditional range of offences incurring individual criminal responsibility in the context of international armed conflict are two that do not require lengthy consideration here, since it is now generally acknowledged that universal jurisdiction does exist for prosecution of the perpetrators. These are *genocide* and *crimes against humanity*.

With regard to genocide, it will suffice to recall briefly that the customary nature of the principles forming the basis of the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948 has been recognized since the 1950s;² that Article 1 of this instrument states that genocide is a crime under international law "whether committed in time of peace or in time of war" ; and moreover that the International Court of Justice recently confirmed that the duty incumbent on States in terms of prevention and repression pursuant to the Convention is no different whether the conflict is international or internal.³

As for crimes against humanity, it is noteworthy that the report by the United Nations Secretary-General on the draft statute of the International Criminal Tribunal for the former Yugoslavia (ICTY) indicates that they can occur in the course of an internal conflict or an international conflict.⁴ This assertion was reinforced by the adoption of the statutes of the International Criminal Tribunals for the former Yugoslavia and Rwanda (the first expressly stipulate, in Article 3, that both categories of conflict are covered by this provision, and the second mentions crimes against humanity in Article 3), and received formal recognition from the Appeals Chamber in the *Tadic* case, which stated: "It is by now a settled rule of customary international law that crimes against humanity do not require a connection to international armed conflict".⁵

Since crimes against peace (today crimes of aggression) are a matter involving a different set of issues, we shall now turn to all the other violations of international humanitarian law applicable in non-international armed conflict and consider whether some of them have, on account of the importance attached to them by the Community of States, been established as crimes whose perpetrators incur international criminal responsibility. Can offences committed during internal conflicts be classed as "war crimes"? Does the term "grave breach" have any meaning within the context of non-international armed conflict?

² See the Advisory Opinion of the International Court of Justice concerning Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide. Advisory Opinion of 18 May 1951, Reports of Judgments. Advisory Opinions and Orders (hereinafter ICJ Reports), 1951, p. 23.

³ *Case concerning application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia-Herzegovina v. Yugoslavia), Preliminary Objections, Judgment of 11 July 1996, para. 31 (not yet published).

⁴ UN Doc. S/25704, Report of the Secretary-General pursuant to paragraph 2 of Security Council Resolution 808 (1993), 3 May 1993, p. 13, para. 47.

⁵ International Criminal Tribunal for the former Yugoslavia. *Prosecutor v. Dusko Tadic a/k/a "Dule"* : *Decision on the defence motion for interlocutory appeal on jurisdiction*, Decision of 2 October 1995, Case No. IT-94-I-AR72, p. 72, para. 141.

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Application of international obligations to individuals

Today there is no longer any doubt as to the existence of treaty-based and customary rules applicable in internal conflicts. Moreover, with regard to the question of whether the rules of humanitarian law are binding only on States -which would thus be held solely responsible in the event of non-observance -or whether they also apply to individuals, who could violate them directly by their conduct, it would seem that the second option clearly outweighs the first, regardless of whether the conflict is internal or international in nature.

It is worth briefly noting here that the substance of the rules contained in Article 3 common to the four Geneva Conventions of 1949 and in Protocol II additional to the Conventions (for example, Article 4 relating to fundamental guarantees) makes frequent reference to the acts of individuals;⁶ that there is an obligation to disseminate the rules (Protocol II, Article 19); and that: the obligation to, 'ensure respect' for the provisions of humanitarian law (in this regard the State is required not only to ensure that its own agents respect these provisions, but also to ensure that all the people under its jurisdiction do so) is also applicable in internal conflicts.⁷ All these observations point to the fact that the law applicable in such conflicts also governs the conduct of individuals.

In this connection, it would be remiss not to mention the following assertion made by the International Military Tribunal at Nuremberg: "Crimes against International Law are

⁶ See T. Meron, "International criminalization of internal atrocities", *American Journal of International Law*, Vol. 89, 1995, pp. 559-562.

⁷ See *Military and Paramilitary Activities in and against Nicaragua*, (Nicaragua v. United States of America), Merits, Judgment of 27 June 1986, ICJ Reports, 1986, paras 220 and 255, pp. 114 and 129.

committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of International Law be enforced".⁸

International criminalization of violations of international humanitarian law

Points at issue

If the rules of international humanitarian law applicable in internal conflicts do in fact govern the conduct of individuals, it remains to be determined whether violation of those rules incurs individual criminal responsibility and, more specifically, whether such responsibility emanates from international law as it stands today.

First, there is broad consensus that the treaty law applicable in non-international armed conflicts does not make any specific provision for the prosecution of serious violations of its rules. Common Article 3 has nothing to say in this respect and Protocol II does not provide for any system similar to the mechanism for dealing with grave breaches established by the 1949 Conventions and supplemented by Protocol I.

The report by the secretary-General on the draft statute of the International Criminal Tribunal for the former Yugoslavia refers only to international armed conflict when it introduces the article concerning grave breaches of the 1949 Geneva Conventions.⁹ In a similar vein, the ICRC expressed the following view: "According to the terms of the Geneva Conventions and Additional Protocol I, international criminal responsibility for certain violations of humanitarian law, and the relevant obligations, have been established only in respect of international armed conflict".¹⁰ In connection with the *Tadic* case, the ICTY Appeals Chamber stated: "Notwithstanding the foregoing, the Appeals Chamber must conclude that, in the present state of development of the law, Article 2 of the Statute only applies to offences committed within the context of international armed conflicts".¹¹ Thus it too rejects the idea that the scope of the provisions of the Geneva Conventions relating to grave breaches could currently be considered as extending to common Article 3.

Does this entirely rule out international criminal responsibility for serious violations of 'humanitarian law applicable in internal conflicts (other than those amounting to genocide or crimes against humanity)? Even recently, the answer to this question would most likely have been in the affirmative. For example, the final report issued by the United Nations Commission charged with examining and analysing information relating to serious violations of international humanitarian law in the former Yugoslavia stated, with regard to the law applicable in non-international armed conflict, that "in general (...) the only offences committed in internal armed conflict for which universal jurisdiction exists are 'crimes against humanity' and genocide, which apply irrespective of the conflicts' classification".¹²

⁸ Judgment of the International Military Tribunal, in *The Trial of German Major War Criminals: Proceedings* (if the international Military Tribunal sitting at Nuremberg, Germany, Part 22, London, 1950, p. 447.

⁹ *Op. cit.* (note 4), p. II, para. 37.

¹⁰ UN Doc. A/CONF.169/NGO/ICRC/I, Ninth United Nations Congress on the Prevention of Crime and the treatment of Offenders, Cairo, Egypt, Statement of the International Committee of the Red Cross, 30 April 1995 (Topic IV), p. 4.

¹¹ *Tadic* decision, *op. cit.* (note 5), p. 48, para. 84.

¹² UN Doc. S/1994/674 (annex), Final Report of the Commission of Experts established pursuant to Security Council Resolution 780 (1992), 27 May 1994, p. 13, para. 42.

Likewise, the literature has also quite recently tended towards this view on a number of occasions.¹³

However, on 2 October 1995, the ICTY Appeals Chamber decision on the defence motion for interlocutory appeal on jurisdiction in the *Tadic* case did not restrict itself to making a simple finding nor to giving a definitive ruling on the fact that common Article 3 is not subject to the system of grave breaches. This is a matter we shall come back to later.

