"War Crimes Under International Customary Law - The Historical Development and the Legal Issues"

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DECLARATION

I declare that this research report is my own work. It is submitted in partial fulfilment of the requirements of the degree Magister Legum at the University of Western Cape, Bellville. It has not been submitted before for any degree or examination in any other university.

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Content

Abbreviations

AJIL	American Journal of International Law
ASIL	American Society of International Law
BYIL	British Yearbook of International Law
Conf.	Conference
Dept.	Department
Doc.	Document
e.g.	for example
GA	General Assembly of the United Nations
ICC	International Criminal Court
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
i.e.	that is
ILC	International Law Commission
IRRC	International Review of the Red Cross
NGO	Non-governmental organisation
No.	Number
NSCSC	North Sea Continental Shelf Cases
NYIL	Netherlands Yearbook of International Law
Para	Paragraph
RdC	Recueil des Cours
Res	Resolution
SC	Security Council of the United Nations
Sess	Session
UCLA	University of California Los Angeles
UN	United Nations
VJIL	Virginia Journal of International Law
Vol.	Volume

Chapter 1 Introduction

War is characterized by outburst of primitive, raw violence and has always played an important role in the history of mankind. When states or groups within a state cannot or will not settle their disagreements or differences by means of peaceful discussion, weapons are suddenly made to speak. War inevitably results in immeasurable suffering among people and in severe damage to objects.[1]

Despite the consequences of war, states continue to wage wars and groups still take up weapons when they have lost hope of just treatment at the hands of the government. Facing the fact that wars will always occur, states developed a need to lay down rules that seek to mitigate the effects of war. These rules are predominantly included in international treaties. Some of these rules constitute war crimes under international customary law.

This dissertation will discuss the historical development and the legal issues of war crimes under international customary law. Discussing all issues concerning war crimes would be beyond the scope of this dissertation. In some aspects, this dissertation provides just an overview. In short, the definition of war crimes and their applicability are discussed right at the beginning, as well as the historical development of war crimes before the 20th century. Also the topic "war crimes committed in international conflicts" is not discussed in detail. However, the most important issues that are essential for the understanding of war crimes in general are explained and sufficient information is provided on this topic.

The emphasis of this dissertation is focuses on two very important and very actual issues:

(i) War crimes committed in non-international (internal) conflicts and

(ii) Individual criminal responsibility for war crimes committed both in international and non-international conflicts.

[1] Gasser, *"International Humanitarian Law – An Introduction"*, at 3.

The first issue is currently a prevalent issue. In regard to this, many problems have not yet been solved.

The second issue, individual criminal responsibility is often neglected. However, it is an essential part of international criminal law.

Generally, after reading this dissertation it might be possible to answer following question: Are war crimes punishable no matter where and by whom they are committed?

Chapter 2 War crimes

I. Definitions of international humanitarian law and war crimes

International humanitarian law seeks to protect persons in times of armed conflict who are not or are no longer taking part in the hostilities, and to restrict the methods and means of warfare employed.

International humanitarian law is also known as the law of armed conflicts. It has two branches:

(i) the Law of Geneva, or humanitarian law proper, which is designed to safeguard military personnel who are not or no longer taking part in the fighting and persons not actively involved in hostilities, particularly civilians;

(ii) the Law of The Hague or the law of war, which establishes the rights and obligations of belligerents in the conduct of military operations, and limits the means of harming the enemy.[2]

These two branches of international humanitarian law are not completely separate, however, because the effect of some rules of the Law of The Hague is to protect the victims of conflicts, while the effect of some rules of the Law of Geneva is to limit the action that the belligerents can take during hostilities. With the adoption of the Additional Protocols of 1977,

[2] See in particular, Pictet, *"Humanitarian Law and the Protection of War Victims"*, at 16-17.

which combine both branches of international humanitarian law, that distinction is now of merely historical and didactic value.[3]

"War crime" is the technical expression for a serious violation of the law of war by any person or persons, military or civilian. Every serious violation of the law of war is a war crime.[4]

The term "war crimes" encompasses, for example, violations of treaties such as the Fourth Hague Convention of 1907. Also the list of grave breaches of the Geneva Conventions and Additional Protocol I are regarded as war crimes.[5] However, providing an exhaustive list of all war crimes is beyond the scope of this dissertation. It is, therefore, sufficient to state that the most serious violations of international humanitarian law, which can also be called the law of war, are war crimes.[6]

II. The concept of "armed conflict"

We have already pointed out that international humanitarian law is a special branch of law covering situations of armed conflict. Thus, the existence of an armed conflict is essential for the application of international humanitarian law. This is laid down in different provisions of international treaties.

Common Article 2 of the 1949 Geneva Conventions states that:

"the present Convention shall apply in all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them."

If there is an armed conflict between two or more states, then international humanitarian law is automatically applicable, whether or not a declaration of war has been made, and whether the parties to the conflict have

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[3] *"What is International Humanitarian Law?"*, Extract from *"International Humanitarian Law: Answers to your questions"*, ICRC, 1 May 1998.
[4] Lillich/Newman, *"International Human Rights: Problems of Law and Policy"*, at 677.
[5] Pfanner, *"The Establishment of a Permanent International Court"*, IRRC No. 322 (1998), at 23-24.

recognized that there is a state of war. Thus, the only requirement for the application of international humanitarian law is the existence of an armed conflict.

The expression "armed conflict" also appears in common Article 3 of the Geneva Conventions, which deals with non-international armed conflicts. In its provisions the 1977 Additional Protocols refer to the term "armed conflict" laid down in the Conventions.[7]

The problem is that the Conventions themselves do not include any definition and thus presuppose a general definition of "armed conflict". This leads to the conclusion that the reason for using armed forces is of no consequence of international humanitarian law. It is therefore irrelevant whether there was any justification for taking up weapons, whether the use of arms was intended to restore law and order, or whether it constituted an act of naked aggression. It is also of no concern whether or not the party attacked resists. Therefore an armed conflict means fighting between armed forces.[8] The *Appeals Chamber in the Tadic case* stated that an armed conflict exists whenever there is a resort to armed force between states or protracted armed violence between governmental authorities and organized armed groups or between such groups within a state.[9]

Consequently, international humanitarian law ceases to have any effect when the armed conflict is over.[10] This means in practical terms that all prisoners of war have been repatriated, all civilian internees set free and all occupied territories liberated.[11]

III. Internal disturbances and tensions

The application of international humanitarian law depends on the existence of an armed conflict.[12] Whether there is an armed conflict or not

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[6] *"Penal Repression Punishing War Crimes"*, ICRC, 31 January 1998.
[7] Protocol I: Article 1 (3); Protocol II: Article 1 (1).
[8] *"What is International Humanitarian Law?"*, Extract from *"International Humanitarian Law: Answers to your questions"*, ICRC, 1 May 1998.
[9] *The Prosecutor v. Dusko Tadic*, Case No. IT-94-1-AR72, Appeals Chamber, Decision of 2 October 1995, at 70.
[10] *The Prosecutor v. Tadic*, Appeals Chamber, Decision of 2 October 1995, at 70.
[11] First, Second and Third of the 1949 Geneva Conventions, Art. 5; Fourth Convention, Art. 6.
[12] See above.

is often difficult to decide, especially if the situation has similarities with internal disturbances or tensions. Internal tensions or disturbances are not included in the definition of "armed conflict".[13]

Internal disturbances and tensions are marked by serious disruption of domestic order resulting from acts of violence which do not, however, have the characteristics of an armed conflict. They encompass, for example, riots by which individuals or groups of individuals openly express their opposition, their discontent or their demands, or even isolated and sporadic acts of violence. They may take the form of fighting between different factions or against the power in place.[14]

For a situation to be qualified as one of internal disturbances or tensions, it is of no consequence whether state repression is involved, or not, whether the disturbances or tensions are lasting, brief with durable effects, or intermittent, whether only a part or all of the national territory is affected or whether the disturbances or tensions are of religious, ethnic, political or any other origin.[15]

The fact that internal disturbances and tensions are not at present within the field of the application of international humanitarian law does not mean that there is no international legal protection applicable to such situations. They are covered by universal and regional human rights instruments.[16]

IV. International and non-international conflicts

International humanitarian law recognizes two different categories of armed conflict:

(i) international and

(ii) non-international (internal) armed conflict.

In the absence of a general definition of non-international armed conflict, which may take very different forms, an attempt should be made to

[13] See Article 1 (2) of Protocol II.
[14] Harroff-Tavel, *"Internal Violence"*, IRRC No. 296 (1993), at 200.
[15] Harroff-Travel, *"Internal Violence"*, IRRC No. 296 (1993), at 201.

describe the difference between international and non-international armed conflicts. First, the reference point for distinguishing is the state border: wars between two or more states are considered to be international armed conflicts, and warlike clashes occurring on the territory of a single state are non-international (or internal) armed conflicts (usually known as civil wars).[17] Secondly, in an international conflict, parties of the conflict are sovereign states, whereas in a non-international conflict the government of a single state is in conflict with one or more armed factions within its territory.[18] Thus, the legal status of the parties involved in an internal conflict is fundamentally unequal.[19]

The distinction between international and non-international armed conflicts is essential in international humanitarian law. Both types of conflicts are governed by different provisions of international humanitarian law. One is surprised by the immense difference in the number of provisions referring to either situation. Most of the rules of international humanitarian law govern international armed conflicts. The 1949 Geneva Conventions and their 1977 Additional Protocols contain 20 provisions on non-international armed conflicts against almost 500 on international wars.[20]
There are reasons for this different development to which we refer later in this dissertation.

Chapter 3 The development of war crimes in the context of the development of humanitarian law and human rights law

We have seen that the existence of a war crime is strictly connected with the existence of a rule of international humanitarian law which must have been violated. That is why "war crimes" and their historical development must be seen in the context of international humanitarian law.

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[16] Sandoz/Swinarski/Zimmermann, *"Commentary on the Additional Protocols"*, at 4479.
[17] Gasser, *"International Humanitarian Law – An Introduction"*, at 21.
[18] Sandoz/Swinarski/Zimmermann, *"Commentary on the Additional Protocols"*, at 4339.
[19] Sandoz/Swinarski/Zimmermann, *"Commentary on the Additional Protocols"*, at 4458.
[20] Gasser, *"International Humanitarian Law – An Introduction"*, at 21.

I. General

International humanitarian law is perceived more and more as part of human rights law applicable in armed conflict. The greater awareness of the relevance of humanitarian law to the protection of people in armed conflict, coupled with the increasing use of human rights law in international affairs means that both areas of law now have much greater international profile and are regularly being used together.[21]

However, human rights law and humanitarian law have totally different historic origins, and the codification of these laws has until very recently followed entirely different lines.

II. Origin and development of humanitarian law

Restrictions on hostile activities can be found in many cultures and typically originate in religious values and the development of military philosophies.[22] The extent to which these customs resemble each other is of particular interest. In general their similarities relate both to the expected behaviour of combatants between themselves and to the need to spare non-combatants. Traditional manuals of humanitarian law cite the basic principles of this law as being those of military necessity, humanity and chivalry.[23] The last criterion seems out of place in the modern world, but it is of importance for an understanding of the origin and nature of humanitarian law. Chivalry contributed in some degree to the evolution of international law. Declarations of war, the status of those who carried a flag of truth and the banning of certain weapons are part of the heritage of chivalry. The institution brought with it the recognition that in war as in the game of chess there should be rules that one does not win by overturning the board.[24]

Another important development in this context was the church's "just war" doctrine. It did nothing less than provide believers with a justification for war and all its infamy, by offering a compromise between moral ideas and

[21] See, e.g., Pictet, *"Humanitarian Law and the Protection of War Victims"*, at 13.
[22] See Pictet, *"Development and Principles of International Humanitarian Law"*, at 6ff.
[23] Oppenheim, *International Law*, Volume II, pp. 226-227.

political necessities. The reasoning was as follows: natural order is a reflection of divine order. A legitimate sovereign has the power to establish and maintain order. Since the end justifies the means, acts of war carried out for the sovereign are exempt from sin – it is a just war.[25] Even if the "just war" doctrine regulated the justice of resorting to force, it led to serious consequences: men used the doctrine to justify cruelties as the punishment of God.[26]

In short, people from all over the world were trying to regulate war by means of generally binding rules.

The achievements of the 19th century must be viewed against this rich historical background. Today's universal and for the most part written international humanitarian law can be traced directly back to two persons: Henry Dunant and Francis Lieber. Dunant and Lieber made essential contributions to the concept and contents of contemporary international humanitarian law.

Dunant and Lieber both built on an idea put forward by Jean-Jacques Rousseau. In the Contract Social, published in 1762 and subsequently condemned and publicly burnt in Geneva, Rousseau gave expression to certain ideas which have had considerable ethical, juridical and political consequences.[27] One such statement was: "War is not, therefore, any relation between state and state in which individuals are enemies only accidentally, not as men, or even as citizens, but as soldiers....". Rousseau continued logically that soldiers may only be fought as long as they themselves are fighting. Once they lay down their weapons "they again become mere men". Their lives must be spared.[28]

Rousseau thus summed up the basic principle underlying international humanitarian law. In so doing he lays foundation for the distinction to be made between members of a fighting force, the combatants and the remaining citizens of an enemy state, the civilians not participating in the

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[24] Pictet, *"Development and Principles of International Humanitarian Law"*, at 15.
[25] Pictet, *"Development and Principles of International Humanitarian Law"*, at 13.
[26] Pictet, *"Development and Principles of International Humanitarian Law"*, at 14.
[27] Lillich/Newman, *"International Human Rights: Problems of War and Policy"*, at 671.
[28] Jean-Jacques Rousseau, *"A Treatise on the Social Contract"*, Book I, Chapter IV.

conflict. The use of force is permitted only against the former, since the purpose of war is to overcome enemy armed forces, not to destroy an enemy nation. But force may be used against individual soldiers only so long as they put up resistance. Any soldier laying down his arms, or obliged to do so because of injury, is no longer an enemy and may no longer be the target of a military operation. It is in any case pointless to take revenge on a simple soldier, as he cannot be held responsible for the conflict.[29]

The intellectual foundation for the work of Dunant and Lieber was therefore laid.

Henry Dunant, after being shocked to see thousands of wounded soldiers after the battle of Solferino in Northern Italy in 1859, undertook to tell the world what he had seen by writing *Un souvenir de Solferino* (A memory of Solferino), published in 1862.[30] Dunant indicated in his book the two steps that he regarded as indispensable: first, in each country, the establishment of a national private aid organization to assist the military medical services in a task the latter were not, by far, equipped to perform; and secondly, for states to conclude a treaty that would facilitate the work of these organizations and guarantee a better treatment of the wounded.[31] The work of Dunant had consequences. In short, it led to the foundation of the International Committee of the Red Cross in 1863 and the adoption of the first Geneva Convention in 1864 (Convention for the Amelioration of Condition of the Wounded in Armies in the Field).[32]

Francis Lieber was asked by President Lincoln to set up a list of regulations concerning the conduct of war which should be regarded by Unionist soldiers in the American Civil War. The result of Lieber's work is generally known as the Lieber Code.[33] It came into force in April 1863 and

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[29] Pictet, *"Development and Principles of International Humanitarian Law"*, at 23.
[30] Bory, *"Origin and Development of International Humanitarian Law"*, at 9.
[31] Kalshoven, *"Constraints on the Waging of War"*, at 9.
[32] Kalshoven, *"Constraints on the Waging of War"*, at 9.
[33] *Instructions for the Government of Armies in the Field*, 24 April 1863, prepared by Francis Lieber during the American Civil War, and promulgated by President Lincoln as

is important that it marked the first attempt to codify the existing laws and customs of war. Unlike the first Geneva Convention of 1864, however, the code did not have the status of a treaty as it was intended solely for Union soldiers fighting in the American civil war.[34] The Lieber Code has nonetheless served as a model and a source of inspiration for the efforts undertaken later on.[35]

The Lieber Code of 1863 was used as the principal basis for the development of the Hague Conventions of 1899 and 1907 which in turn influenced later developments. Thus, it is necessary to examine some provisions of the code in detail.

The relevance of war being a lawful activity at the time is reflected in Art 67 of the Lieber Code:

"The law of nations allows every sovereign government to make war upon another sovereign state, and, therefore, admits of no rules or laws different from those of regular warfare, regarding the treatment of prisoners of war, although they may belong to the army of a government which the captor may consider as a wanton and unjust assailant".

The law was therefore based on what was considered necessary to defeat the enemy and outlawed what was perceived as unnecessary cruelty:

" Military necessity, as understood by modern civilized nations, consists in the necessity of those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war" (Art. 14).

"Military necessity does not admit of cruelty – that is, the infliction of suffering for the sake of suffering or for revenge, nor of maiming or

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General Orders No. 100. Reproduced in Schindler and Toman (eds.), *"The Laws of Armed Conflicts"*.

[34] *"What is International Humanitarian Law?"*, Extract from *"International Humanitarian Law: Answers to your Questions"*, ICRC, 1 May 1998.

[35] Kalshoven, *"Constraints on the Waging of War"*, at 12.

wounding except in fight, nor of torture to extort confessions. It does not admit of the use of poison in any way, nor of the wanton devastation of a district..." (Art. 16).

Two basic rules of international humanitarian law, namely the protection of civilians and the decent treatment of prisoners of war, are described in the following terms:

"Nevertheless, as civilization has advanced during the last centuries, so has likewise steadily advanced, especially in war on land, the distinction between the private individual belonging to a hostile country and the hostile country itself, with its men in arms. The principle has been more and more acknowledged that the unarmed citizen is to be spared in person, property, and honour as much as the exigencies of war will admit" (Art. 22).

The importance of respectful treatment of prisoners of war is referred to as follows:

"A prisoner of war is subject to no punishment for being a public enemy, nor is any revenge wreaked upon him by the intentional infliction of any suffering, or disgrace, by cruel imprisonment, want to food, by mutilation, death, or any other barbarity" (Art. 56).

"Honourable men, when captured, will abstain from giving to the enemy information concerning their own army, and the modern law of war permits no longer the use of any violence against prisoners in order to extort the desired information or to punish them for having given false information" (Art. 80).

On the protection of hospitals the Lieber Code states:

"Honourable belligerents often request that the hospitals within the territory of the enemy may be designated, so that they may be spared..." (Art. 116).

"It is justly considered an act of bad faith, of infamy or fiendishness, to deceive the enemy by flags of protection..." (Art. 117).

The chapter relating to occupied territory specifies the action that an occupier may take for military purposes, in particular levying taxes and similar measures, but it is very clear about types of abuses that are prohibited:

"All wanton violence committed against persons in the invaded country, all destruction of property not commanded by authorized officer, all robbery, all pillage or sacking, even after taking a place by main force, all rape, wounding, maiming , or killing of such inhabitants, are prohibited under the penal of death, or such other severe punishment as may seem adequate for the gravity of the offense.
A soldier, officer or private, in the act of committing such violence, and disobeying a superior ordering him to abstain from it, may be lawfully killed on the spot by such superior" (Art. 44).

Finally, in this small selection of articles, mention should be made of Lieber's caution to states in their resort to reprisals which were still generally considered lawful at that time:

"Retaliation will...never be resorted to as a measure of mere revenge, but only as a means of protective retribution, and moreover, cautiously and unavoidably: that is to say, retaliation shall only be resorted to after careful inquiry into real occurrence, and the character of misdeeds that may demand retribution.
Unjust or inconsiderate retaliation removes the belligerents farther and farther from the mitigating rules of regular war, and by rapid steps leads them nearer to the internecine wars of savages" (Art. 28).

The fundamental concepts of laws of war have remained essentially unchanged and are still based on the balance between military necessity and humanity. The major characteristic of humanitarian law is the fact that the law makes allowance in its provisions for actions necessary for military purposes. Much of it may therefore not seem very "humanitarian". But the way in which humanitarian law incorporates military necessity in its provisions is of particular interest when comparing the protection afforded by this branch of law and human rights.

Military necessity has been defined as:

"Measures of regulated force not forbidden by international law, which are indispensable for securing the prompt submission if the enemy, with the least possible expenditure of economic and human resources".[36]

The Lieber Code describes military necessity as follows:

"Military necessity admits of all direct destruction of life or limb of armed enemies, and of other persons whose destruction is incidentally unavoidably in the armed contest of the war; it allows of the capturing of every armed enemy, and every enemy of importance to the hostile government, or of peculiar danger to the captor: it allows of all destruction of property, and obstruction of the ways and channels of traffic, travel, or communication, and of all withholding of sustenance or means of life from the enemy; of the appropriation of whatever an enemy's country affords necessary for the subsistence and safety of the army, and of such deception as doe snot involve the breaking of good faith either positively pledged, regarding agreements entered into during the war, or supposed by the modern law of war to exist. Men who take up arms against one another in public war do not cease on this account to be moral beings, responsible to one another and to God" (Art. 15).

[36] U.S. Air Force Law of War Manual.

This balance between military necessity and humanity is broadly speaking achieved in four different ways.[37]

First, some actions do not have any military value at all and are therefore simply prohibited, for example, sadistic acts of cruelty, pillage and other private rampages by soldiers which tend to undermine professional disciplined behaviour. In this respect it is worth recalling that many of the early customs of war were motivated by the desire to encourage discipline. Secondly, some acts may have a certain value, but it has been accepted that humanitarian considerations override these. On this basis the use of poison and toxic gases has been prohibited. Thirdly, some rules are a true compromise in that both the military and the humanitarian needs are accepted as important to certain actions and consequently consideration of both is limited to some extent. An example is the rule of proportionality in attacks, which accepts that civilians will suffer "incidental damage" (the limitation with respect to humanitarian needs), but that such attacks must not take place if the incidental damage would be excessive in relation to the value of the target (the limitation with respect to military needs). Finally, some provisions allow the military needs in a particular situation to override the normally applicable humanitarian rule.[38]

III. The development of human rights law

We have seen that humanitarian law originated in notions of honourable and civilized behaviour that should be expected from professional armies. Human rights law on the other hand has less clearly defined origins. There are a number of theories that have been used as basis for human rights law, including those stemming from religion, the law of nature which is permanent and which should be respected, positivist utilitarianism and socialist movements.[39]

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[37] Schwarzenberger, *"International Law as applied by International Courts and Tribunals"*, Volume II, *"The Law of Armed Conflict"*, at 10-12.

[38] Schwarzenberger, *"International Law as applied by International Courts and Tribunals"*, Volume II, *"The Law of Armed Conflict"*, at 15-18.

[39] Shestack, *"The Jurisprudence of Human Rights"* in T. Meron, *"Human Rights in International Law"*, Volume I, at 69.

As the development of human rights progressed from theories of social organization to law, it is not surprising that lawyers began to analyse the nature of these rights from the legal theory point of view. Thus there are plenty of articles arguing over whether human rights are really legal rights if the beneficiary cannot insist on their implementation in court. The focus of this argument is on the nature of economic and social rights which many legal theorists argue cannot therefore be described as legal rights.[40] However, the first major international instrument defining "human rights", namely the 1948 Universal Declaration of Human Rights, contains not only civil and political but also economic and social rights.

A further development of importance in the philosophy underlying human rights law is the appearance of what are commonly referred to as "third generation" rights. Third world states have in particular pointed out that in order to be able to show proper respect for economic and social rights, the appropriate economic resources are required, and that for this purpose they have a right to development. Other rights in this category are, for example, the right to peace or to a decent environment. It is clear that these factors have a direct effect on the quality on individuals' lives or even their very existence, but legal purists again indicate here that it is not possible to categorize these human rights as they cannot be implemented by a court and also because the specific corresponding legal duties are unclear.[41]

IV. Similarities between international humanitarian law and human rights law

Having looked at the origins and formulation of these two areas of law, we can now turn to their present method of interpretation and implementation. We shall limit ourselves here to an overview of the most important provisions of humanitarian law that help to protect the most fundamental human rights in practice.

The most striking point is that, like human rights law, humanitarian law is based on the premise that the protection accorded to victims of war must

[40] See in particular Dowrick, *"Human Rights, Problems, Perspectives and Texts"*.
[41] Drzewicki, *"The Rights of Solidarity – the Third Revolution of Human Rights"*, at 26.

be without any discrimination. This is such a fundamental rule of human rights that it is specified not only in the United Nations Charter but also in all human rights treaties.[42] One of many examples in humanitarian law is Article 27 of the Fourth Geneva Convention of 1949:

"...all protected persons shall be treated with the same consideration by the Party to the conflict in whose power they are, without any adverse distinction based, in particular, on race, religion or political opinion".

A great deal of humanitarian law is devoted to the protection of life, thus having a direct beneficial effect on the right to life. First and foremost, victims of war, i.e. those persons directly in the power of the enemy, are not to be murdered as this amounts to an unnecessary act of cruelty. These persons are mainly protected by the 1949 Geneva Conventions, with some extension of this protection in 1977 Additional Protocol I. As far as the protection of life during hostilities is concerned, it is obvious that the lives of combatants cannot be protected whilst they are still fighting. However, humanitarian law is not totally silent even here, for the rule that prohibits the use of weapons of a nature to cause superfluous injury or unnecessary suffering is partly aimed at outlawing those weapons that cause an excessively high death rate among soldiers.[43]

The most important contribution of Protocol I of 1977 is the careful delimitation of what can be done during hostilities in order to spare civilians as much as possible. The balance between military necessities and humanitarian needs that was explained in the Lieber Code are at the basis of this law. The result is a reaffirmation of the limitation of attacks to military objectives and a definition of what this means,[44] but accepting the occurrence of "incidental loss of civilian life" subject to the principle of proportionality.[45]

On the other hand, the Protocol protects life in a way that goes beyond the traditional civil right to life. First, it prohibits the starvation of civilians as a

[42] Dowrick, *"Human Rights, Problems, Perspectives and Texts"*, at 31.
[43] See 1977 Protocol I Additional to the four Geneva Conventions, Article 35(b).
[44] Articles 48 and 52.

method of warfare and consequently the destruction of their means of survival.[46] Secondly, it offers means for improving their survival by, for example, providing for the declaration of special zones that contain no military objectives[47] and consequently may not be attacked. Thirdly, there are various stipulations in the Geneva Conventions and their Additional Protocols that the wounded must be collected and given the medical care that they need. In human rights treaties this would fall into the category of "economic and social rights". Fourthly, the Geneva Conventions and their Protocols specify in detail the physical conditions that are needed in order to sustain life in as reasonable a condition as possible in armed conflict. Thus, for example, the living conditions required for prisoners of war are described in the Third Geneva Convention and similar requirements are also laid down for civilian persons interned in an occupied territory. With regard to the general population, an occupying power is required to ensure that the people as a whole have the necessary means of survival and to accept outside relief shipments if necessary to achieve this purpose.[48] These kinds of provisions would be categorized by human rights lawyers as "economic and social".[49] Finally in this selection of provisions relevant to the right to life, humanitarian law lays down restrictions on the imposition of the death penalty, in particular, by requiring a delay of at least six months between the sentence and its execution, by providing for supervisory mechanisms, and by prohibiting the death sentence from being pronounced on persons under eighteen or being carried out on pregnant women or mothers of small children. Also of interest is the fact that an occupying power cannot use the death penalty in a country which has abolished it.[50]

The next "hard-core" right is that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. Humanitarian law also contains an absolute prohibition of such behaviour, and not only

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[45] Article 52(5)(b).
[46] Article 54.
[47] Articles 59 and 60.
[48] Article 55 of the Fourth Geneva Convention and Article 69 of Additional Protocol I.
[49] Drzewiki, *"The Rights of Solidarity – the Third Revolution of Human Rights"*, at 31.
[50] Articles 68 and 75 of the Fourth Geneva Convention.

states this prohibition explicitly in all the appropriate places[51] but goes still further, since a large part of the Geneva Conventions can be said in practice to be detailed description of how to carry out one's duty to treat victims humanely.

The Protection of children and family life is also given a great deal of importance in humanitarian law. It is taken into account in a number of different ways, such as the provision made for children's education and physical care, the separation of children from adults if interned (unless they are members of the same family), and special provisions for children who are orphaned or separated from their families.[52]

This very brief review is by no means an exhaustive list of the ways in which humanitarian law overlaps with human rights norms. However, it should be noted that there are a number of human rights, such as the right of association and the political rights, that are not included in humanitarian law because they are not perceived as being of relevance to the protection of persons from particular dangers of armed conflict.

V. The mutual influence of humanitarian law and human rights law

The separate development of these two branches of international law has always limited the influence upon each other. However, their present convergence, as described above, makes the establishment of certain closer links between these two legal domains conceivable.

The true turning point, when humanitarian law and human rights law gradually began to draw closer, came in 1968 during the International Conference on Human Rights in Tehran at which the United Nations for the first time considered application of human rights in armed conflict. The delegates adopted a resolution inviting the Secretary-General of the United Nations to examine the development of humanitarian law and to

[51] See Article 3 common to all four Geneva Conventions.
[52] See D. Plattner, *"Protection of Children in International Humanitarian Law"*, IRRC No. (1984), at 140-152.

consider steps to be taken to promote respect for it.[53] Humanitarian law thus branched out from its usual course of development and found a new opening within the UN which had neglected it – unlike human rights to which UN attention had been given from start.