We shall now move on to examine the elements that might indicate a trend in the area in question, by looking for a hypothetical customary rule providing for international criminalization. The International Military Tribunal at Nuremberg emphasized that individuals could be prosecuted for particularly reprehensible conduct in violation of international law, by means of a customary rule grafted onto those which deal with such conduct. After examining the jurisprudence, declarations by States and other elements, the Tribunal reached the conclusion that the conduct punishable under its Statute already entailed individual criminal responsibility at the time of the commission of the offences for which the accused were being tried.¹⁴

State practice and opinions

1. State declarations

We shall begin this section by taking a look at State declarations, focusing first of all on those made within the Security Council following the unanimous vote on resolution 827 (1993) approving the report by the Secretary-General on the establishment of the ICTY. Statements illustrative of a move towards the affirmation of individual criminal responsibility for violations of the rules applicable in non-international conflicts included that of the United States representative, who expressed the view that "the 'law or customs of war' referred to in Article 3 include all obligations under humanitarian law agreements in force in the territory of the former Yugoslavia at the time the acts were committed, including common Article 3 of the 1949 Geneva Conventions, and the 1977 Additional Protocols to these Conventions".¹⁵ Before making this statement, she had remarked that other members of the Security Council shared this view. Indeed, the French representative seemed to be thinking along the same lines when he asserted that this same expression "law or customs of war" "covers specifically, in the opinion of France, all the obligations that flow from- the humanitarian agreements in force in the territory of the former Yugoslavia at the time when the offences were committed".¹⁶ While the British statement was not as clear-cut, since there was no reference to all obligations under the treaties,¹⁷ Hungary stressed "the importance of the fact that the jurisdiction of the Tribunal covers the *whole range* of international humanitarian law and the entire duration of the conflict *throughout* the territory of the former Yugoslavia",¹⁸ and the Spanish representative also envisaged a very broad scope of jurisdiction in his reference to

¹³ For example: E. David, "Le Tribunal international penal pour l'ex-Yougoslavie", *Revue belge de droit international*. 1992, pp. 574-575.

¹⁴ Judgment of the International Military Tribunal, *loc. cit.* (note 8), pp. 445-447.

¹⁵ Statement by Mrs Albright (United States) during the 3217th meeting of the Security Council. UN Doc. S/PV.3217, 25 May 1993, p. 15.

¹⁶ Statement by Mr Mérimée (France) at the same meeting, *ibid.* p. 11.

¹⁷ Statement by Sir David Hannay (United Kingdom). *ibid.*, pp. 17-18.

¹⁸ Statement by Mr Erdos (Hungary) (*italics added*). *ibid.* p. 20.

"the conflict or conflicts in that area".¹⁹ These statements, together with the repeated assertion that current international law has to be applied, show that for these States universal jurisdiction did indeed exist for the repression of serious violations committed in the course of internal conflict; or, in the case of some of the statements, show at least that the jurisdiction of the tribunal was considered extensive and that there was absolutely no question of deliberately restricting it.²⁰

Still on the subject of the ICTY, the United States went even further. In its *amicus curiae* brief submitted in connection with the *Tadic* case, it actually asserted that the provisions concerning grave breaches of the Geneva Conventions I (referred to in Article 2 of the Statute of the Tribunal) also covered non-international armed conflicts.²¹

A number of joint statements by European Community member States concerning the situation in the former Yugoslavia address the issue of individual criminal responsibility. They progress from a single express reference to the system of grave breaches provided for in the Geneva Conventions²² to the assimilation of all serious violations, which, it becomes increasingly clear, include those committed in internal conflicts.²³ Furthermore, on the subject of Rwanda, an extract from the joint position defined by the Council reads as follows: "The European Union stresses the importance of bringing to justice those responsible for the grave violations of humanitarian law, including genocide. In this respect the European Union considers the establishment of an international tribunal as an essential element to stop a tradition of impunity and to prevent further violations of human rights".²⁴ It can thus be observed that there seems to be general recognition of universal jurisdiction over serious violations of humanitarian law applicable in internal conflict.

Although they are of the greatest interest with a view to the possible establishment of an *opinio juris*, these statements must be backed up by evidence of actual practice.

2. Military manuals;

Since all armed conflict naturally involves action by armed forces or groups, it seems logical to continue our discussion with a brief look at the rules that purport to govern their conduct, in other words, the content of the relevant military manuals currently available.

Starting with the most recent of them, it is interesting to note that the 1992 German military manual includes references to Article 3 common to the Geneva Conventions and Protocol II when it gives a non-exhaustive list of grave breaches of international humanitarian law.²⁵

¹⁹ Statement by Mr Yañez-Barnuevo (Spain). *ibid.* pp. 39-40.

²⁰ On these statements see also the *Tadic* decision, *loc. cit.* (note 5), pp. 44-45, para. 75, and p. 54, para. 88.

²¹ See *Submission of the Government of the United States of America concerning Certain Arguments made by Counsel for the Accused in the Case of The Prosecutor of the Tribunal v. Dusan Tadic* (Case No. IT -94-1- T). 17 July 1995. pp. 35-36.

²² Joint Statement of 6 August 1992, Official Journal of the European Communities, Commission, No. 7/8, 1992, pp. 108-109.

²³ Joint Statement of 5 October 1992, *op. cit.* No.10, 1992, pp. 91, and Joint Statement of 2 November 1992, *op. cit.* No.11, 1992, p. 102.

²⁴ Council Decision 94/697/CFSP concerning the common position adopted on the basis of Article J .2 of the Treaty on European Union on the objectives and priorities of the European Union *vis-à-vis* Rwanda, *op. cit.*, No.10, 24 October 1994, p. 48.

²⁵ (Deutsches) Bundesministerium der Verteidigung, *Humanitäres Völkerrecht in bewaffneten Konflikten*, Handbuch, August 1992, para. 1209 (also in English: Federal Ministry of Defence, *Humanitarian Law in Armed*

Likewise, the Annotated Supplement to the US *Commander's Handbook on the Law of Naval Operations* makes several references to Protocol II when providing examples of "war crimes".²⁶ The 1991 Italian military manual uses a lapidary formula to introduce a list of examples of grave breaches, indicating that such violations of the Conventions and Protocols also constitute war crimes.²⁷

Several military manuals, taking a different approach, group all violations of the law of armed conflict under the term "war crimes". While undoubtedly excessive in the strictest sense of international law, this conception does allow an interpretation whereby grave breaches of humanitarian law applicable in non-international armed conflicts can be included within the operative scope of the legal notion of "war crimes". Examples of this can be found both in earlier manuals, such as those issued in Great Britain in 1958²⁸ and in the United States in 1956,²⁹ and in more recent documents such as the draft manual prepared by Canada.³⁰

However, while the more recent of these manuals are probably indicative of a new trend in favour of the criminalization of serious violations of humanitarian law applicable in internal conflicts, or leave the door open to such a course by the general nature or imprecision of their definition of war crimes, the legal framework for any resulting prosecution is another matter. While very useful, even essential, for understanding the rules governing the conduct of troops in the theatre of operations, something often difficult to define with precision, military manuals are considerably less pertinent when it comes to more visible elements linked to the repression and punishment of violations of such rules. Therefore, before examining the jurisprudence in this regard, we shall take a look at the relevant legal instruments, that is, laws applying the Geneva Conventions (and the Protocols thereto), general criminal law , and military penal codes.