The convergence which began 1968 slowly continued over the years and is still in progress today. Human right texts are increasingly expressing ideas and concepts typical of humanitarian law. The reverse phenomenon, although much rarer, has also occurred. In other terms, the gap which still exists today between human rights and humanitarian law is diminishing. Influences from both sides are gradually tending to bring the two spheres together.[54]

Some examples of this development can be found in the texts of the treaties. For example, the adoption in 1977 of the two Protocols additional to the 1949 Geneva Conventions was a reflection of what had happened in Tehran nine years earlier. The world of humanitarian law paid tribute to the world of human rights. The subjects and wording of Protocol's Article 75, entitled "Fundamental guarantees", are in fact directly inspired by the major prohibitions relating to the physical and mental well-being of individuals, the prohibition of arbitrary detention and essential legal guarantees. The same could be said of Articles 4, 5 and 6 of Protocol II which, in situations of non-international armed conflict, are the counterpart to the aforesaid article in Protocol I.[55]

Apart from this example there exist plenty of mutual influences between international humanitarian law and human rights law. But space does not allow to go into details. However, it is very likely that the present trends will continue in future.

[53] Resolution XXIII *"Human Rights in Armed Conflicts"* adopted by the International Conference on Human Rights, Tehran, 12 May 1968.

[54] Meron, *"The Protection of the Human Person under Human Rights Law and Humanitarian Law"*, U.N. Bulletin of Human Rights 91/1 (1992).

[55] Meron, *"The Protection of the Human Person under Human Rights Law and Humanitarian Law"*, U.N. Bulletin of Human Rights 91/1 (1992), at 56.

Chapter 4 War crimes - Developments in the 20th century

The modern definition of war crimes and thus the content of international humanitarian law can be traced back to developments which started at the mid of the 19th century (e.g. Lieber Code). Besides the Lieber Code there are other important developments that laid the foundation for our current rules of international humanitarian law (e.g. the Geneva Convention of 1864, the St. Petersburg Convention of 1868, the Brussels Conference of 1880). But it is impossible to discuss all of them. Therefore, we have to confine ourselves to a few examples.

However, it is useful to distinguish between international and non-international conflicts. Originally, war crimes under international customary law could only be committed in international armed conflicts. After the Second World War international lawyers focused more and more on non-international armed conflicts. Since then several rules under international humanitarian law came into force (Article 3 common to all four Geneva Conventions (1949) and Additional Protocol II), governing explicitly non-international armed conflicts. From a logical point of view it is, therefore, necessary to discuss the development of war crimes in international and non-international armed conflicts separately.

I. War crimes committed in international armed conflicts

A. The definition of war crimes before the Second World War committed in international armed conflicts - The Hague Conferences of 1899 and 1907

1. The First Hague Peace Conference of 1899

The First Hague Peace Conference of 1899 was convened on the initiative of tzar Nicholas II. The stated main purpose of this First Hague Peace Conference was to create conditions precluding further wars. It was hoped

that this time a conference would be able to reach agreement on a treaty text that would prove acceptable to most governments.[56]

Three separate Conference commissions dealt with weapons, the law of armed conflict, and mediation and arbitration. The revision of the Brussels Declaration of 1874 was referred to the second commission presided by the Russian delegate Martens. The Convention drafted by this commission was adopted as Convention No. 2 with annexed Regulations.[57]

The Regulations deal primarily with the rights and duties of belligerent parties between themselves, and the relations of noncombatants and civilians in occupied territories with belligerents.

Section 1 of the Hague Regulations deals with belligerents. Those not included in the category of belligerents are not treated with the same leniency. The 1899 Conference claimed that these provisions offer greater protection to civilian populations as well. Enemy armed forces and peaceful civilians were considered two classes with distinct rights and duties. No person could belong to both categories at the same time.

However, many questions remained undecided.[58] The debate resulted in the introduction in the preamble of the Convention, of an extremely important and justly famous paragraph usually indicated as the Martens clause, after its author, the Russian delegate De Martens.[59] Recognizing that it had not been possible to solve all problems, the Contracting parties stated:

"On the other hand, it could not be intended by the high contracting parties that the cases not provided for should, for want of a written provision, be left to the arbitrary judgement of the military commanders. Until a more complete code of the laws of war is issued, the high contracting parties think it right to declare in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they

[56] Kalshoven, *"Constraints on the Waging of War"*, at 13.
[57] Higgins, *"The Hague Peace Conferences"*, at 27ff.
[58] E.g. compulsory arbitration was not achieved.

result from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience."

The Martens clause is also the preamble to the Hague Convention No. IV of 1907 on the Law of War on Land and is today repeated and inserted in each of the four Geneva Conventions of 1949 for the Protection of War Victims.

The Martens clause acquired a significance far beyond that specific issue. It implies that, no matter what governments may fail to agree upon, the conduct of war will always be governed by existing principles of international law.[60]

It is true that opinions differ as to the substance of Convention and the Regulations. But there is no doubt that its adoption marked an era in the history of the law of armed conflict: it secured the acceptance of a complete code of military law.

2. The Second Hague Peace Conference of 1907

Two motives led to the Second Hague Peace Conference of 1907. Firstly, political events casted doubt on the results of the 1899 Conference. The latter had scarcely been concluded, when Russia, the initiator of the First Hague Conference, was engaged in war against Japan, one of the signatories of the Final Act of the Conference of 1899. Secondly, although the conflict between the demands of humanity and military necessity was the determining feature of the Hague Regulations, it was not elaborated in detail.[61]

The activities of the Second Hague Conference with respect to the law of land warfare were confined to minor alterations of the Convention and the Regulations of 1899. One important addition to the Regulations was connected with the bombardment of undefended towns. This had already been prohibited in 1899. However, besides artillery bombardment another

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[59] Kalshoven, *"Constraints on the Waging of War"*, at 14.
[60] Kalshoven, *"Constraints on the Waging of War"*, at 14.
[61] Davis, *"The United States and the Second Hague Peace Conference"*, at 90-91.

technical possibility began to emerge – that of bombardment from the air. In 1907, this was still no more than a rudimentary possibility, with bombs being thrown from balloons. Yet the mere realization of the possibility provided the Conference with sufficient ground to add to the existing prohibition the words "by whatever means".[62]

For the rest, the Conference of 1907 actively occupied itself with various questions of naval warfare.[63]

B. The definition of war crimes in the post-war era committed in international armed conflicts

1. The Nuremberg Tribunal

1.1. Historical background

In October 1943, the Allies set up the United Nations Commission for the Investigation of War Crimes[64] and issued the Moscow Declaration which stated that after the war German and Japanese political and military leaders responsible for waging aggressive war and for war crimes and crimes against humanity would be brought to trial for these offenses.[65] In August 1945, the victorious allied Governments of France, the United Kingdom, the United States and the Soviet Union met in London and concluded an agreement providing for the establishment of the International Military Tribunal at Nuremberg to try the most notorious of the Germans accused of crimes against peace, war crimes and crimes against humanity.

[62] Kalshoven, *"Constraints on the Waging of War"*, at 15.
[63] See in particular Kalshoven, *"Constraints on the Waging of War"*, at 15-16.
[64] *History of the United Nations War Crimes Commission and the Development of the Laws of War*, compiled by the United Nations War Crimes Commission, at 112.

1.2. War Crimes according to the Charter of the Nuremberg Tribunal

The Charter of the International Tribunal[66] provided the basis for the Nuremberg Tribunal. The most important provision of the Nuremberg Charter was Article 6 which defined the crimes of which the defendants were accused and over which the Nuremberg Tribunal had jurisdiction (i.e. crimes against peace, war crimes and crimes against humanity). War crimes are defined in Article 6 (b) as follows:

"War Crimes: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave-labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by necessity."

1.3. The legal issues

The trial had both supporters and critics. Critics from a legal point of view contended that the Tribunal had no jurisdiction in international law and that it applied *ex post facto* law. With regard to the latter, it was argued that a crime could only be considered as a violation of law in existence at the time of its perpetration.[67]

The Tribunal rejected this argument. Although the Hague Conventions were silent on the matter of criminal liability for violations of the Regulations, the laws and customs of armed conflict, including those of military occupation, were well established in international law. They were enacted in national legislation, incorporated in military manuals, codified in international conventions and affirmed by state practice. It was accepted that a belligerent government had the authority to try and punish

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[65] *Joint Declaration of Roosevelt, Stalin and Churchill of Nov. 1, 1942*, 9 Dept. of State Bulletin (Nov. 6, 1943), at 310.
[66] *Charter of the International Tribunal*, Annexed to the London Agreement, 8 August 1945.
[67] Tusa/Tusa, *"The Nuremberg Trial"*, at 53.

individuals for crimes which constituted violations of the laws and customs of armed conflict when such persons fell within his power. The Hague Regulations were considered declaratory of international law binding all belligerents.[68]

Furthermore, the Tribunal concluded that international law was a progressive system, the rules and principles of which were to be determined at any moment by examining all its sources, including general principles of law and international custom. Thus it decided that international law had designated as crimes the acts so specified in the Charter long before the acts charged against the defendants were committed. So, no question of *ex post facto* legislation was involved in the proceedings at Nuremberg with regard to Article 6 (b) of the Charter.[69]

1.4. Historical and legal consequences of Nuremberg

In October 1946, the International Military Tribunal sentenced twelve of the twenty-two Nazi defendants to death by hanging and seven to imprisonment for terms ranging from ten years to life.[70]

The jurisprudence of the Nuremberg Tribunal also laid the foundation for over a thousand subsequent war crime trials conducted under Control Council Law No. 10 by military tribunals in occupied zones in Germany and in the liberated or allied nations.[71] Major Japanese war criminals were tried before the International Military Tribunal for the Far East (the Tokyo Tribunal) whose Charter was based largely on the Charter of the Nuremberg Tribunal.

The Nuremberg Charter and Judgement are among the most significant developments in international law in this century. Today the Nuremberg precedent stands for the principle of individual accountability for the commission of the gravest crimes known to mankind which have been

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[68] *International Military Tribunal (Nuremberg), Judgement and Sentences*, 1 October 1946, reprinted in 41 AJIL (1947), at 216-220.

[69] See e.g. Lauterpacht, *"The Law of Nations and the Punishment of War Crimes"*, BYIL 1944, at 58-95.

[70] *International Military Tribunal (Nuremberg), Judgement and Sentences*, October 1, 1946, reprinted in 41 AJIL (1947), at 172-333.

[71] O'Brien, *"The Nuremberg Precedent and the Gulf War"*, 31 VJIL (1991), at 396.

committed throughout history and are, unfortunately, still being committed in various parts of the world.[72]

Moreover, the Nuremberg precedent led to other significant developments in international criminal law in the years following the Second World War. The principles recognized in the Nuremberg Charter and Judgement were unanimously affirmed by the United Nations General Assembly in 1946.[73] The definition of war crimes contained in the Nuremberg Charter was codified and further developed in the Four Geneva Conventions for the protection of war victims adopted in 1949.[74]

2. The Four Geneva Conventions of 1949

2.1. Preliminary Conferences

First it should be mentioned that the International Committee of the Red Cross (ICRC) played an important role concerning the preparations for the adopted Geneva Conventions. The ICRC worked on the lines it had followed after 1914-1918 War. First, it collected the fullest possible preliminary information on those aspects of international law that required confirmation, enlargement or amendment. Then, with the help of experts from various countries, it prepared the revised and new drafts which were submitted, first, to an International Red Cross Conference, and then to a Diplomatic Conference empowered to give these treaties final validity.[75]

The first meeting of experts was held in October 1945 and comprised the neutral members of the Mixed Medical Commission which, during the conflict, had visited wounded or sick persons of war, to decide about their repatriation.[76]

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[72] See discussion in Chapter 5.

[73] *United Nations General Assembly Resolution on Affirmation of the Principles of International Law* recognized by the Charter of the Nuremberg Tribunal, 11 December 1946, United Nations General Assembly Resolution 95; see in particular Chapter (individual responsibility).

[74] See for further details the discussion of the Geneva Conventions in 3..

[75] International Committee of the Red Cross, *"The Geneva Conventions of August 12, 1949"*, at 2.

[76] International Committee of the Red Cross, *"The Geneva Conventions of August 12, 1949"*, at 2.

The second meeting was the "Preliminary Conference of National Red Cross Societies for the study of the Conventions and of various problems relative to the Red Cross" in Geneva in 1946 where draft proposal were submitted.[77]

After passing through further preparatory stages, the proposals were adopted with certain amendments at the 17th International Conference of the Red Cross, held in Stockholm in 1948.[78]

2.2. Diplomatic Conference for the Establishment of International Conventions for the Protection of Victims of War, 1949

The Diplomatic Conference for the Establishment of International Conventions for the protection of Victims of War, convened by the Swiss Federal Council as trustee of the Geneva Conventions, was held in Geneva from 21 April to 12 August, 1949. Of the 63 governments represented at the Conference, 59 had sent plenipotentiaries; four governments sent observers only. Representatives of the ICRC were invited to participate in the capacity of experts. After four months of continuous debate, the Conference established the following four Conventions:

I. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field.
II. Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea.
III. Geneva Convention relative to the Treatment of the Prisoners of War.
IV. Geneva Convention relative to the Protection of Civilian Persons in Time of War.

The Conference was divided into four Committees:

[77] Circular letter no. 371, 10 September 1945.
[78] *"17th International Conference of the Red Cross, August 1948"*, ICRC, 1948.

(i) Revision of Conventions I and II,

(ii) Revision of Convention III,

(iii) Establishment of the new Convention relative to the Protection of Civilian Persons and

(iv) The Joint Committee to deal with the provisions common to the four Conventions.[79]

2.3. General

The core of the system of protection provided in the Geneva Conventions of 1949 may be described as the principle that protected persons must be respected and protected in all circumstances and must be treated humanely, without any adverse distinction founded on sex, race, nationality, religion, political opinions, or any other similar criteria (Article 12 of Conventions I and II, 13 of Convention III and 27 of Convention IV).[80] The Conventions I-III were basically developments of earlier texts in that they only protect combatants. The original humanitarian legislation represented by the First Geneva Convention of 1864 provided protection only for combatants, as at that time it was considered evident that civilians would remain outside hostilities. The Hague Convention of 1907 made no provision for civilians. However, the development of arms and the increased radius of action given to armed forces by modern inventions have made it apparent that civilians were certainly "in the war" and exposed to the same dangers as the combatants.[81]

In so far, the Fourth Convention represented an innovation in that it protects "persons taking no active part in the hostilities" and "who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals" (Art. 3 and 4). Thus, the main purpose of this

[79] International Committee of the Red Cross, *"The Geneva Conventions"*, at 4-5.
[80] Kalshoven, *"Constraints on the Waging of War"*, at 42.
[81] International Committee of the Red Cross, *"The Geneva Conventions"*, at 16-17.

Convention is to protect civilians under the control of an enemy state against arbitrary action by that state.[82]

The Convention was, however, not regarded as introducing new ideas to international law, but rather as building on pre-existing provisions.[83] Article 154 expressly declares that its regulations supplement rather than replace relevant articles of the Regulations of the Hague Conventions:

" In the relations between the Powers who are bound by the Hague Conventions respecting the Laws and Customs of War on Land, whether that of July 29, 1899, or that of October 18, 1907, and who are parties to the present Convention, this last Convention shall be supplementary to Sections II and III of the Regulations annexed to the above-mentioned Conventions of The Hague."

2.4. Grave breaches

According to the Geneva Conventions, "grave breach" means an act or omission which is defined as grave breach in:

(iii) Article 50 of the First Convention,
(iv) Article 51 of the Second Convention,
(v) Article 130 of the Third Convention or
(vi) Article 147 of the Fourth Convention.

All Conventions, thus, contain a similar provision defining the notion of grave breaches under each of the Conventions, as follows:

a) wilful killing;
b) torture or inhuman treatment, including biological experiments;
c) wilfully causing great suffering or serious injury to body or health;
d) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;

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[82] *"General Problems in Implementing the Fourth Geneva Convention"*, Report by the ICRC Meeting of Experts, Geneva, 27 – 29 October 1998.
[83] International Committee of the Red Cross, *"The Geneva Conventions"*, at 16.

e) *compelling a prisoner of war or other protected person to serve in the forces of the hostile power;*
f) *wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial prescribed in the Third and Fourth Convention;*
g) *unlawful deportation or transfer of a protected person;*
h) *unlawful confinement of a protected person;*
i) *taking of hostages.*[84]

Moreover, *"The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention."*

Thus begins Article 146 of the Fourth Convention.[85] Furthermore, Article 146 reads as follows:

"Each party is under obligation to search for persons alleged to have committed, or to have ordered to be committed, grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another high contracting party concerned, provided the latter has made out a prima facie case."

This concept is called "universal jurisdiction": The requirement that war criminals be punished whenever and wherever possible, even by states that had no connection whatsoever with the conflict in which the atrocities in any case were committed. As the Conventions lay down, this works by way of the principle *aut dedere, aut punire*, which in case of "grave breaches" places an obligation on any state holding an alleged war

[84] See in particular Schutte, *"The System of Repression of Breaches of Additional Protocol I"*, Delissen/Tanja (eds.), *"Humanitarian Law of Armed Conflict – Challenges Ahead", at 178-185.*
[85] See Art. 49 (Conv. No. 1), Art. 50 (Conv. No. 2), Art. 129 (Conv. No. 3).

criminal either to institute proceedings against tat person itself, or to extradite him to any other state that is prepared to institute proceedings.[86] Grave breaches are, therefore, universal crimes punishable by the national courts of each of the contracting parties.

The practical effects of these Articles of the Geneva Conventions has proved unsatisfactory. Few states have enacted legislation providing penal sanctions for the perpetrators of grave breaches. A number of states take the view that their criminal law in force is adequate to cope with the prosecution of grave breaches.[87]

2.5. Articles common to all four Geneva Conventions

The Geneva Conventions are linked not only by general humanitarian principles, but more specifically by a number of common articles.

One group of common articles concerns the application of the Conventions and the protecting powers, whereas another group deals with sanctions for breaches.

As space does not allow us to go into further details, we should shortly focus on common Article 2 of the Conventions which deals with the scope of application of the Geneva Conventions in international conflicts.

The Diplomatic Conference emphasized that many armed conflicts commenced without being preceded by any of the formalities laid down in 1907 Hague Convention No. 3 Relative to the Opening of Hostilities.[88]

In this regard, common Article 2 was the most straightforward. It applies the Geneva Conventions to armed conflicts between states. There was no need for formal declaration. The occurrence of hostilities was sufficient.[89]

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[86] Turns, *"War Crimes Without War? The Applicability of International Humanitarian Law to Atrocities in Non-International Armed Conflicts"*, 7 African Journal of International and Comparative Law (1995), at 810.

[87] Kalshoven, *"Constraints on the Waging of War"*, at 68-69.

[88] Art 1 of the 1907 Hague Convention No. 3 states: "The contracting powers recognize that hostilities between themselves must not commence without previous and explicit warning, in the form either of a declaration of war, giving reasons, or of an ultimatum with conditional declaration of war."

[89] Schindler, *" The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols"*, 119 RdC (1979), at 133.

However trivial this may seem today, this is of great importance. The legal status of armed conflict has serious consequences for the application of the Geneva Conventions: the broader the scope of the legal definition of armed conflict, the broader the scope of application of the Conventions.
Another very important Article is common Article 3. It deals with conflicts not of an international character. This issue will be discussed later on.

2.6. The customary law status of the 1949 Geneva Conventions

Before discussing the customary character of the 1949 Geneva Conventions it is necessary to take a closer look at the concept of international customary law in general.

2.6.1. Importance of international customary law

If an international treaty between states is adopted, basically the contracting states will have to fulfil the obligations of the treaty. In this regard, a treaty is similar to a normal contract.[90] But, concerning international humanitarian law which is largely based on treaties, this means that only contracting parties would be bound. In non-contracting states a protection of war victims would not be possible.
In the highly codified humanitarian law context, however, the existence of customary law bridges this gap. The primary and the most obvious significance of a norm's customary character is that the norm binds states that are not parties to the instrument in which that norm is restated. It is, therefore, not the treaty norm, but the customary norm with identical content, that binds such states.[91] Thus, only by customary rules a worldwide respect for humanitarian law can be achieved.

[90] An international treaty is not the same as a normal private contract and thus is governed by different rules. The law of treaties is stipulated in the *Vienna Convention on the Law of Treaties, 1969*. These rules are part of international customary law as the ICJ in the *Namibia Advisory Opinion* (1971 ICJ Rep. 3) stated.
[91] Meron, *"Human Rights and Humanitarian Norms as Customary Law"*, at 3.

2.6.2. Treaties and international customary law

The development of a treaty norm into customary law depends on different requirements. They are treated as customary law in two cases:

(i) when they codify principles which already form part of customary international law prior to the conclusion of the treaty, and

(ii) when, although they go beyond the existing customary law, the principles which they lay down come to be accepted as generally applicable and thus become part of a new customary international law.[92]

Concerning the first of these categories it should, however, be remembered that even when a treaty provision is already part of customary law, the adoption of that provision may nevertheless have an important effect. In the first place, it serves to confirm the customary rule and removes doubts that may have existed about its continued existence. Secondly, the codification of unwritten rules will almost invariably affect the content of these rules. In selecting words to codify a customary principle, those responsible for the draft are generally forced to try to resolve the ambiguities about the scope and content of that rule and their choice may have the effect of creating new ambiguities. Attention in future will focus on the text so that the scope of the customary rule will tend to become a matter of textual interpretation.[93]

The way in which treaty provisions develop into customary norms is explained in a decision of the International Court of Justice (ICJ). In the *North Sea Continental Shelf Cases* (NSCSC)[94] the ICJ laid down three requirements for the development of a treaty norm into customary law:

(i) the provision must be of a norm-creating character;

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[92] See in particular Meron, *"Human Rights and Humanitarian Norms as Customary Law"*.
[93] The Decision of the Arbitral Tribunal for the Agreement on German External Debts, in *Kingdom of Belgium and Others v. Federal Republic of Germany"*, 59 ILR 494 (1980).
[94] *Federal Republic of Germany v. Denmark, Federal Republic of Germany v. Netherlands*, 3 ICJ Rep. (1969).

(ii) state practice, particularly that of those states whose interests are most specially affected, must indicate a widespread acceptance of the principle and

(iii) that practice must be based on *opinio juris*.

The Court stated that such a result was not "lightly to be regarded as having been attained"[95] and held that it had not occurred in the case of the provision of the Geneva Convention on the Continental Shelf, 1958, which lay down as the basis of the NSCSC. This test suggests that an innovative provision in a treaty can only be regarded as having passed into custom if there is convincing evidence of widespread state practice applying the principle enshrined in that provision in circumstances where the treaty itself was not applicable and the states concerned appear to have treated the principle as binding customary law.

Nevertheless, in the Nicaragua Case[96] the International Court of Justice dealt with its adopted rules far less rigorous, holding that numerous provisions in multilateral conventions – including common Articles 1 and 3 of the Geneva Conventions of 1949 – had become part of customary law although the Judgement contains no examination of state practice upon which such conclusions should have been based if the approach in the NSCSC had indeed been followed.[97]

The *Nicaragua Judgement* is not unique in adopting such cavalier approach. The International Military Tribunal at Nuremberg assumed, without explanation, that the provisions of the Hague Regulations on Land Warfare, 1907, had become part of customary international law by 1939.[98] In contrast, the Hague Tribunal in *Tadic* engaged in a detailed and focused examination of the formation of customary law.[99] The Tribunal adhered to the traditional requirements (state practice and *opinio juris*) for the formation of international customary law. However, in effect it weighed

[95] Paragraph 71 of the Judgement.
[96] *Military and Paramilitary Activities in and against Nicaragua*, ICJ Rep. 1986, p. 114.
[97] Criticized by Meron, *"Human Rights and Humanitarian Norms as Customary Law"*, at 25-37.
[98] See above.
[99] *The Prosecutor v. Dusko Tadic*, Case No. IT-94-1-AR72, Appeals Chamber, Decision of 2 October 1995, at 96-127.

statements both as evidence of practice and as articulation of *opinio juris*. Thus, the Tribunal follows the law of war tradition of speaking of custom even when this requires stretching the traditional meaning of customary law.[100]

This suggests two refinements to the test in the NSCSC. First, where a treaty provision is merely a detailed application of a more general principle which is already well established in customary law, the passage of the detailed provision into custom may more easily be assumed. Baxter has suggested that treaties of an essentially humanitarian character might be thought to be distinguishable by reason of their laying down restraints on conduct that would otherwise be anarchical. In so far as they are directed to the protection of human rights, rather than to the interests of states, they have a wider claim to application than treaties concerned, for example, with the purely political and economic interests of states. The passage of humanitarian treaties into international customary might further be justified on the ground that each new wave of such treaties builds upon the past conventions, so that each detailed rule of the Geneva Conventions for the Protection of War Victims is nothing more than an implementation of a more general standard already laid down in an earlier convention, such as the Regulations annexed to Convention No. IV of The Hague.[101]

Secondly, in examining the state practice as required by the NSCSC test, it should be remembered that the adoption of the treaty text itself is an important piece of state practice which in some cases may be sufficient to bring about a change in customary law.[102] If abused, however, this approach runs the risk of obliterating the distinction between conventional and customary law and of ignoring the often delicate nature of treaty negotiations. Nevertheless, it is suggested that it is acceptable (it is, indeed, applied in practice) in cases where the treaty provision concerned commands general acceptance amongst the international community as a

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[100] Meron, *"The Continuing Role of Custom in the Formation of International Humanitarian Law"*, 90 AJIL (1996), at 239-240.
[101] Baxter, *"Multilateral Treaties as Evidence of Customary International Law"*, 41 BYIL (1965-1966), at 286.
[102] The Judgement in the NSCSC admits this possibility, ICJ Rep. 3 (1969), at 42.

whole not merely as part of treaty package but as the statement of a rule of general application.[103]

Thus, the *Appeals Chamber in the Tadic case* stated:[104]

"When attempting to ascertain state practice with view to establishing the existence of a customary rule or general principle, it is difficult, if not impossible, to pinpoint the actual behaviour of the troops in the field for the purpose of establishing whether they in fact comply with, or disregard, certain standards of behaviour. This examination is rendered extremely difficult by the fact that not only is access to the theatre of military operations normally refused to independent observers (often even to the ICRC) but information on the actual conduct of hostilities is withheld by the parties of conflict; what is worse, often recourse is had to misinformation with a view to misleading the enemy as well as public opinion and foreign Governments. In appraising the formation of customary rules or general principles one should therefore be aware that, on account of inherent nature of this subject-matter, reliance must primarily be placed on such elements as official pronouncements of states, military manuals and judicial decisions."

2.6.3. Customary character of the Geneva Conventions

According to the Secretary General, the Geneva Conventions of 1949 have beyond doubt become part of international customary law.[105] The Secretary General even held that these provisions provide the core of customary law.[106]

This opinion was not challenged until now so that there can be no doubt about the customary law character of the 1949 Geneva Conventions.[107]

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[103] Cassese, *"The Geneva Protocols of 1977 on the Humanitarian Law of Armed Conflict and Customary International Law"*, 3 UCLA Pacific Basin Law Journal 55 (1984), at 59.
[104] *The Prosecutor v. Tadic*, Appeals Chamber, Decision of 2 October 1995, at 99.
[105] Report of the UN Secretary General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), at 35.
[106] Report of the UN Secretary General, at 37.
[107] See in particular Meron, *"Human Rights and Humanitarian Norms as Customary Law"*, at 41-62.

C. The latest developments concerning war crimes committed in international armed conflicts

1. Protocol I of 1977 additional to all Four Geneva Conventions

1.1. Diplomatic Conference in Geneva (1974-1977)

The Diplomatic Conference on the Reaffirmation and the Development of International Humanitarian Law Applicable in Armed Conflicts (Geneva, 1974-1977) adopted on 8 June 1977 the text of two Protocols Additional to the Geneva Conventions of 12 August 1949. One (Protocol I)[108] is applicable in international armed conflicts, and the other (Protocol II)[109] in non-international armed conflicts.[110]

The 1977 codification is surely an achievement comparable to the revisions achieved in 1949. Supplemented in this way, borrowing copiously from the Hague law – which itself had been in a great need in updating since 1907 – the Geneva Conventions henceforth constitute an impressive monument of 600 articles of which 150 almost are new.

Although the aim was only described as "reaffirming and developing humanitarian law" in order to emphasize the "additional" and complementary character of the Protocols, there is no doubt that on certain points the 1977 instruments modify previous law and sometimes even introduce fairly bold innovations.[111]

This chapter deals only with Protocol I. Protocol II will be discussed in chapter "non-international armed conflicts".