3. National legislation

Among the instruments of national legislation, one of the most significant for our discussion is undoubtedly the Belgian law of 16 June 1993 regarding grave breaches,³¹ heralded as a "world legal first" by publicists who believe that Belgium has become "the first State to

Conflicts, Manual, August 1992). However, a commentary on this manual specifies that Protocol II does not provide for a system of grave breaches and that the repression of violations of the rules of Protocol II ensues solely from national criminal law. Rüdiger Wolfrum, "Zur Durchsetzung des humanitären Völkerrechts", in D. Fleck, ed., *Handbuch des humanitären Völkerrechts in bewaffneten Konflikten*, Munich, 1994, paras 1201 and 1209 (also in English: D. Fleck, ed., *Handbook of Humanitarian Law in Armed Conflicts*, Oxford University Press, 1995). The limits imposed by German criminal law on prevention and punishment are discussed below.

²⁶ Annotated Supplement to The *Commander's Handbook on the Law of Naval Operations*. NWP 9 (REV.A)/FMFM 1-10, Washington D.C., 1989. para. 6.2.5. Issued by the Office of the Judge Advocate General and consisting mainly of legal references added to the text of the handbook itself, this supplement is not an official publication of the Department of the Navy or the United States government. Moreover, it will be recalled that the United States is not party to the Additional Protocols.

²⁷ "Sono considerati crimini di guerra anche le infrazioni gravi alle Convenzioni internazionali ed ai Protocolli aggiuntivi alle stesse." Stato Maggiore della Difesa, *Manuale di diritto umanitario* (Vol. I: *Usi e Convenzioni di Guerra*), Rome, 1991, p. 28, para. 85.

²⁸ War Office. *The Law of War on Land*, Part III of the Manual of Military Law, 1958, para. 626.

²⁹ Department of the Army, *The Law of Land Warfare*, FM 27-10, 1956, para. 499.

³⁰ Canadian Forces, *Law of Armed Conflict Manual*. Second Draft, 1988, paras 1701-1704.

³¹ Loi relative à la repression des infractions graves aux Conventions internationales de Genève du 12 août 1949 et aux Protocoles I et II du 8 juin 1977, additionnels a ces Conventions (16 June 1993)", in *Moniteur belge*, 5 August 1993, pp. 17751-17755.

specifically classify as 'war crimes' certain serious violations of international humanitarian law committed in the course of a non-international armed conflict".³² Offences considered to constitute grave breaches are the acts or omissions listed under Article 1 (paras 1 to 20) when committed against persons protected by the Geneva Conventions or their Additional Protocols. Article 7 of the same law specifies that the jurisdiction of Belgian courts is not territorially limited, and there is no requirement relating to nationality. Although the original bill made no reference to Protocol II, the scope of application was extended to conflicts governed by the latter with government approval and on the basis of the following justifications put forward by the authors of the amendment: the need to fill a potential legal vacuum; reasons of morality and image in respect of public opinion; and, above all, the absence of any particular legal problems, since the adoption of the amendment was in line with current trends in humanitarian law.³³

Given the provisions of this law and the terms it uses, its adoption would seem to point to formal recognition of the international criminalization of serious violations of the law applicable in non-international conflict. However, it is worth noting that a commentary on the law specifies that "there is no rule of international law (except, perhaps, in respect of certain specific offences such as torture and hostage-taking) that defines the acts referred to in the law of 16 June 1993 as international breaches when they are committed in the context of a non-international conflict".³⁴ According to the same authors, the new jurisdiction granted to Belgian courts can, however, be considered compatible with the rules of international law, provided that the prosecution of acts or omissions committed abroad by a foreigner in an internal conflict situation respects the principle of legality; in particular, the act in question must be an offence both in the country where it is prosecuted and in the country where it was committed.³⁵

In any event, at this stage it will suffice to raise two further points in relation to this law. First, there is still some doubt as to the threshold of the non-international conflicts considered (owing to the uncertainty as to whether there can be 'grave breaches of Article 3 common to the Geneva Conventions, whose threshold of application is lower than that of Protocol II').³⁶ Secondly, certain acts carried out in the context of a non-international conflict could be considered as crimes under the Belgian law even when there are no provisions prohibiting them in international humanitarian law.³⁷

Thus Belgium has adopted a legal instrument that is innovative on more than one count. However, *Spain* follows closely on its heels. With the recent adoption of a new penal code,³⁸ it has taken a step in the same direction. The chapter dealing with the law of armed conflict opens with an article enumerating the persons protected thereunder and continues with various provisions detailing punishable acts. Article 608 includes among protected persons

³² A. Andries, E. David, C. Van Den Wijngaert, J. Verhaegen, "Commentaire de la loi du 16 juin 1993 relative à la répression des infractions graves au droit international humanitaire", *Revue de droit pénal et de criminologie*, 1994, p. 1133, para. 2.24 (ICRC translation).

³³ E. David, "La loi belge sur les crimes de guerre", *Revue belge de droit international*. Vol. XXVIII, 1995, pp. 668-671.

³⁴ *Op. cit.* (note 32), p. 1174 (ICRC translation).

³⁵ *Ibid.* pp. 1174-1175.

³⁶ The answer should nevertheless lean towards conflicts covered by Protocol II alone. See E. David. *op. cit.* (note 33). p. 671, and A. Andries et al., *op. cit.* (note 32), pp.1134-1135.

³⁷ The judge should therefore pay particular attention to the principle of *nullum crimen sine lege* when exercising jurisdiction over acts committed by a foreigner outside Belgian territory.

³⁸ *Código Penal*, Law 10/1995, of 23 November

those who are protected by virtue of Additional Protocol II of 1977.³⁹ The penal code does not stipulate any special restrictions with regard to jurisdiction *ratione personae* or *ratione loci*. On the other hand, the 1985 law on the judiciary⁴⁰ indicates that the jurisdiction of Spanish courts may extend to offences committed by anybody anywhere, if the acts in question can be classified under Spanish criminal law as offences that should be prosecuted in Spain pursuant to international treaties and conventions. It should also be noted that no adverse distinction is made in regard to situations covered by Protocol II and that, on the contrary, they seem to be fully integrated in the articles governing armed conflict in general. Further, these articles are among the provisions grouped under the heading “*Delitos contra la Comunidad internacional*”

Although it provides a less precise, less structured description of acts that amount to criminal conduct, the *Finnish* penal code is equally noteworthy. It effectively encompasses all armed conflict situations and all violations of treaty and customary rules of humanitarian law, qualifying all these offences as war crimes. Moreover, Finnish courts have jurisdiction over such acts; wherever and by whomever they are committed.⁴¹

Similarly, Section 11 of Chapter 22 of the *Swedish* penal code clearly regards any serious violation of international humanitarian law (treaty or customary) as a crime against international law, whether committed during a war or during any other type of armed conflict. Such acts fall within the jurisdiction of Swedish courts even if they are committed in another country by non-nationals and against non-nationals (Chapter 2, Section 3, para. 5).⁴²

Article 1, para. 3, of the *Netherlands Criminal Law in Wartime Act (Wet Oorlogsstrafrecht)* plainly states that civil war should be included under the term "war", while Article 12 gives Dutch courts universal jurisdiction.⁴³ A case relating to the conflict in the former Yugoslavia, which we shall discuss below, recently clarified the scope of these provisions.