1.2. General

Protocol I deals with humanitarian law applicable in international armed conflicts. In the first place, it reaffirms the fundamental principle that the right of the parties to an armed conflict to choose methods and means of

[108] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts.
[109] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts.
[110] Kalshoven, *"Constraints on the Waging of War"*, at 71.

combat is not unlimited and codifies several specific prohibitions. It also reaffirms the principle that a distinction must be made at all times between civilians and combatants and between civilian objects and military objectives, and that consequently the civilian population as such, as well as individual civilians, shall not be the object of attack. By modernizing essential parts of the "Hague Law" on the conduct of hostilities, Protocol I includes rules which should effectively cope with the dangers of modern warfare. Furthermore, Protocol I updates rules on a broad range of issues which have long been the concern of the "Law of Geneva".[112]

Finally, Protocol I broadens the scope of application of international humanitarian law. It submits wars of national liberation to the law of international armed conflicts.[113]

Generally, Protocol I is, without any doubt, the most important treaty codifying and developing international humanitarian law applicable in armed conflicts since the four Geneva Conventions of 1949, and it is the first treaty since 1907 to deal with methods and means of warfare and the protection of the civilian population from the effects of warfare.[114]

1.3. The new grave breaches under Protocol I

Protocol I has considerably expanded the category of crimes that are considered to be "grave breaches". Under the Conventions of 1949, this category only included infringements of the "law of Geneva", i.e. the provisions for the protection of those who do not (or do not longer) take part in hostilities, including the wounded and sick, prisoners of war and protected civilians.[115]

Protocol I not only adds new grave breaches to this category, but introduces a new category of grave breaches, namely those referring to violations of the "law of The Hague", i.e. of the rules that regulate the

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[111] Sandoz/Swinarski/Zimmermann, *"Commentary on the Protocols"*, at xxxiv.
[112] Gasser, *"Negotiating the Protocols: was it a waste of time?"*, Delissen/Tanja, *"Humanitarian Law of Armed Conflict – Challenges Ahead"*, at 82.
[113] See in particular Kalshoven, *"Constraints on the Waging of War"*, at 74-75.
[114] Aldrich, *"Why the United States should ratify Additional Protocol I"*, Delissen/Tanja, *"Humanitarian Law of Armed Conflict – Challenges Ahead"*, at 130.
[115] Wyngart, *"The Suppression of War Crimes under Additional Protocol I"* in: Delissen/Tanja, *"Humanitarian Law of Armed Conflict – Challenges Ahead"*, at 198.

conduct of hostilities as such. The new elements and clarifications introduced by the Protocol may be summarized as follows:

a) the system of repression of the Conventions is supplemented, or clarified on certain points, by Articles 86-91;
b) the system of repression of the Conventions, as supplemented by the Protocol, applies to breaches of the Protocol (Article 85 – *Repression of breaches of this Protocol*, paragraph 1);
c) acts described as grave breaches in the Conventions are grave breaches of the Protocol if they are committed against new categories of persons and objects protected under the Protocol (Article 85 – *Repression of breaches of this Protocol*, paragraph 2);
d) the list of grave breaches is supplemented (Article 11 – *Protection of persons,* paragraph 4, and Article 85 – *Repression of breaches of this Protocol*, paragraphs 3 and 4);
e) judicial guarantees are set out in detail and the list is enlarged (Article 75 – *Fundamental guarantees*, paragraph 4);
f) grave breaches of the Conventions and the Protocol are qualified as war crimes (Article 85 – *Repression of breaches of this Protocol*, paragraph 5; Article 75 – *Fundamental guarantees*, paragraph 7); this does not, however, affect the application of these instruments.[116]

These provisions are not new in the sense that they create new prohibitions and replace the system of repression in the Conventions.[117] New is that Art. 85 makes clear that the system of the four Conventions for the suppression of grave breaches likewise applies to the suppression of grave breaches of the Protocol. This means that, with respect to "grave breaches" of the Protocol, contracting parties have to enact legislation necessary to provide effective penal sanctions for persons committing or ordering such offences. Moreover, they have to establish the necessary criminal jurisdiction, according to the principle of "universal jurisdiction", allowing the courts of each contracting party to take cognizance of "grave

[116] Sandoz/Swinarski/Zimmermann, *"Commentary on the Protocols"*, at 3408.
[117] Sandoz/Swinarski/Zimmermann, *"Commentary on the Protocols"*, at 3398.

breaches", irrespective of where and by whom they may have been committed. Moreover, provisions must be made for handing over persons who are suspected of having committed such grave breaches to other contracting parties.[118]

1.4. The customary law status of Protocol I

It should be noted that the greatest contribution of the Protocol is not introducing new rules, but in specifying the meaning and import of the general principles and provisions of the Conventions and the Hague Regulations in the conditions of present-day warfare. Most of the provisions of the Protocol fall into this category. Thus, it is commonly agreed that major parts of Protocol I give expression to customary law. In particular, many Articles of Protocol I have firm roots in pre-existing general principles of law or in customary law.[119] Only a minority of articles break absolutely new ground.[120]

This is a very important contribution (comparable to that of judicial decisions). Through fleshing out and thickening the texture of existing rules and principles it makes for their more effective implementation and reduces the margin of interpretative controversies. However, it is not considered as normatively creative. This means that there is no need at all to invoke custom or general international law in this context which formally involves the mere interpretation of pre-existing law.[121]

Discussing all customary law elements of Protocol I would go beyond the topic of this dissertation.[122] As far as grave breaches are concerned it can be stated that even the newly invented grave breaches which are included in Articles 11 and 85 of Protocol I refer to conduct that was already prohibited under the Hague Regulations and had been declared a war

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[118] Schutte, *"The System of Repression of Breaches of the Additional Protocol I"*, Delissen/Tanja, *"Humanitarian Law of Armed Conflict – Challenges Ahead"*, at 186.
[119] Gasser, *"International Humanitarian Law – An Introduction"*, at 85.
[120] Gasser, *"International Humanitarian Law – An Introduction"*, at 85.
[121] Abi-Saab, *"The 1977 Additional Protocols and General International Law: Some Preliminary Reflexions"*, Delissen/Tanja, *"Humanitarian Law of Armed Conflict – Challenges Ahead"*, at 120.
[122] See in particular to this problem Meron, *"Human Rights and Humanitarian Norms as Customary Law"*, at 62-70.

crime under the Nuremberg Charter.[123] Thus, it is beyond any doubt that the grave breaches laid down in the Protocol are part of international customary law as both the Hague Regulations and the Nuremberg Charter reflect international customary law.

2. The Statute of the Yugoslavia Tribunal

2.1. General

In May 1993, The Security Council of the United Nations established 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, headquartered at The Hague, The Netherlands. The Security Council acted pursuant to Chapter VII of the UN Charter, which empowers it to take measures "to maintain or restore international peace and security". Generally, the Tribunal and its governing Statute were designed to investigate and address gross and systematic human rights violations reported in various territories. In particular, the Statute for the International Tribunal for the Former Yugoslavia was established to govern criminal prosecutions of individual persons in the protection of humanitarian law and to ensure accountability committed against civilian populations during the Yugoslavian conflict.[124]

2.2. War crimes under the Statute

Articles 2 and 3 of the Statute provide the Tribunal with jurisdiction over war crimes. They contain two definitions of war crimes covering the two branches of international humanitarian law, namely the law of Geneva and the Law of The Hague.

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[123] See above.

[124] Beane, *"The Yugoslav Tribunal and the Deferral of National Prosecutions of War Criminals"*, Asil Insight, September 1996.

2.2.1. Grave breaches of the Geneva Conventions of 1949 – Article 2 of the Statute

Article 2 lists "grave breaches" against persons protected by one of the Geneva Conventions:

"The International Tribunal shall have the power to prosecute persons committing or ordering to be committed grave breaches of the Geneva Conventions of 12 August 1949, namely the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

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

This definition reproduces and combines the grave breaches listed in the Geneva Conventions.[125] The application of this provision requires reference to the Geneva Conventions with respect to the definition of the protected persons and property against which the crimes may be committed.

It is not clear whether the crime of rape is included in the definition of Article 2 of the Statute. However, rape is covered by the definition of crimes against humanity in Article 5 (g) of the Statute. There have been

[125] Articles 49, 50, 129, 146 of Geneva Conventions I – IV.

numerous reports of rape committed on massive scale in the conflict in Bosnia-Herzegovina.[126]

Rape is not specifically referred to in Article 2 of the Statute because it is not listed as a grave breach in the Geneva Conventions. Since the jurisdiction of the International Tribunal was to be limited to crimes which were beyond doubt prohibited under customary law, there was great reluctance to make any changes in the definitions of crimes which had been identified as meeting this criterion. The conclusions as to the present state of customary law contained in the Secretary-General's report[127] were based on an authoritative pronouncement by a judicial body or a clear indication by the international community to that effect, rather than relying solely on the views of the Office of Legal Affairs, to ensure compliance with the applicable law standard "beyond doubt customary law." However, it is generally assumed that rape is a war crime under existing customary law.[128] Even a single act of rape would constitute the war crime of "wilfully causing great suffering or serious injury to body or health" under Article 147 of Geneva Convention IV and Article 2 of the Statute.[129]. Furthermore, the reported acts of sexual abuse of both men and women in detention camps may constitute "torture or inhuman treatment" which is also listed as a grave breach in Article 147 of Convention IV and Article 2 of the Statute.

[126] *Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780*, U.N. Doc. S/1994/674, 27 May 1994, at 54 and at 84.

[127] *Report of the UN Secretary-General* Pursuant to Paragraph 2 of Security Council Resolution 808 (1993).

[128] Resolution 48/143, 20 December 1993; the General Assembly "expressed its outrage that the systematic practice of rape is being used as a weapon of war and an instrument of 'ethnic cleansing' against the woman and children in the areas of armed conflict in the former Yugoslavia, in particular against Muslim women and children in Bosnia Herzegovina" and "declared that rape is a heinous crime and encouraged the International Tribunal to give due priority to the cases of victims of rape."

[129] Rape, enforced prostitution or any form of indecent assault are expressly prohibited by Article 27 of Geneva Convention IV. By reading Articles 27 and 147 together, it becomes clear that rape constitutes a grave breach of the Convention; see in particular Meron, *"Rape as a Crime Under International Customary Law"*, 87 AJIL (1993), at 424-427.

2.2.2. Violations of the Laws or Customs of War – Article 3 of the Statute

The second definition of war crimes contained in Article 3 of the Statute is based primarily on the relevant provisions of the Nuremberg Charter as applied by the Nuremberg Tribunal.

"The International Tribunal shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, but not be limited to:

a) *employment of poisonous weapons or other weapons calculated to cause unnecessary suffering;*
b) *wanton destruction of cities, towns or villages, or devastation not justified by military necessity;*
c) *attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings;*
d) *seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences historic monuments and works of art and science;*
e) *plunder of public or private property."*

One might be confused by the expression "violations of the laws or customs of war". It is a traditional term of art used in the past, when the concepts of "war" and "laws of warfare" still prevailed, before they were largely replaced by two broader notions:

a) that of "armed conflict", essentially introduced by the 1949 Geneva Conventions[130] and
b) the correlative notion of "international law of armed conflict", or the more recent and comprehensive notion of "international humanitarian law".[131]

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[130] See above.
[131] The Prosecutor v. Dusko Tadic, Case No. IT-94-1-AR72, Appeals Chamber, Decision of 2 October 1995, at 87.

It is clear from the Report of the Secretary General that the expression "violations of the laws and customs of war" was used in Article 3 of the Statute primarily to make reference to the 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land and the Regulations annexed thereto.[132]

As in the Nuremberg Charter, the definition of war crimes contained in Article 3 of the Statute includes a general reference to violations of the laws or customs of war as well as a non-exhaustive list of such violations. However, this list is not open-ended. The applicable law is also limited to the rules of international humanitarian law which are beyond any doubt customary law.[133]

In addition to the definition of crimes concerning wanton destruction and plunder contained in the Nuremberg Charter, the Statute also specifically refers to other crimes which were considered to be of particular importance with respect to the conflict of the former Yugoslavia. These crimes relate to the use of poisonous weapons or other weapons calculated to cause unnecessary suffering, attacks on undefended civilian targets, and the seizure or destruction of cultural or religious property.

The International Tribunal may prosecute persons for war crimes other than those expressly listed in Article 3 of the Statute. The non-exhaustive character of the enumeration of the crimes contained therein is clearly indicated by the phrase "shall include, but not be limited to." The United States, France and the United Kingdom expressed the view that this provision should be interpreted as including other serious violations of international humanitarian law contained in the Geneva Conventions of 1949 and Additional Protocols which were not expressly referred to in the definition of grave breaches contained in Article 2 of the Statute.[134] They

[132] *Report of the Secretary-General* Pursuant to Paragraph 2 of S/RES/808 (1993), at 41.
[133] Meron, *"Rape as a Crime Under International Customary Law"*, 87 AJIL (1993), at 425.
[134] See the statements of the United States, France and the United Kingdom contained in U.N. Doc. S/PV.3217, at 15/11/19.

can be regarded as providing an authoritative interpretation of Article 3 of the Statute since no delegate contested these declarations.[135]

However, in interpreting the meaning and purport of the expressions "violations of the laws and customs of war" or "violations of international humanitarian law", one must take account of the context of the Statute as a whole. A systematic construction of the Statute emphasizes the fact that various provisions refer to "serious violations" of international humanitarian law.[136] It is therefore appropriate to take the expression "violations of the laws and customs of war" to cover serious violations of international humanitarian law.[137]

2.3. The Statute of the Yugoslavia Tribunal and the Statute of the Rwanda Tribunal – a comparison

2.3.1. General

The International Criminal Tribunal for Rwanda was established by the UN Security Council Resolution 955 of 8 November 1994.[138] The purpose was to prosecute persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring states between 1 January and 31 December 1994. At the same time, the Security Council adopted the Statute of the Tribunal and requested the UN Secretary General to make political arrangements for its effective functioning. On 22 February 1995, the Security Council passed Resolution 977 designating the town of Arusha in the United Republic of Tanzania as the seat of the Tribunal.[139]

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[135] It must be added that the wording of Article 3 of the Statute can also refer to non-international conflicts. The American delegate, e.g., stated that "it is understood that the 'laws and customs of war' used 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*", U.N. Doc. S/PV.3217, at 15.

[136] See Statute of the International Tribunal, Preamble, Articles 1, 9 (1), 10 (1)-(2), 23 (1), 29 (1).

[137] *The Prosecutor v. Tadic*, Appeals Chamber, Decision of 2 October 1995, at 90.

[138] Security Council Resolution, 8 November 1994, Doc. S/RES/955.

[139] Peter, *"The International Criminal Tribunal for Rwanda: bringing the killers to book"*, IRRC No. 321 (1997), at 697.

2.3.2. Difference between the Rwanda and the Yugoslavia Statute

Concerning war crimes, a noticeable difference between the Rwanda and the Yugoslav Statute relates to Article 4 of the Rwanda Statute. In contrast to the Statute of the Yugoslav Tribunal, which treats the ensemble conflicts in the former Yugoslavia as international, the Statute for Rwanda is predicated on the assumption that the conflict in Rwanda is a non-international armed conflict.[140] Article 4 of the Statute reads as follows:

"The International Tribunal for Rwanda shall have the power to prosecute persons committing or ordering to be committed serious violations of Article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977. These violations shall include, but shall not be limited to..."

Common Article 3 and Protocol II are rules that are just applicable to non-international armed conflicts. Thus, the grave breaches provisions of the 1949 Geneva Conventions and Additional Protocol I are clearly inapplicable.[141]
The problems concerning Article 4 are, therefore, part of chapter "non-international conflicts".