The *Swiss* military penal code also grants national military courts jurisdiction to hear cases involving violations of humanitarian law applicable in non-international armed conflicts, even if such violations are committed in another country and do not directly affect the interests of the Swiss Confederation. In general terms, all violations of international conventions or other laws and customs of war are punishable; whether they amount to a "crime" under national law depends on the seriousness of the offence. There is just one limitation: the second paragraph of Article 108, which permits extension to non-international armed conflict, provides only for violations of international agreements, thus excluding customary rules. The military courts are given relatively broad jurisdiction under Article 2, para. 9, which states that in peacetime persons who can be prosecuted under the military penal code include "civilians who, in the course of an armed conflict, commit offences

³⁹ Cases of internal armed conflict more broadly covered by common Article 3 are apparently excluded

⁴⁰ *Ley orgánica* 6/1985, of 1 July, of the Judiciary, Art. 23, para. 4.

⁴¹ *Penal Code of Finland* (translated by M. Joutsen). in *American Series of Foreign Penal Codes*, Vol. 27, Wayne State University Law School, Rothman/Sweet&Maxwell, Littleton (Colorado)/London, 1987, Chap. I, Art. 3, para. 2.1, p. 17; Chap. 13, Arts 1 and 2, pp. 48-49. See also L. Hannikainen, R. Hanski, A. Rosas, *Implementing humanitarian law applicable in armed conflicts: The case of Finland*, Nijhoff, Dordrecht/Boston/London, 1992, pp. 116..118.

⁴² *Swedish Penal Code*, National Council for Crime Prevention, Stockholm, 1986, pp.9 and 68.

⁴³ *Wet Oorlogsstrafrecht, Nederlandse Wetboeken*, Suppl. 226, 1991, pp. 161-167.

against the law of nations",⁴⁴ with references to the relevant articles of the code. As in the case of the Netherlands, we shall return to this subject later.

Under the heading "*Delitos de carácter internacional*", Article 551 of the *Nicaraguan* penal code adopts a very comprehensive approach to the prosecution of any violation of humanitarian law, whether committed, ill the words of the provision itself, in time of international war or civil war. Article 16, para. 3(!), of the code gives Nicaraguan courts jurisdiction over offences included under this heading, irrespective of who committed them and where.⁴⁵

A recently adopted amendment to the *United States War Crimes Act* of 1996 extends the jurisdiction of national courts to violations of Article 3 common to the Geneva Conventions, classifying them as "war crimes".⁴⁶ At first sight, the current position of the United States on this matter therefore seems clear. However, it could be argued that the wording of the text is such that it implies that this term is used to refer solely to US domestic legislation and does not mean that the US considers the concept of "war crimes", as understood in international law, valid for internal conflicts. Nevertheless, it does seem significant that violations of common Article 3 are accorded the same status as grave breaches of the Geneva Conventions. Unlike another draft amendment presented at the same time, this text did not provide for application of the principle of universal jurisdiction, with the result that us legislation still falls short of the system established by the Geneva Conventions for grave breaches. However, due note should be taken of the US government's support for the idea of removing the limitations imposed on the jurisdiction of national courts by the requirement that either the victim or the perpetrator must be a US national or a member of the US armed forces, also in regard to violations of common Article 3.

While the new German military manual seems rather progressive, the *German* penal code fails to meet expectations in this regard. Indeed, none of its provisions refers specifically to armed conflict. The question of the different categories of violations of international humanitarian law incurring individual criminal responsibility is considered to be covered by the normal provisions of criminal law.⁴⁷ With the exception of the case of German servicemen outside Germany, to whom the *Wehrstrafgesetz* extends the applicability of the penal code as a whole,⁴⁸ the only grounds of any interest for broadening the scope of application of the provisions to acts committed abroad refer to those "which are made punishable by the terms of an international treaty binding on the Federal Republic of Germany".⁴⁹ The extraterritorial jurisdiction of German courts over serious violations of humanitarian law applicable in non-international armed conflicts therefore seems far from guaranteed because of the need for a treaty provision attributing individual criminal responsibility for such acts. However, there is nothing to prevent criminal charges being

⁴⁴ *Code pénal militaire*. Federal Law of 13 June 1927, 321.0, Federal Chancellor's Office, 1995 (ICRC translation).

⁴⁵ *Ley de Código penal de la Republica de Nicaragua*, Bibliografias Tecnicas, 1997, pp. 4 and 148.

⁴⁶ *War Crimes Act of 1996*, Public Law 104-192, 21 August 1996. For the 1997 amendment see also: *Congressional Record -Senate*, November 9, 1997, p. S12362 and *Congressional Record -House*, November 12, 1997, p. H10728.

⁴⁷ See R. Wolfrum, *op. cit.* (note 25), p. 433.

⁴⁸ *Wehrstrafgesetz*, Art. 1, para. a, in G. Erbs, M. Kohlhaas, eds., *Strqfrechtliche Nebengesetze*, Vol. IV, Munich 1990.

⁴⁹ *Penal Code of the Federal Republic of Germany* (translated by J. Darby), *American Series of Foreign Penal Codes*, *op. cit.* (note 41), Vol. 28, Art. 6, para, 9, p. 50.

brought against perpetrators of serious violations of the rules applicable in internal conflicts committed in the context of a conflict occurring on the national territory.⁵⁰

When read together, Articles 12 and 356 of the new *Russian* Penal Code of 13 June 1996 lead to similar conclusions. Indeed, while Article 356 refers in very general terms to conduct prohibited by treaties to which the Russian Federation is a party (thus excluding the rules of customary law), without specification as to the type of conflict, Article 12 allows the jurisdiction of the Russian courts to be extended beyond the national territory and to non-nationals if the interests of the Russian Federation are affected or in the event that such an extension of jurisdiction is provided for in an international agreement. The case of nationals, stateless persons, and servicemen is dealt with in the preceding paragraphs of the same article.⁵¹

Generally applicable in time of war, armed conflict, and occupation, Articles 241 and 242 of the *Portuguese* penal code cover some aspects of humanitarian law (war crimes against civilians and the destruction of monuments, respectively). However, Article 5 extends jurisdiction beyond the national territory and to non-nationals only in certain specified cases, which, curiously enough, include only the second of the above-mentioned articles, or when such jurisdiction is imposed by international treaty provisions.⁵²

Other legal instruments that should be briefly mentioned include the penal codes of *Ethiopia* (1957),⁵³ *Yugoslavia* (1990; also adopted by *Bosnia-Herzegovina* in (1992),⁵⁴ and *Slovenia* (1995),⁵⁵ which all provide for the criminalization of certain acts classed as war crimes, regardless of the type of conflict. The *Norwegian* military penal code penalizes all violations of the rules protecting persons and property that are set out in the four Geneva Conventions and the two Additional Protocols thereto,⁵⁶ and the Irish Geneva Conventions Act of 1962 makes all violations of the Conventions of 1949 punishable, including, therefore, common Article 3. This legal instrument provides for jurisdiction over acts committed abroad by non-nationals, although the scope of that jurisdiction is limited to cases of grave breaches of the Conventions. The Irish Act does not, however, explicitly rule out the hypothesis of the commission of grave breaches in relation to common Article 3.⁵⁷

4. Jurisprudence of national courts

⁵⁰ For a discussion of the problems relating to internal conflicts on the territory of States without specific provisions, see M. Bothe "War crimes in non-international armed conflicts" *Israel Yearbook on Human Rights*, Vol. 24, 1994, pp. 243-244.