2.4. Contribution of statutes and tribunals to the development of international law

The Yugoslavia Statute respectively the Rwanda Statute have contributed significantly to the development of international humanitarian law. This advance can be explained by the pressure for rapid adjustment of law, process and institutions.[142] Moreover, the existence of the Tribunals sends

[140] Meron, *"International Criminalization of Internal Atrocities"*, 89 AJIL (1995), at 556.
[141] Akhavan, *"The International Criminal Tribunal for Rwanda: the Politics and the Pragmatics of Punishment"*, 90 AJIL (1996), at 503.
[142] Meron, *"Rape as a Crime Under International Customary Law"*, 87 AJIL (193), at 426.

a powerful message. Their statutes, rules of procedure and evidence, and practice stimulate the development of the law.[143]

3. The Rome Statute

3.1. General

After years of relentless effort[144], on 15 December 1997, the UN General Assembly resolved to convene a diplomatic conference of plenipotentiaries in Rome during June-July 1998 for the purpose of establishing a permanent international criminal court.[145] Five weeks of intense and difficult negotiations led to the adoption of the Statute of the International Criminal Court (ICC). It was opened for signature in Rome on 17 July 1998.

3.2. Jurisdiction of the International Criminal Court over war crimes

Although not all serious violations of international humanitarian law appear on the list of war crimes given in Article 8 of the Statute, it does contain a large number of offences. The major accomplishment in this regard is the inclusion of a paragraph on war crimes committed during non-international conflicts.[146] The vast majority of the crimes included are taken directly from, or clearly derive from, established provisions of international law, principally Hague law or the 1949 Geneva Conventions and the Additional Protocols.[147]

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 using them to participate actively in hostilities is

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[143] Meron, *"International Criminalization of Internal Atrocities"*, 89 AJIL (1995), at 555.
[144] See, e.g., Pella, *"Towards an International Criminal Court"*, 44 AJIL (1950), at 37ff.
[145] *Establishment of an International Criminal Court*, U.N. GAOR, 52d Sess., Agenda Item 150, U.N. Doc. A/C.6/52/L.16 (1997).
[146] Article 8, paragraph 2 (c)-(f) and paragraph 3.
[147] *Summary of the Key Provisions of the ICC Statute (September 1998)*, Human Rights Watch.

also recognized as a war crime falling within the jurisdiction of the Court.[148]

However, some war crimes were omitted. To mention just 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 desire expressed by some states to see nuclear weapons included on the list of prohibited weapons and the resistance of others of such a move. Accordingly, nuclear, biological and blinding laser weapons, as well as anti-personnel mines, were omitted.[149]

II. War crimes committed in non-international (internal) armed conflicts

We already pointed out that non-international armed conflicts are governed by rules that are only applicable to this kind of conflict. The following discussion will show the reasons for this development and will explain these provisions and their customary character.

A. State sovereignty – the fundamental problem

The basic problem in applying international humanitarian law to non-international armed conflicts is following: international law does not apply to non-international conflicts. They are by definition within the exclusive sovereignty of individual states and traditionally not governed by international law.[150]

The question of protection of victims, however, is all the more acute in internal conflicts, where Governments will find it very difficult, from a

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[148] Roberge, *"The new International Criminal Court – A preliminary assessment"*, IRRC No. 325 (1998), at 673.

[149] Roberge, *"The new International Criminal Court – A preliminary assessment"*, IRRC No. 325 (1998), at 673.

[150] Turns, *"War Crimes without War? The applicability of International Humanitarian Law to Atrocities in Non-International Conflicts"*, 7 African Journal of International and Comparative Law (1995), at 806.

political point of view, to accept outside intervention by humanitarian institutions in favour of their own nationals fighting the central authority. Indeed, this opposition between sovereignty and humanity is permanent in situations of internal conflicts.[151] Thus, the sovereignty of states and their insistence on maintaining maximum discretion in dealing with those who threaten their "sovereign authority" has combined to limit the reach of international humanitarian law applicable to non-international conflicts.[152] Correspondingly, international law treated the two classes of conflict in a markedly different way: interstate wars were regulated by a whole body of international legal rules, governing both the conduct of hostilities and the protection of persons not participating (or no longer participating) in armed violence (civilians, the wounded, the sick, shipwrecked, prisoners of war). By contrast, there were very few international rules governing civil commotion. This dichotomy was clearly sovereignty-oriented and reflected the traditional configuration of the international community, based on the coexistence of sovereign states more inclined to look after their own interests than community concerns or humanitarian demands.[153] In this context it is interesting to note that none of the declarations or Conventions on the laws of armed conflicts adopted prior to 1949 contained a specific provision on the scope of application of these instruments.[154] Internal conflicts were therefore regarded as purely domestic affairs and consequently, matters for the exclusive domestic jurisdiction of individual states. The only way in which an internal conflict could be ruled by international law was for the belligerents themselves to declare the existence of a state of war and behave *inter se* as though the conflict were international in character.[155] But without such a statement,

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[151] Abi-Saab, R., *"Humanitarian Law and Internal Conflicts: the Evolution of Legal Concern"*, Delissen/Tanja, *"Humanitarian Law of Armed Conflict – Challenges Ahead"*, at 211.
[152] Meron, *"International Criminalization of Internal Atrocities"*, 89 AJIL (1995), at 554.
[153] *The Prosecutor v. Tadic*, Appeals Chamber, Decision of 2 October 1995, at 96.
[154] Abi-Saab, R., *"Humanitarian Law and Internal Conflicts: the Evolution of Legal Concern"*, Delissen/Tanja, *"Humanitarian Law of Armed Conflict – Challenges Ahead"*, at 209.
[155] See Art. 1 of the 1907 Hague Convention No. 3.

internal conflicts were simply treated as a "state of peace" according to international law.[156]

This distinction, however, has gradually become more and more blurred, and international rules have increasingly emerged or have been agreed upon to regulate non-international armed conflict. There exist various reasons for this development.

First of all, states have certainly realized that unbridled violence and murderous weapons cause as much injury and destruction in civil war as in conflicts between states.[157]

Besides that civil wars became more frequent, the large scale of such conflicts, coupled with the increasing interdependence of states in the world community, has made it more and more difficult for third states to remain aloof: the economic, political and ideological interests of third states have brought about direct or indirect involvement of third states in this category of conflict.[158]

A further explanation is the enormous progress, since the Second World War, of the idea of human rights. International human rights law "interferes" quite consciously and deliberately in the internal affairs of states. The differences between humanitarian law applicable in non-international armed conflicts and human rights law do not alter the fact that both types of law are directed to a common purpose: to guarantee respect for human dignity at all times.[159]

However, there is still a gap between the law governing international conflicts and the law governing non-international conflicts. The position adopted by Article 2 (7) of the UN Charter has helped to ensure that the traditional opinion of state sovereignty led to a slower development of international humanitarian law in this regard. Article 2 (7) states as follows:

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[156] Turns, *"War Crimes Without War? The Applicability of International Humanitarian Law to Atrocities in Non-International Armed Conflicts"*, 7 African Journal of International and Comparative Law (1995), at 806.
[157] Gasser, *"International Humanitarian Law – An Introduction"*, at 67.
[158] *The Prosecutor v. Tadic*, Appeals Chamber, Decision of 2 October 1995, at 97.
[159] Gasser, *"International Humanitarian Law – An Introduction"*, at 67.

"Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the jurisdiction of any state..."

Thus, one can state that a state-sovereignty-oriented approach has been gradually supplanted by a human-being-oriented approach[160] but the interests of sovereign states still play an important role.
The latest developments of international humanitarian law governing non-international conflict must therefore be seen against this historical background.

B. Rules governing non-international armed conflicts

1. Article 3 common to all Four 1949 Geneva Conventions

We already noted that the Geneva Conventions of 1949 are linked not only by general humanitarian principles, but also by a number of common articles.
Common Article 3 is the one and only Article of the Geneva Conventions of 1949 especially written for the event of a non-international armed conflict. The Article, which has been variously described as "the mini-convention" or the "convention within the conventions", provides the rules which parties to an internal armed conflict are "bound to apply, as a minimum".[161]

During the Conference in 1949 the Stockholm draft Article 2 paragraph 4, which was the later basis for common Article 3, gave rise to a long debate:[162]

"In all cases of armed conflict not of an international character which may occur in the territory of one or more of the high contracting parties, each of

[160] The Prosecutor v. Tadic, Appeals Chamber, Decision of 2 October 1995, at 97.
[161] Kalshoven, *"Constraints on the Waging of War"*, at 59.
[162] *Draft Convention for the Protection of Civilian Persons in Time of War.* Text approved by the 17th International Conference of the Red Cross, Stockholm 1948, published in:

the parties shall be bound to implement the provisions of the present Convention, subject to the adverse party likewise acting in obedience thereto."

The expression of "armed conflict not of an international character" was so vague that many governments feared that might be understood to include any act committed by force of arms.[163] Britain and the United States declared themselves opposed to the adoption of draft Article 2. In the view of Britain, the draft article was a source of serious difficulties, not only because the Conventions would be applicable to situations which were not war, but because the application of the Conventions would appear to give status of belligerents to insurgents, whose right to wage war could not be recognized.[164] The United States declared that the Conventions should be applicable only where the government had extended recognition to the rebels, or where those conditions obtained which would warrant other states in recognizing the belligerency of rebels. Furthermore, every government would have the right to punish insurgents in accordance with its criminal laws; premature recognition of the belligerency of insurgents would be a tortuous act against the lawful government and a breach of international law.[165]

However, these statements met with strong opposition. The objections submitted by Britain and the United States did not seem to justify such decision. Civil war was a form of conflict closely resembling international war, but taking place within the territory of a state. As a matter of principle, the Conference was asked to agree "purely humanitarian rules should be applied in armed conflict independently of any recognition of belligerency".[166]

ICRC, Revised and New Draft Conventions for the Protection of War Victims, Geneva 1948, at 113-67.

[163] Pictet (ed), *"Geneva Convention relative to the Protection of Civilian Persons in Time of War"*, Commentary, at 35.

[164] 1st Meeting of the joint committee, 26 April 1949, Final Record, Vol. II, section B, at 10.

[165] 2nd Meeting of the joint committee, 27 April 1949, Final Record, Vol. II, section B, at 12.

[166] 1st Meeting of the joint committee, 26 April 1949, Final Record, Vol. II, section B, p. 11.

Although several governments expressed their fear that such an article would pose a serious threat to the sovereignty of states, common Article 3 was adopted by the Conference:

"In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

1) *Persons taking no active part in 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, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.*

   To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

   a) *violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;*
   b) *taking of hostages;*
   c) *outrages upon personal dignity, in particular, humiliating and degrading treatment;*
   d) *the passing of sentences and carrying out executions without previous judgement pronounced by regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.*

2) *The wounded and sick shall be collected and cared for.*

   An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

   The parties to the conflict shall further endeavour to bring into force, by means of special agreements, all or part of other provisions of the present Convention.

   The application of the preceding provision shall not affect the legal status of the Parties to the conflict."

For reasons of space it is not proposed to analyse common Article 3 in detail. It should be noted that common Article 3 merely provides for the application of the principles of the 1949 Geneva Conventions, and not for the application of specific provisions. It defines those principles and in addition lays down some mandatory rules.[167] Thus, the main problem with common Article 3 was always its restricted scope: its protection is limited to non-combatants, its provisions are so vaguely phrased as to make a mockery of attempts to apply them consistently, and it cannot in any sense be regarded as a complete or adequate codification of the laws of war relating to non-international armed conflicts.[168]

2. 1977 Protocol II additional to all Four 1949 Geneva Conventions

Additional Protocol II takes as its starting point, in the Preamble, the overriding need to observe international human rights in all armed conflicts and the consequent applicability of "the principles of humanity and the dictates of the public conscience". In its Articles, Protocol II develops the basic standards laid down in 1949 by adding to the list of prohibited acts the following: collective punishments, acts of terrorism, rape, enforced prostitution, any form of indecent assault, slavery, pillage and threats to commit any of the foregoing acts.[169]

Generally, most of the rules stated in the substantive Articles of the Protocol apply principles identical, or notably similar, to those traditionally applied by international law to wars in the strict sense of the term. However, Protocol II contains no reference to grave breaches like Article 85 of Protocol I.[170]

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[167] Pictet (ed), *"Geneva Convention relative to the Protection of Civilian Persons in Time of War"*, Commentary, at 34.

[168] Turns, *"War crimes Without War? The Applicability of International Humanitarian Law to Atrocoties in Non-International Armed Conflicts"*, 7 African Journal of International and Comparative Law (1995), at 816-817.

[169] See Article 4 (2) of Protocol II.

[170] Turns, *"War Crimes Without War? The Applicability of International Humanitarian Law to Atrocities in Non-International Armed Conflicts"*, 7 African Journal of International and Comparative Law (1995), at 818.

There are, of course, some peculiarities that can be traced back to the scope of application of Protocol II.

2.1. Scope of application

Protocol II applies, like common Article 3, to non-international armed conflicts. This is made clear in Article 1 of the Protocol:

"1. This Protocol, which develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions of application, shall apply to all armed conflicts which are not covered by Article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.

2. This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of similar nature, as not being armed conflicts."

Article 3 of the Protocol also contains a clause to safeguard the sovereignty of states:

"1. Nothing in this Protocol shall be invoked for the purpose of affecting the sovereignty of a State or the responsibility of the government by all legitimate means, to maintain or re-establish law and order in the State or to defend the national unity and territorial integrity of the State.

2. Nothing in this Protocol shall be invoked as a justification for intervening, directly or indirectly, for any reason whatever, in the armed conflict or in the internal or external affairs of the High Contracting Party in the territory of which that conflict occurs."

However, a number of governments felt that Article 1 infringed to some extent the jurisdiction of states as laid down in Article 2 (7) of the UN Charter.[171] Thus, at the Diplomatic Conference, the tension between state sovereignty and international concern of humanitarian law applicable in non-international armed conflicts was very much apparent and pervaded all the discussions on Protocol II.[172]

2.2. The link with common Article 3

Protocol II develops and supplements common Article 3 of the 1949 Geneva Conventions.

The link between Protocol II and common Article 3 is that the Protocol's field of application is included in the broader one of common Article 3. Thus, the Protocol's explicit reference "without modifying its [common Article 3] existing conditions of application" makes it possible that the Protocol and common Article 3 will apply simultaneously in circumstances where the conditions of application of the Protocol are met. On the other hand, in a conflict where the level of strife is low and which does not contain the characteristic features required by the Protocol, only common Article 3 will apply. In fact, common Article 3 retains an autonomous existence. This formula has the advantage of furnishing a guarantee against any reduction of the level of protection long since provided by common Article 3.[173]

3. The 1949 Geneva Conventions

As discussed above, there is no doubt about the applicability of the Conventions to international armed conflicts as international customary law. Thus, it might be a bit confusing to mention the Conventions in terms of non-international armed conflicts.

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[171] See above.