⁵¹ *Criminal Code of the Russian Federation*. No. 63-FZ of 13 June 1996. Garant-Service. 1996. Arts 12 and 356.

⁵² *Código Penal Português* (anotado e comentado: M. Maia Goncalves). Livraria Almedina. Coimbra. 1996. pp. 93. 727- 728.

⁵³ *Penal Code of the Empire of Ethiopia*. Proclamation No.158 of 1957. in *Negarit Gazeta*. Gazette Extraordinary. Addis Ababa. 1957. Arts 282-284. pp. 87 -88.

⁵⁴ *Penal Code of the Socialist Federal Republic of Yugoslavia*. 1990. Art. 142-143. On this point, see: Tadic decision. *loc. cit.* (note 5), para. 132, pp. 76- 77.

⁵⁵ *Penal Code of Slovenia*. 11 January 1995 (unofficial translation by the Ministry of Justice), Chap. 35: Criminal offences against humanity and international law, pp. 117-118. Arts 374-377.

⁵⁶ *Militær Straffelov* of 22 May 1902, No.13. Art. 108 (as incorporated by the law of 26 November 1954, No.6, and amended by the law of 12 June 1981. No.65).

⁵⁷ *Geneva Conventions Act*, 1962, No.11, Sections 3 and 4.

In addition to the War Crimes Act of 1996 and the *amicus curiae* brief submitted to the ICTY in connection with the *Tadic* case,⁵⁸ a third element, this time of a jurisdictional nature, should be mentioned to illustrate the position of the US. In a tons claim filed by Bosnian victims against Radovan Karadzic, a US coun of appeal had to give a ruling on the issue of war crimes in an internal conflict. Although this was a civil action, the line of reasoning followed by the court provides points of interest that are relevant to our discussion. The court considered it necessary to establish clearly that the acts in question constituted violations of international law, so as to establish whether the matter fell within the jurisdiction of the US courts pursuant to the Alien Tort Act of 1789. To this end, the court examined the question of attributing individual responsibility for violations of the law of war under international law. Under the heading of "war crimes", the court measured the alleged acts against the requirements contained in common Article 3. It clearly situated its reasoning in the context of non-international armed conflict and acknowledged the existence of individual responsibility, referring in particular to the judgment delivered by the International Military Tribunal at Nuremberg. In reaching its ruling, the court incidentally touched on matters of criminal law. On the basis of this individualization of responsibility, and setting aside its primarily criminal aspect, the court inferred that national courts had jurisdiction in civil actions relating to acts constituting war crimes. In regard to the principle of universal jurisdiction, the court acknowledged its relevance to war crimes, essentially in relation to criminal law, but used it as a basis for asserting that "international law also permits states to establish appropriate civil remedies".⁵⁹ In any event, the court seemed convinced that the notion of war crimes, together with the principle of universal jurisdiction, also covered certain violations of the law applicable in non-international armed conflicts.

A case in which a Bosnian Serb was accused of committing acts including deportation, murder and rape in Bosnia-Herzegovina in June 1992 raised several interesting points in connection with the interpretation of the relevant provisions in *Netherlands* legislation. The military division of the district court of Arnhem, Netherlands, was required to rule on whether there was sufficient basis in law to proceed with the prosecution by military courts of a non-national for acts committed outside the national territory. Classifying the hostilities in question as civil war, and invoking the fact that this type of conflict falls within the definition of "war" within the meaning of the Criminal Law in Wartime Act (Article 1, para. 3), the court pointed out that there was no requirement to establish a link with the national territory (Article 12, para. 1), adding that the notion of a link with the Netherlands State is required only in very specific cases, none of which applied in this instance (Article 1, para. 2). Consequently, it acknowledged the jurisdiction of the Netherlands courts, military courts in the first instance. Following an initial appeal to the Supreme Court, the case was remitted to the district court for reconsideration because of a procedural irregularity. This time round the military division of the Arnhem district court took the opportunity to rule in favour of granting jurisdiction to ordinary courts. A second appeal finally led to confirmation by the Supreme Court that the jurisdiction of the Netherlands courts is not subject to any limitations relating to territory or nationality (of victims or perpetrators). It expressed the opinion that an accurate interpretation of Article 3 of the Criminal Law in Wartime Act, concerning the

⁵⁸ See note 21 above.

⁵⁹ Court of Appeals for the Second Circuit, Decision of 13 October 1995 in the case of S. Kadic v. R. Karadzic, in *International Legal Materials*, Vol. 34, 1995, p. 1601. See also pp. 1604-1605. Other decisions relating to this case: US District Court for the Southern District of New York. Decisions of 7 September 1994 and of 2 December 1997 in the case of Jane Doe v. R. Karadzic.

jurisdiction of the national courts, implies the non-validity of any restriction imposed by the terms of Article 1. Nevertheless, the Supreme Court remitted the case to the military courts.⁶⁰

In April 1997 a case concerning war crimes was brought before a Swiss military court for the first time. It involved a Bosnian Serb accused of violence to the physical and mental well-being and outrages on the personal dignity of prisoners and civilians interned in the camps of Omarska and Keraterm. In this particular case, the court finally acquitted the accused for lack of conclusive evidence. Two points are worth highlighting here. First, the indictment refers explicitly (but not exclusively) to Additional Protocol II and to Article 3 common to the Geneva Conventions, even though the alleged acts were committed outside the territory of the Confederation and did not involve a Swiss national. Secondly, although in its judgment the court expressed the view that the conflict in the former Yugoslavia should be considered globally and therefore classified as an international conflict, it also implied that, even if the conflict were otherwise classified, this would not have a decisive effect on jurisdiction by virtue of Articles 108 and 109 of the military penal code.⁶¹

In *Denmark*, a Bosnian Croat was indicted on numerous charges of ill-treating, and even causing the death, of persons held in a prison camp. He was tried and found guilty on various counts on the explicit basis of the articles relating to grave breaches of the Third and Fourth Geneva Conventions, together with the relevant articles of the Danish penal code.⁶² It is interesting to note that, while the offences all took place in July and/ or August of 1993 in the context of a conflict that was, on the face of it, non-international, the court did not rule on the nature of the conflict, from which it can be deduced that it did not consider this question pertinent to the application of the system of grave breaches.⁶³

The same line of reasoning seems to have been followed in *France*, without, however, reaching the stage of a judgment on the merits. Replying to a request filed by Bosnian nationals alleging ill-treatment in a Serb-run detention camp in the town of Kozarac, the High Court of Paris found that it did not have jurisdiction in regard to the charges of genocide and crimes against humanity, but that it did have jurisdiction over charges of torture and war crimes. With regard to the latter, the court examined the articles relating to grave breaches, without considering the nature of the conflict and inferring its jurisdiction from the obligation stipulated in those articles that defendants have to be committed to the national courts (or have to be extradited).⁶⁴ The Public Prosecutor lodged an appeal and the decision was overturned. With regard to war crimes, jurisdiction was rejected on the grounds that the provisions of the Geneva Conventions that were invoked were not directly applicable because of their wording, and that there was no text adapting French legislation to those provisions. The criminal division of the Court of Cassation subsequently confirmed this ruling.⁶⁵

⁶⁰ Arrondissementsrechtbank te Arnhem, militaire kamer, Decision of 21 February 1996: Hoge Raad der Nederlanden, Strafkamer, Decision of 22 October 1996; Arrondissementsrechtbank te Arnhem, militaire kamer, Decision of 19 March 1997; Hoge Raad der Nederlanden, Strafkamer, 11 November 1997.

⁶¹ Divisional Military Court No.1, Decision of 18 April 1997 in the case of Judge Advocate v. G. Grabec.

⁶² Østre Landsret (Eastern Division of the Danish High Court), Court 3, Decision of 25 November 1994 in the case of Prosecutor v. R. Saric.

⁶³ On this point see the *Tadic* decision, loc. cit. (note 5), p. 46-47, para. 83.

⁶⁴ Tribunal de grande instance de Paris, Order establishing partial lack of jurisdiction and the admissibility of a civil suit of 6 May 1994 in the case of E. Javor, K. Kussuran, M. Softic, S. Alic et M. Mujdzic v. X.

⁶⁵ Fourth Indictment Division of the Paris Court of Appeal. Appeal against an Order establishing partial lack of jurisdiction and the admissibility of a civil suit of 6 May 1994 in the case of Eo Javor. K. Kussuran. M. Softic. So Alic et M. Mujdzic v. X; Criminal Division of the Court of Cassation. Decision of 26 March 1996 (same case).

In *Belgium*, a case involving a Rwandan accused of having committed, in Rwanda, crimes defined as grave breaches of international humanitarian law by the Belgian law of 16 June 1993 gave various courts the opportunity to confirm the jurisdiction of Belgian courts over acts punishable under that law, even if they are committed in an internal conflict outside the national territory and do not involve Belgian nationals.⁶⁶

Required to rule on the constitutionality of a bill concerning the procedure for the repression of criminal offences committed during the events of 1956 and, more specifically, on the question of their imprescriptibility, the *Hungarian* Constitutional Court stated that violations of common Article 3 could be subject to imprescriptibility under Hungarian constitutional law, which provides for an exception to the rules on statutory limitations in respect of war crimes and crimes against humanity as defined by international law. Having made this assertion, the court itself classified violations of common Article 3 as crimes against humanity. But without precisely delimiting the concept. However, the reasons given for reaching this conclusion clearly revealed that the court did not consider such violations to constitute grave breaches within the meaning of the Geneva Conventions of 1949. In this respect, it drew attention to the confusion that could result from the wording of Article 2 of the bill under examination, provided indications as to a possible interpretation, but refrained from declaring it unconstitutional (which it did in respect of Article 1). Subsequently, the Hungarian Parliament incorporated the wording of Article 2 intact in a new law and the Constitutional Court, called upon once again to rule on the matter, annulled the legislative text in its entirety on the grounds of the unconstitutionality of this article as it stood. In its reasoning, it reiterated its position on the absence of a link between violations of common Article 3 and the provisions concerning grave breaches. The fact that the contested article of the national law established such a link was one of the considerations that prompted the court to declare it unconstitutional.⁶⁷

Finally, we should mention the few cases involving rebels or members of the Nigerian army who were tried on the basis of the "Operational code of conduct of the Nigerian armed forces", adopted in 1967 during the civil war against the Biafran rebels.⁶⁸ They clearly reveal a trend towards criminalization of certain types of conduct that violate the rules of humanitarian law applicable in internal conflicts, but the narrow scope of application limits the significance of these examples.

Other sources

I. Security Council resolutions

Other elements that might point to the existence of an *opinio juris* on international criminalization of flagrant violations of humanitarian law applicable in internal conflicts include two resolutions adopted unanimously by the Security Council concerning events in Somalia. In these resolutions the Security Council asserts that those committing or ordering

⁶⁶ Brussels Court of Appeal. Indictment Division, Decision of 17 May 1995 in the case of V. Nt.; Court of Cassation. Second Chamber. F., Decision of 31 May 1995 (same case); District of Brussels Court of First Instance, Council Chamber. Order of 22 July 1996 (same case).

⁶⁷ Constitutional Court of the Republic of Hungary, Decision No. 53/1993 (X. 13.) AB and Decision No. 36/1996 (IX.4.) AB

⁶⁸ See paras 106, 125, and 130 of the *Tadic* decision, *loc. cit.* (note 5), pp. 58, 67 and 68.

the commission of violations of humanitarian law shall be held individually responsible.⁶⁹ Certain resolutions adopted in connection with the conflicts in Rwanda and Burundi contain assertions along the same lines.⁷⁰ Similarly, a few resolutions concerning the former Yugoslavia are relevant to this discussion insofar as they address internal conflict situations.⁷¹

The adoption of such resolutions shows that the Security Council clearly considers the criminal responsibility of individuals committing or ordering the commission of the violations in question (in the context of an internal conflict) to be an issue of international concern, and suggests that this principle of individual responsibility is already well established. Although one may occasionally be perplexed by the terms used, because of their rather imprecise nature or because of the range of violations covered, in general it seems that what the Security Council is addressing in these resolutions is what we call "serious violations" of humanitarian law (applicable, in this case, in non-international armed conflicts).

2. Statutes of the two ad hoc international criminal tribunals

The Statute of the International Tribunal for the former Yugoslavia, the result of a rather cautious drafting procedure, does not actually come down in favour of or against the possible criminalization of serious violations committed in internal conflicts. However, the circumstances of its adoption by the Security Council, the task entrusted to the Tribunal by the latter, the competence *ratione rempori* defined in Article 1 of the Statute, and the Council's awareness of the mixed nature of the conflict (involving elements of both an international and an internal conflict), suggest "that the Security Council intended that, to the extent possible, the subject-matter jurisdiction of the International Tribunal should extend to both internal and international armed conflicts".⁷² However, even if we can infer that the Security Council wished to move in this direction, what we do not have (by the simple fact of the adoption of the Statute) is a clear assertion as to the state of the law in this regard.

The adoption of the Statute of the International Criminal Tribunal for Rwanda is another matter. Indeed, 'in that latter respect, the Security Council has elected to take a more expansive approach to the choice of the applicable law than the one underlying the statute of the Yugoslav Tribunal, and included within the subject-matter jurisdiction of the Rwanda Tribunal international instruments regardless of whether they were considered part of customary international law or whether they have customarily entailed the individual criminal responsibility of the perpetrator of the crime'.⁷³ With the adoption of Article 4 regarding serious violations of Article 3 common to the Geneva Conventions and of Additional Protocol II, the Security Council effects what could be regarded as an act of faith in respect of the existence of a law attributing individual criminal responsibility. This sudden

⁶⁹ See resolutions S/RES/794 (3 December 1992) and S/RES/814 (26 March 1993).

⁷⁰ For Rwanda, see S/RES/935 (1 July 1994), S/RES/955 (8 November 1994) and S/RES/978 (27 February 1995). For Burundi, see S/RES/1012 (28 August 1995) and S/RES/1072 (30 August 1996).