[172] See in particular Kalshoven, *"Reaffirmation and Development of International Humanitarian Law in Armed Conflicts: The Diplomatic Conference, Geneva 1974-1977"*, 9 NYIL (1977), at 110: "A wide variety of positions could be discerned here, with what might be termed the Norwegian position at one extreme and the Canadian position at the other."

[173] Sandoz/Swinarski/Zimmermann, *"Commentary on the Protocols"*, at 4457.

However, this question was discussed in the Tadic case[174] concerning the relationship between international armed conflicts and Article 2 of the Yugoslavia Statute and the "grave breaches" regime of the Geneva Conventions.

The Trial Chamber in the Tadic case held that, despite the express reference in Article 2 to grave breaches of the Geneva Conventions, the jurisdiction of the Tribunal under this Article was not limited to conduct which would be categorized as a grave breach of one of the Conventions and thus extended to acts occurring in the course of an internal armed conflict:

"The requirement of international conflict does not appear on the face of Article 2. Certainly, nothing in the words of the Article expressly requires its existence; once one of the specified acts is allegedly committed upon a protected person the power of the International Tribunal to prosecute arises if the spatial and temporal requirements of Article 1 are met."[175]

"It follows that the element of internationality forms no jurisdictional criterion of the offences created by Article 2 of the Statute of the International Tribunal..."[176]

The Appeals Chamber reversed this ruling that a determination that the armed conflict in question was international was not required for jurisdiction under Article 2 of the Statute:

"The grave breaches system of the Geneva Conventions establishes a twofold system: there is, on the one hand, an enumeration of offences that are regarded so serious as to constitute "grave breaches"; closely bound up with this enumeration a mandatory enforcement mechanism is set up, based on the concept of a duty and right of all Contracting States to

[174] See above Art. 2: "The International Tribunal shall have the power to prosecute persons committing or ordering to be committed grave breaches of the Geneva Conventions of 12 August 1949...".

[175] *The Prosecutor v. Dusko Tadic*, Case No. IT-94-1-T, Trial Chamber Decision, 10 August 1995, at 50.

search for and try or extradite persons allegedly responsible for "grave breaches". The international armed conflict element generally attributed to the grave breaches provisions of the Geneva Conventions is merely a function of the system of universal mandatory jurisdiction that those provisions create. The international armed conflict requirement was a necessary limitation on the grave breaches system in light of the intrusion on State Sovereignty that such mandatory universal jurisdiction represents. State parties to the 1949 Geneva Conventions did not want to give other jurisdiction over serious violations of international humanitarian law committed in their internal armed conflicts – at least not the mandatory jurisdiction involved in the grave breaches system."[177]

The Appeals Chamber's opinion is supported by the Report of the Secretary General which states that the Geneva Conventions constitute rules of international humanitarian law and provide the core of customary law applicable in international armed conflicts.[178]
However, this opinion is not that acknowledged as it may seem. Even the Appeals Chamber admits that this conclusion (Article 2 of the Statute and therefore the grave breaches provisions of the 1949 Geneva Conventions are just applicable to international armed conflicts) may appear not to be consonant with recent trends of both State practice and the whole doctrine of human rights.[179] The Chamber mentions the *amicus curiae* brief submitted by the United States which says that:

"the 'grave breaches' provisions of Article 2 of the International Tribunal Statute apply to armed conflicts of a non-international character as well as those of an international character."[180]

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[176] *The Prosecutor v. Tadic*, Trial Chamber, Decision of 10 August 1995, at 53.
[177] *The Prosecutor v. Tadic*, Appeals Chamber, Decision of 2 October 1995, at 80; separate opinion by Judge Abi-Saab in the Appeals Chamber Decision: "Instead of reaching, as the Decision does, for the acts expressly mentioned in Article 2 via Article 3 when they are committed in the course of an internal armed conflict, I consider, 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."
[178] *Report of the Secretary General* Pursuant to Paragraph 2 of SC Res. 808, at 37.
[179] *The Prosecutor v. Tadic*, Appeals Chamber, Decision of 2 October 1995, at 83.
[180] U.S. Amicus Curiae Brief, at 35.

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 point of view, there is no gainsaying its significance: that statements articulates the legal views of one of the permanent members of the Security Council on a delicate issue; on this score it provides the first indication of a possible change in *opinio juris* of states. Where other states and international bodies come to share this view, a change in customary law concerning the scope of the "grave breaches" system might gradually materialize.[181]

These indications of the direction in which the law may be moving must, however, be set against the fact that two diplomatic conferences on humanitarian law since the Second World War have treated internal armed conflicts in a markedly different way from international armed conflicts. The 1949 Conference adopted only a single provision on internal conflicts, namely common Article 3, while the 1974-77 Conference pointedly failed to include in Additional Protocol II any reference to grave breaches, despite the fact that Additional Protocol I developed the scope of grave breaches in the context of international armed conflicts. Therefore, it is difficult to escape the conclusion that, at least for the present, the concept of grave breaches of the Geneva Conventions and Additional Protocol I is confined to international armed conflicts.[182]

C. International customary law applicable to non-international armed conflicts

This chapter deals with issue whether common Article 3 and Additional Protocol are part of international customary law. The formation of customary law in an international context was already explained above so that there is no need to explain the rules again in detail. It should be enough to repeat that the formation of international customary law depends on two requirements, state practice and *opinio juris*. However,

[181] *The Prosecutor v. Tadic*, Appeals Chamber, Decision of 2 October 1995, at 83 with further details concerning a change in *opinio juris* of states.

these two requirements do not have to be balanced out equally. The emphasis must be laid on *opinio juris* because of the difficulties in pinpointing the actual state practice on battlefields. Therefore, reliance must primarily be placed on such elements as official pronouncements of states, military manuals and judicial decisions.[183]

1. Customary law character of common Article 3

Concerning common Article 3, the conflict in Nicaragua between the *Sandanista* government and the *Contra* rebels has raised interesting questions in this area through the decision of the International Court of Justice in the *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)*.[184] The court expressed the opinion that common Article 3 is essentially a codification of customary minimum norms applicable in both international and non-international armed conflicts:

"Article 3...defines certain rules to be applied in the armed conflict of a non-international character....In the event of international armed conflicts, these rules also constitute a minimum yardstick, in addition to the more elaborate rules which are also to apply to international conflicts...they...reflect what the Court in 1949 called 'elementary considerations of humanity'...

Because the minimum rules applicable to international and to non-international conflicts are identical, there is no need to address the question whether those actions must be looked at in the context of these rules which operate for the one or for the other category of conflict. The relevant principles are to be looked for in the provisions of Article 3 of each of the four Conventions of 12 August 1949, the text of which, identical in

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[182] Greenwood, *"International Humanitarian Law and the Tadic Case"*, 7 EJIL (1996), at 276.

[183] See discussion above with reference to the Appeals Chamber Decision in the Tadic case of 2 October 1995.

[184] 1986 ICJ Rep. 14.

each Convention, expressly refers to conflicts not having an international character."[185]

This approach might be confusing since common Article 3 is applicable in non-international armed conflicts. It is undoubtedly true, however, that the logic of the law requires that certain basic humanitarian principles (as well as an essential and non-derogable core of human rights) should be applicable in all situations involving violence of high intensity. In this sense, the Court was entirely correct.[186] Therefore, at least with respect to the minimum rules in common Article 3, the character of the conflict is irrelevant.[187]

Also the Appeals Chamber in the Tadic case pointed out that common Article 3 must be seen as part of international customary law. The Chamber refers in its judgement on several statements and resolution that, in the Chamber's opinion, contribute to the customary law character of common Article 3.[188] Reference was made to the work of the ICRC that, when confronted with non-international armed conflicts, promoted the application by the contending parties of the basic principles of humanitarian law. When the parties, or one of them, refused to comply with the bulk of international humanitarian law, the ICRC stated that they should respect, as a minimum, common Article 3.[189] Furthermore, the Chamber mentioned two General Assembly resolutions on "Respect of human rights in armed conflict". The first one was unanimously adopted by the General Assembly 1968: "recognizing the necessity of applying basic humanitarian principles in all armed conflicts".[190] The second resolution elaborated on the principles laid down in 1970. The resolution stated, e.g., that "fundamental human rights, as accepted in international law and laid down in international instruments, continue to apply fully in situations of armed conflict."[191]

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[185] 1986 ICJ Rep., 114.
[186] Meron, *"Human Rights and Humanitarian Norms as Customary Law"*, at 33.
[187] *The Prosecutor v. Tadic*, Appeals Chamber, Decision of 2 October 1995, at 102.
[188] *The Prosecutor v. Tadic*, Appeals Chamber, Decision of 2 October 1995, at 96-116.
[189] *The Prosecutor v. Tadic*, Appeals Chamber, Decision of 2 October 1995, at 109.
[190] G.A. Res. 2444, U.N. GAOR, 23rd Session, Supp. No. 18 U.N. Doc. A/7218 (1968).
[191] G.A. Res. 2675, U.N. GAOR, 25th Session, Supp. No. 28 U.N. Doc. A/8028 (1970).

The Appeals Chamber's comments on this subject are, of course, *obiter dicta*, since they were not necessary for the ruling on the issues in the Tadic case. Nevertheless, the confirmation by the Chamber of the existence of customary law regarding internal armed conflicts is of the greatest importance and is likely to be seen in the future as major contribution to the development of international humanitarian law.[192]

A very important aspect in this context is Article 4 of the Rwanda Statute.[193] It provides the Tribunal jurisdiction deriving from instruments governing non-international armed conflicts, both common Article 3 and Additional Protocol II. This type of offence within the Rwanda Statute represents the greatest innovation in terms of international law. This is the very first occasion on which substantive measures have been taken to make punishable on an international level atrocities which have occurred in an non-international armed conflict, and for this reason alone the Statute fully deserves the epithet "historic".[194] Thus, whatever the Tribunal does in practice, this development has enormous normative importance.[195]

The latest development in this context is Article 8 paragraph 2 (c) and (d) of the Rome Statute of the International Criminal Court.[196] Article 8 paragraph 2 states:

"(c) In the case of an armed conflict not of an international in character, serious violations of Article 3 common to the four Geneva Conventions of 112 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:

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[192] Greenwood, *"International Humanitarian Law and the Tadic case"*, 7 EJIL (1996), at 278-79.

[193] Article 4 of the Statute: "The International Tribunal for Rwanda shall have the power to prosecute persons committing or ordering to be committed serious violations of Article 3 Common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977...."

[194] Turns, *"War Crimes Without War? The Applicability of International Humanitarian Law to Atrocities in Non-International Armed Conflicts"*, 7 African Journal of International and Comparative Law (1995), at 822.

[195] Meron, *"Criminalization of Internal Atrocities"*, 89 AJIL (1995), at 559.

[196] See above.

(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."

Article 8 paragraph 2 (c) and (d) repeats the main content of common Article 3.

As a result it can be stated that the norms laid down in common Article 3 are of such an elementary, ethical character, and echo so many provisions in statutes or other humanitarian and human rights treaties that they must be regarded as embodying minimum standards of customary law applicable to non-international armed conflicts.[197]

2. Customary law character of Additional Protocol II

Unlike Protocol I, Protocol II on internal armed conflicts was drafted against the background of a customary law which contained few relevant provisions (common Article 3). Moreover, many states refused to ratify Protocol II. Some of them are even permanent members of the Security Council, e.g. the United States of America.[198] That, together with the hostile attitude of many states towards the whole of Protocol II, has led

[197] Meron, *"Human Rights and Humanitarian Norms as Customary Law"*, at 34.
[198] Meron, *"Human Rights and Humanitarian Norms as Customary Law"*, at 75-76.

some commentators to argue that none of the provisions of the Protocol can be regarded as reflecting customary law.[199]

Such a position is too extreme. In places Protocol II does no more than restate principles already contained in common Article 3 of the Geneva Conventions. Other provisions do no more than cloak the bare bones of common Article 3 with a moderate amount of flesh.[200]

This opinion is supported by the Appeals Chamber in the Tadic case. The Chamber refers in its decision to several views expressed by a number of states. Thus, for example, mention can be made of the stand taken in 1987 by El Salvador. The Salvadorian Government declared that, strictly speaking, Protocol II did not apply to that civil war. Nevertheless, the Salvadorian Government undertook to comply with the provisions of the Protocol, for it considered that such provisions "developed and supplemented" common Article 3, "which in turn constituted the minimum protection due to every human being at any time and place".[201] Even the Deputy Legal Adviser of the United States Department stated that:

"the basic core of Protocol II is, of course, reflected in common Article 3 of the Geneva Conventions and therefore is, and should be, a part of generally accepted customary law. This specifically includes its prohibitions on violence towards persons taking no active part in hostilities, hostage taking, degrading treatment, and punishment without due process."[202]

Also the German Military Manual of 1992 provides that:

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[199] Greenwood, *"Customary Law Status of the Protocols"*, Delissen/Tanja, *"Humanitarian Law of Armed Conflict – Challenges Ahead"*, at 113.
[200] Greenwood, *Customary Law Status of the Protocols"*, Delissen/Tanja, *Humanitarian Law of Armed Conflict – Challenges Ahead"*, at 113.
[201] *The Prosecutor v. Tadic*, Appeals Chamber, Decision of 2 October 1995, at 117.
[202] *Humanitarian Law Conference, Remarks of Michael J. Matheson*, 2 American University Journal of International Law and Policy (1987), at 430-431.

" Members of the German army, like their Allies, shall comply with the rules of international humanitarian law in the conduct of military operations in all armed conflicts, whatever nature of such conflicts."[203]

Moreover, this view is supported by Article 4 of the Rwanda Statute. Like common Article 3, the Statute also empowers the Tribunal to apply Protocol II. This development is for Protocol II as important as for common Article 3 which was discussed above. Therefore, the Statute has also a very important normative character towards the confirmation of the Protocol's customary character.

Nevertheless, it is difficult to avoid the conclusion that some of the provisions of Protocol II have to be regarded as confined to treaty law. The latest example of an agreement on the status of international humanitarian law is the Rome Statute for an International Criminal Court which was adopted in July 1998. As already mentioned above, Article 8 Paragraph 2 (c) and (d) deals with war crimes which are within the jurisdiction of the future International Court. Article 8 refers expressively to common Article 3, but not to Additional Protocol II. This can be seen as proof that Protocol II has not become part of international customary law yet. However, Article 8 paragraph 2 (c) lists up certain acts which shall be considered as war crimes committed in a non-international armed conflict. These acts are partly part of Protocol II.[204] Since the Statute is the result of negotiations of 148 sovereign states, it can be seen not only as an important contribution to international customary law, but also as a reflection of the current humanitarian rules that are part of international customary law.
Thus, it can be stated that not the Protocol as a whole but just some provisions of the Protocol can be regarded as declaratory of existing rules or as having crystallised emerging rules of customary law or else as

[203] Humanitaeres Voelkerrecht in bewaffneten Konflikten – Handbuch, August 1992, at 211.
[204] E.g., "violence to life", "taking of hostages": Article 4 (2) (a) and (c) of Additional Protocol II.

having been strongly instrumental in their evolution as general principles.[205]

Chapter 5 Individual criminal responsibility

I. War crimes committed in international armed conflicts

Individual responsibility for unlawful behaviour is a very important part of international law.[206] Individual responsibility for crimes under international law provides the connection between the rules of international law and the individual.