⁷¹ S/RES/787 (16 November 1992), S/RES/808 (22 February 1993), S/RES/819 (16 April 1993), S/RES/820 (17 April 1993), S/RES/827 (25 May 1993), S/RES/859 (24 August 1993), S/RES/913 (22 April 1994), S/RES/941 (23 September 1994), S/RES/1010 (10 August 1995), S/RES/1019 (9 November 1995), and S/RES/1034 (21 December 1995).

⁷² *Tadic* decision. *loc. cit.* (note 5), p-44, para. 78.

⁷³ United Nations, *Report of the Secretary-General pursuant to paragraph 5 of Security Council resolution 955* (1994), 13 February 1995, UN Doc. S/1995/134, pp. 3-4, para. 12.

development could very well have been anticipated in the light of the preliminary report by the Commission of Independent Experts for Rwanda, which readily classified the situation as-a non-international armed conflict, going on to address the issue of individual responsibility.⁷⁴ Although somewhat vague in the report, the link could easily be established.

3. Work of the International Law Commission

The International Law Commission (ILC), which is an ideal forum for expounding legal doctrine, incidentally had occasion to approach the issue under discussion from two different angles. The need to frame a statute for an international criminal court (a draft was adopted before the draft code on crimes against the peace and security of mankind, even though work on it was begun later) led the Commission to examine the question of non-international conflicts with a view to defining the scope of the jurisdiction of the future court.

In addition to crimes against humanity, genocide and crimes of aggression, the court would also exercise jurisdiction. according to the draft, over serious violations of the laws and customs applicable in armed conflicts and crimes 'that are defined as such or are governed by the treaties enumerated by the ILC. This list excludes Protocol II because it does not meet the criteria established by the ILC, one of which requires "that the treaty created either a system of universal jurisdiction based on the principle *aut dedere aut judicare* or the possibility for an international criminal court to try the crime, or both, thus clearly recognizing the principle of international concern".⁷⁵ The commentary on the subparagraph referring to serious violations of the laws and customs applicable in armed conflicts gives no clear indication as to whether it is intended to cover the notion of "war crimes",⁷⁶ nor whether non-international conflicts are also included (which the text itself seems to imply). On this last point, the ILC makes particular reference to its draft code on crimes against the peace and security of mankind, as adopted on first reading. The commentary on the latter explains that: "The expression 'armed conflict', on the other hand, was clear and precise and required no explanation. The definition of war crimes as violations of the 'rules-of international law applicable in armed conflict' covered both conventional law and customary law, as well as *all types of armed conflict*, to the extent that international law was applicable to them".⁷⁷

The second ILC draft that interests us here is precisely the draft code on crimes against the peace and security of mankind. After some hesitation on this point,⁷⁸ the Commission finally adopted a draft that dealt, in paragraph (f) of the article entitled "War crimes", with acts committed in violation of humanitarian law applicable in internal conflicts.⁷⁹ In its

⁷⁴ United Nations, Preliminary report of the Independent Commission of Experts established in accordance with Security Council resolution 935 (1994), UN Doc, 5/1994/1125, 4 October 1994, p. 20, paras 89-91.

⁷⁵ United Nations. Report of the International Law Commission on the work of its forty-sixth session (2 May-22 July 1994), UN Doc. A/49110, p. 78. However, the exclusion of Protocol II leaves aside the question of possible "grave breaches" of common Article 3, which could, in this respect, fall within the jurisdiction of the court.

⁷⁶ The ILC believes, for example, that conduct classified as a "grave breach" (and therefore to be regarded as a "war crime") would not necessarily constitute a "serious violation" within the meaning of this article. *Ibid.*, pp. 74- 75,

⁷⁷ Report of the International Law Commission on the work of its forty-first session. in *Yearbook of the International Law Commission*. 1989. Vol. II. Part 2. p. 53, para. 105 (our italics).

⁷⁸ After the above-mentioned comment (note 77), the Commission backtracked briefly. See for example the Report of the International Law Commission on the work of its forty-seventh session (2 May-21 July 1995). UN Doc. A/50/10. p. 54.

⁷⁹ UN Doc. A/CN.4/L.532. 8 July 1996.

commentary on this article, it stresses that there is now general recognition of the principle of individual criminal responsibility for such violations.⁸⁰ The above-mentioned paragraph (f), not content with following the current trend of developments in the law, went even further, moving in the direction of the possible recognition that crimes against the peace and security of mankind, in the eyes of the ILC an extremely serious category which incurs application of the principle *aut dedere aut judicare*, can be committed in the context of internal conflicts.⁸¹ In a distinctly innovative vein, the Commission specifies in its commentary that paragraph (g) of Article 20 (damage to the environment) should be understood as encompassing both international and non-international conflicts, even though it admits to not being totally convinced that this is necessarily a war crime under the law as it currently stands.⁸²

Terminological aspects

Before concluding, it is important to draw attention, once again, to the lack of uniformity in respect of the vocabulary used: should one talk of "war crimes" or can the term "grave breaches" be used in cases of conduct substantially covered by the treaty provisions relating to this category of violations ?

The decision of the Tribunal for the former Yugoslavia in the Tadic case

The Appeals Chamber of the ICTY was required to rule on this issue in its decision of 2 October 1995 in the *Tadic* case, and we shall begin with a brief account of its reasoning and conclusions.

As one of the grounds for its appeal, the defence filed a motion contending that, owing to the internal nature of the conflict in question, Articles 2 (Grave breaches of the Geneva Conventions of 1949), 3 (Violations of the laws or customs of war), and 5 (Crimes against humanity) of the Statute were not applicable. With regard to Article 2, the Appeals Chamber states that the system of grave breaches to which it refers is confined to the persons and property protected by the Geneva Conventions and can in no way be considered as applying to situations covered by common Article 3. It adopts an apparently very strict position on this point, asserting that this is in fact the only possible interpretation of the pertinent provisions. However, referring to the *amicus curiae* brief submitted by the US, it qualifies its position, stating that "a change in customary law concerning the scope of the 'grave breaches' system might gradually materialize".⁸³ With regard to Article 3 of the Statute, it begins by pointing out that it should be interpreted as a "general clause" intended to cover any law meeting the enumerated criteria.⁸⁴ It goes on to examine in depth a number of customary rules relating to internal conflicts and then addresses the issue of individual criminal responsibility. On this point, it admits the existence of a customary rule, and this leads it to the following

⁸⁰ Report of the International Law Commission on the work of its forty-eighth session (6 May -26 July 1996). UN Doc. A/51/10. pp. 118-119.

⁸¹ *Ibid.*, pp. 116-117.

⁸² *Ibid.*, pp. 119-120.

⁸³ *Tadic* decision, *loc. cit.* (note 5), p. 47, para. 83.

⁸⁴ To be liable to prosecution under Article 3, the conduct in question must contravene a rule of international humanitarian law that is of a customary nature (or a treaty rule, depending on the conditions), must constitute a serious violation and must entail the individual criminal responsibility of the perpetrator. *Ibid.*, pp. 54-55, para. 94.

conclusion: "In the light of the intent of the Security Council and the logical and systematic interpretation of Article 3 as well as customary international law, the Appeals Chamber concludes that, under Article 3, the international Tribunal has jurisdiction over the acts alleged in the indictment, regardless of whether they occurred within an internal or an international armed conflict".⁸⁵

Although it does not actually use the term, the Chamber therefore seems to take the view that today "war crimes" can exist in the context of internal conflicts. However, in view of the current state of the law, it refuses to admit that "grave breaches" can be committed in such situations.

While this is the majority position of the Chamber, Judge Abi-Saab issued a separate opinion, stating "on the basis of the material presented in the Decision itself, that a strong case can be made for the application of Article 2, even when the incriminated act takes place in an internal conflict".⁸⁶ In order to explain the shift from the "traditional" interpretation of "grave breaches" towards the new scope of this term, two possibilities are considered (the first being preferable): (1) the "subsequent practice" and *opinio juris* of the States party to the Conventions have led to a new teleological interpretation whereby non-international conflicts have come to be included in the system of "grave breaches"; (2) the new normative substance has established "a new customary rule ancillary to the Conventions, whereby the regime of grave breaches' is extended to internal conflicts".⁸⁷

State practice and opinions

As far as vocabulary is concerned, it has to be admitted that the expression "grave breach" is used with considerable frequency. We have taken note of the position of the United States as set out in its *amicus curiae* brief submitted in connection with the *Tadic* case, the texts of German and Italian military manuals, the Belgian law of 16 June 1993, the decision reached by the High Court of Paris, and the judgment handed down by the Danish Supreme Court. It is by no means coincidental that all these texts are dated later than 1990.

However, every one of these contributions has a weak point: the US position is not underpinned by any tangible element; the German manual is not supported in its ambitions by the legislative framework; and the French decision and the Danish judgment are not explicit as to the nature of the conflict concerned. Hungary stands out on its own with its unequivocal opposition to the use of the expression "grave breaches", its Constitutional Court favouring the term "crimes against humanity".

In any event, the position most commonly adopted (although sometimes implicitly), and perhaps the most convincing in many cases, is to place serious violations under the broader terminological umbrella of "war crimes", even when the acts in question could also be classified as grave breaches if committed in the context of an international conflict.

⁸⁵ *Ibid.*, p. 71. para. 137. It can be noted that in its judgment of 7 May 1997, the court of first instance essentially declared Tadic guilty on the charges of crimes against humanity and violations of common Article 3. International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Dusko Tadic a/k/a "Dule"*: *Opinion and judgment*, 7 May 1997, Case No. IT-94-I-AR72, p. 300.

⁸⁶ International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Dusko Tadic a/k/a "Dule"*: *Separate opinion of Judge Abi-Saab on the defence motion for interlocutory appeal on jurisdiction*, 2 October 1995, Case No. IT-94-I-AR72, p.5.

⁸⁷ *Ibid.*, p. 7.

Although from the terminological point of view the balance therefore seems to be tipped in favour of the generic term "war crimes", one must be careful not to overlook the importance of the real meaning States attribute to the terms they use. It is worth pointing out here that when it is clearly a question of grave breaches according to the "traditional" concept, States also sometimes adopt a circumspect and original approach. In any event, and in particular following the adoption of Protocol I, which marked an important move towards bringing what is known as "the law of The Hague" and "the law of Geneva" into line with each other (or the gradual inclusion of one in the other), it is becoming increasingly difficult to make any distinction between the two notions on the basis of the range of behaviours they encompass. In point of fact, it is probably their respective mechanisms of repression that most clearly differentiate one from the other.

In this regard, one point is evident: even though some States assume the right to prosecute non-nationals for serious violations of international humanitarian law applicable in internal conflicts committed in other countries (and even though the work of the ILC and the statutes and jurisprudence of the ad hoc international criminal tribunals are also based on the principle of universal jurisdiction), it still seems very difficult to conclude that a sufficiently significant number of States initiate prosecutions by virtue of a hypothetical obligation to do so. It cannot therefore be asserted that a system of grave breaches currently exists for situations of internal conflict.

Conclusion

In the last analysis, it does not seem unreasonable to assert that serious violations of humanitarian law applicable in internal conflict do in fact constitute "war crimes" under international law as it stands today, the corollary to this change in status being the principle of universal jurisdiction.

Furthermore, doctrine, which serves as a subsidiary means for the determination of the rules of international law, appears to substantiate that opinion.⁸⁸ Indeed, very recent developments seem to support the idea that the customary rule we are seeking has now clearly emerged. Indeed, in mid-February 1997 the ICRC submitted a rather circumspect working paper on war crimes to the Preparatory Committee for the Establishment of an International Criminal Court. After considering grave breaches and other serious violations of international humanitarian law applicable in international armed conflict, the document devotes a third section to what the ICRC, in the statement attached thereto, describes as war crimes committed in the course of non-international armed conflicts.⁸⁹

This paper, presented by New Zealand and Switzerland and supported by several other delegations, was initially selected, along with the US proposal (which also contained a section on non-international conflicts), as a basis for discussion and as one of the sources for

⁸⁸ For example: M. Bothe. *op. cit.* (note 50), p. 247; C. Meindersma. "Violations of common Article 3 of the Geneva Conventions as violations of the laws or customs of war under Article 3 of the Statute of the International Criminal Tribunal for the former Yugoslavia". *Netherlands. International Law Review*, Vol. XLII. 1995. p. 396; T. Meron. *op. cit.* (note 6).

⁸⁹ ICRC. *War Crimes*, working paper prepared by the ICRC for the Preparatory Committee for the Establishment of an International Criminal Court. New York, 14 February 1997, 4 pp.. and ICRC, *Statement of the ICRC before the Preparatory Committee for the Establishment of an International Criminal Court*, New York. 14 February 1997. 2 pp.

a draft consolidated text on war crimes.⁹⁰ At the beginning of December 1997, the Preparatory Committee pursued its examination of the issue. A new draft article on war crimes (Article 20C), which includes numerous options, contains two sections devoted to non-international armed conflict. Section C deals with serious violations of common Article 3, and section D enumerates several other violations of the law applicable in internal armed conflicts.⁹¹

Many States were agreeable to the inclusion of the first or both sections (with minor divergences as to the content of the second). Only a small number were reticent, and very few were totally opposed to the inclusion of any provisions at all relating to internal armed conflict. Further, the objections raised by these States did not necessarily refer to the pertinence of the notion of war crimes in non-international armed conflict.⁹² They might well be linked solely to the scope of the future court's jurisdiction.

In any event, there is no disputing that during the past five years developments in this area have moved extremely rapidly towards the attribution of individual criminal responsibility to perpetrators of serious violations of international humanitarian law committed in the course of non-international armed conflicts.

⁹⁰ See: United Nations. Preparatory Committee for the Establishment of an International Criminal Court. Working group on the definition of crimes. *Written proposal submitted by New Zealand and Switzerland*, 14 February 1997, UN Doc. A/AC.249/1997/WG.1/DP.2. *Written proposal submitted by the United States*, 14 February 1997, UN Doc. A/AC.249/1997/WG.1/DP.I. *Draft consolidated text*, 20 February 1997, UN Doc. A/AC.249/1997/WG.1/CRP.2.

⁹¹ *Ibid.*, War Crimes, 12 December 1997, UN Doc. A/AC.249/1997/WG.1/CRP.9.

⁹² It is noteworthy that major States such as India and Indonesia are clearly moving in this first direction.