The Hague Conventions of 1899 and 1907 on land warfare are silent on the matter of individual criminal liability for violations of the annexed regulations. This is not to say, however, that such individual liability would have been against the intentions of the Contracting Parties: on the contrary, the competence of the states to punish their nationals or those of the enemy for the war crimes they might have committed had long since developed into an accepted part of customary law so that it was not felt to require express confirmation by treaty.[207]

The principle of individual responsibility for violations of international law was confirmed by the Nuremberg Judgement:

"It was submitted that international law is concerned with the actions of sovereign states, and provides no punishment for individuals; and further, that where the act in question is an act of state, those who carry it out are not personally responsible, but are protected by the doctrine of the sovereignty of the state. In the opinion of the Tribunal, both these submissions must be rejected. That international law imposes duties and liabilities upon individuals as well as upon states has long been

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[205] *The Prosecutor v. Tadic*, Appeals Chamber, Decision of 2 October 1995, at 117.
[206] *History of the United Nations* War Crimes *Commission and the Development of the Laws of War*, at 262.
[207] Kalshoven, *"Constraints on the Waging of War"*, at 67.

recognized...individuals can be punished for violations of international law."[208]

Furthermore, the Tribunal held that:

"Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."[209]

The principles of individual criminal responsibility were then formulated into the "Nuremberg Principles", prepared by the International law Commission, submitted to and affirmed by the General Assembly of the United Nations in 1950:[210]

PRINCIPLE I
Any person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment.

PRINCIPLE II
The fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law.

PRINCIPLE III
The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law.

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[208] *Nuremberg Judgement*, reprinted in 41 AJIL (1947), at 220.
[209] *Nuremberg Judgement*, reprinted in 41 AJIL (1947), at 221.

PRINCIPLE IV

The fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him.

PRINCIPLE V

Any person charged with a crime under international law has the right to a fair trial on the facts of law.

PRINCIPLE VI

The crimes hereinafter set out are punishable as crimes under international law:

a. Crimes against peace...

b. War crimes...

c. Crimes against humanity...

PRINCIPLE VII

Complicity in the commission of a crime against peace, a war crime, or a crime against humanity as set forth in Principle VI is a crime under international law.

A. Official position

The official position of a person does not relieve him from individual criminal responsibility under international law.

The Nuremberg Tribunal confirmed the denial of immunity to such individuals in relation to international crimes:

"The principle of international law, which under certain circumstances, protects the representatives of a state, cannot be applied to acts which are condemned as criminal by international law. The authors of these acts

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[210] *International Law Commission Report on the Principles of the Nuremberg Tribunal*, 29 July 1950, reprinted in 4 AJIL (1950), at 852.

cannot shelter themselves behind their official position in order to be freed from punishment in appropriate proceedings."[211]

In this regard the Nuremberg Tribunal concluded that:

"the very essence of the Charter is that individuals have international duties which transcend the national obligations of obedience imposed by the individual state. He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the state if the state in authorizing action moves outside its competence under international law. He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the state if the state in authorizing action moves outside its competence under international law."[212]

This fundamental principle is reflected in Article 7 (2) of the Yugoslavia Statute and Article 25 (3) of the Rome Statute.

B. Command responsibility

The possibility of imposing criminal responsibility on persons in positions of authority who tolerated or failed to prevent violations of the laws or customs of war committed during the First World War was recognized by the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties. In its report, the commission concluded that persons who "with knowledge thereof and with power to intervene, abstained from preventing or taking measures to prevent, putting an end to or repressing, violations of the laws and customs of war" were liable to criminal prosecution and punishment and should be tried by an international tribunal.[213]

Notwithstanding this fact, the Nuremberg Charter did not provide for the criminal responsibility of a superior for a subordinate's unlawful acts which

[211] *Nuremberg Judgement*, reprinted in 41 AJIL (1947), at 221.
[212] *Nuremberg Judgement*, reprinted in 41 AJIL (1947), at 221.
[213] *Report of the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties for Violations of the Laws and Customs of War, Conference of Paris, 1919*, reprinted in 13 AJIL (Supp. 1919).

the superior neither ordered nor committed.[214] In trials following the Second World War, Allied tribunals indeed recognized this principle and convicted several persons in cases where they had not intervened to prevent a breach or to put a stop to it. However, it was accepted that this rested only on national legislation, either on explicit provisions, or on the application of general principles found in criminal codes.[215]

Article 13 of the Third Geneva Convention contains only a categorical provision:

"Any unlawful act or omission by the Detaining Power causing death or seriously endangering the health of a prisoner of war in its custody is prohibited and will be regarded as a serious breach of the present Convention."

However, only persons committing or ordering the commission of a grave breach would be subjected to criminal prosecution and punishment under the terms of the Conventions.[216]
Nevertheless, the widespread acceptance and therefore its customary character which this principle has attained since the adoption of the Geneva Conventions in 1949 is indicated by the inclusion of this principle in Articles 86 and 87 of Additional Protocol I.
The principle of command responsibility is also reflected in Article 7 (3) of the Yugoslavia Statute and Article 28 of the Rome Statute. Especially Article 28 of the Rome Statute provides an elaborated codification on this issue. Article 28 reads as follows:

"1. A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and

[214] Article 6 of the *Charter of the International Military Tribunal*, annexed to the London Agreement, 8 August 1945.
[215] Sandoz/Swinarski/Zimmermann, *"Commentary on the Protocols"*, at 3525.
[216] See "grave breaches" provisions of the 1949 Geneva Conventions, discussed above.

control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:

(a) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and

(b) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

2. With respect to superior and subordinate relationship not described in paragraph 1, a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:

(a) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes:

(b) The crimes concerned activities that were within the effective responsibility and control of the superior; and

(c) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution."

Thus, it can be stated that the principle of "command responsibility" is part of international customary law.

C. Superior orders

The issue is here whether a person who committed a crime by acting pursuant to the orders of a superior is individually responsible for this offence. The Nuremberg Charter stated in Article 8 that these persons are individual responsible for the crimes they committed. However, the Charter

recognized that superior orders could constitute a mitigating factor in determining the punishment. Article 8 of the Charter states that:

"[t]he fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment, if the Tribunal determines that justice so requires."[217]

The Nuremberg Tribunal confirmed that this provision of the Charter is:

"...in conformity with the law of all nations. That a soldier was ordered to kill or torture in violation of the in violation of the international law of war has never been recognized as a defense to such acts of brutality, though, as the Charter here provides, the order may be urged in mitigation of the punishment."[218]

The principle of individual criminal responsibility notwithstanding superior orders is reflected in Article 7 (4) of the Yugoslavia Statute and Article 33 of the Rome Statute.

The existence of a superior order does not necessarily constitute a mitigating factor in sentencing. In this regard, the Nuremberg Tribunal stated that

"The true test, which is found in varying degrees in the criminal law of most nations, is not the existence of the order, but whether moral choice was in fact possible."[219]

The Nuremberg Tribunal restricted this principle in two respects. First, it rejected the notion of superior orders with regard to certain types of

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[217] Charter of the International Military Tribunal at Nuremberg.
[218] *Nuremberg Judgement*, reprinted in 41 AJIL (1947), at 221.
[219] *Nuremberg Judgement*, reprinted in 41 AJIL (1947), at 221.

criminal conduct which could not be characterized as coming within normal scope of military activity:

"Participation in such crimes as these have never been required of any soldier and he cannot now shield himself behind a mythical requirement of soldiery obedience at all costs as his excuse for commission of these crimes."[220]

Second, the Nuremberg Tribunal rejected superior orders as a mitigating factor in cases of serious and wilful criminal conduct:

"Superior orders, even to a soldier, cannot be considered in mitigation where crimes as shocking and extensive have been committed consciously, ruthlessly, and without military excuse or justification."[221]

However, there are tendencies to regard superior orders, in some cases, as a complete defense to charges. This view was expressed by the United States, a permanent member of the Security Council.[222]
Also Article 33 (1) of the Rome Statute guarantees a complete defense under certain circumstances. Article 33 (1) reads as follows:

"1. The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless:

(a) The person was under a legal obligation to obey orders of the Government or the superior in question;
(b) The person did not know that the order was unlawful; and
(c) The order was not manifestly unlawful."

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[220] *Nuremberg Judgement*, reprinted in 41 AJIL (1947), at 316.
[221] *Nuremberg Judgement*, reprinted in 41 AJIL (1947), at 283.

In contrast to the Rome Statue, the Yugoslavia Statute still adhered to the "mitigation principle" provided by the Nuremberg Judgement.[223] Thus, it is not clear anymore whether in terms of superior orders the "mitigation of punishment" or the "complete defense in some cases" is part of international customary law.

In my opinion, the Rome Statute only shows the way into which international customary law might develop in this regard. The Nuremberg Principles are a firm part of international customary law so that a single statute cannot change this situation even if the Rome Statute is a very important contribution to the formation of customary law. The Yugoslavia Statute of 1993 still followed the Nuremberg Judgement. This is a sign for the fact that these new ideas have not crystallised into customary law, yet. Thus, it must be noted that the current customary law still follows the "mitigation principle".

II. War crimes committed in non-international armed conflicts

A. General

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 humanitarian law has any effect on the conduct of the parties involved. Thus, there is also the need to punish perpetrators committing war crimes in non-international armed conflicts.

We pointed out above that there is a body of international customary rules that govern non-international armed conflicts. However, common Article 3 (which is not among the grave breaches provisions of the Geneva Conventions[224]) and Additional Protocol II do not have any provisions that are similar to the mechanism for dealing with grave breaches established by the 1949 Geneva Conventions and supplemented by Protocol I (universal jurisdiction).[225] This led to the widespread opinion that

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[222] *Statement of Madeleine Albright before the Security Council*, U.N. Doc. S/PV.3217 (25 May 1993), at 16.
[223] Article 7 (4) of the Statute.
[224] Meron, *"International Criminalization of Internal Atrocities"*, 89 AJIL (1995), at 559.
[225] See above.

international humanitarian law applicable to non-international armed conflicts does not provide for international penal responsibility of persons guilty of violations.[226] The ICRC expressed the same 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."[227]

This view was also confirmed by the International Law Commission (ILC) which stated that:

"Protocol II prohibits certain conduct but contains no clause dealing with grave breaches, nor an equivalent enforcement provision."[228]

Furthermore, it is true that the Rwanda Statute expressly confers jurisdiction over individuals accused of violating common Article 3 and Protocol II but this was described by the Secretary General as an innovation, which for the first time criminalizes common Article 3 and Protocol II.[229]

Against this view, however, may be set the fact that when the Security Council established the Rwanda Tribunal and adopted its Statute, it considered that it was complying with the principle *nullum crimen sine lege*, but appears to have had no concerns about whether if violations of common Article 3 and Protocol II were crimes under international law.[230]

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[226] Plattner, *"The Penal Repression of Violations of International Humanitarian Law Applicable in Non-International Armed Conflicts"*, IRRC No. 278 (1990), at 414.
[227] U.N. Doc. A/CONF.169/NGO/ICRC/1, 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), at 4.
[228] *Report of the International Law Commission on the work of its forty-sixth session*, U.N. GAOR, 49th Sess., Supp. No. 10, U.N. Doc. A/49/10 (1994), at 145.
[229] Greenwood, *"International Humanitarian Law and the Tadic Case"*, 7 EJIL (1996), at 280.
[230] Greenwood, *"International Humanitarian Law and the Tadic Case"*, 7 EJIL (1996), at 280.

The question is therefore whether these treaty provisions, which prohibit certain enumerated acts, establish the individual criminal responsibility of the perpetrators. That is the case if the proscriptions applicable to non-international armed conflicts are criminal in character.[231] Those who reject common Article 3 and Additional Protocol II as a basis for individual criminal responsibility tend to confuse criminality with jurisdiction and penalties. The question of what actions constitute crimes must be distinguished from the question of jurisdiction to try those crimes. Failure to distinguish between substantive criminality and jurisdiction has weakened the penal aspects of the law of war.[232] Thus, the universal jurisdiction provision of the grave breaches does not have anything to do with individual criminal responsibility and cannot serve as an argument against criminalization of internal atrocities.[233]

But apart from this view, the ILC pointed out that Protocol II merely regulates conduct, or prohibits conduct but only on an inter-state basis.[234] Consequently, only states could be held responsible for the conduct of their citizens, but not the individual itself.

However, that an obligation is addressed to states is not dispositive of the penal responsibility of individuals, if individuals clearly must carry out that obligation. Typically, norms of international law have been addressed to states. But with increasing frequency international law has directed its proscription both to states and to individuals and groups. Modern international humanitarian law imposes, and is perceived as imposing, criminal responsibility on individuals, often in addition to the state's international responsibility.[235] Even the Nuremberg Tribunal pointed out that:

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[231] Meron, *"International Criminalization of Internal Atrocities"*, 89 AJIL (1995), at 561.
[232] Meron, *"International Criminalization of Internal Atrocities"*, 89 AJIL (1996), at 561.
[233] It should be noted that this is the opinion of the author. There is still a strong tendency to connect "universal jurisdiction" with "individual criminal responsibility".
[234] *Report of the International Law Commission on the work of its forty-sixth session*, at 142.
[235] Meron, *"International Criminalization of Internal Atrocities"*, 89 AJIL (1995), at 562.

"Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."[236]

Thus, common Article 3 and Additional Protocol II include individual criminal responsibility. However, it is questionable whether view has already crystallized into international customary law. This legal issue will be discussed in the next paragraph.

B. Customary law character

1. State declarations

During the discussion in the Security Council for the establishment of the International Tribunal for the former Yugoslavia, many statements supported the view that atrocities committed in non-international armed conflicts should encompass individual criminal responsibility. The United States representative expressed the view that:

"the law or customs of war referred to in Article 3 [of the Statute] 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."[237]

Also the French representative argued in the same way that the 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."[238]

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[236] *Nuremberg Judgement*, reprinted in 41 AJIL (1947), at 221.
[237] Statement by Mrs Albright during the 3217th meeting of the Security Council, U.N. Doc. S/PV.3217 (25 May 1993), at 15.

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."[239]

These statements support, as already explained above, not only the view that there exists a body of customary rules which governs non-international armed conflicts, but also the opinion that these rules entail individual criminal responsibility because otherwise the subject matter jurisdiction of the Tribunal would not cover breaches of these rules.[240]

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 1949 Geneva conventions[241] to the assimilation of all serious violations, which include those committed in non-international conflicts.[242] Furthermore, on the subject of Rwanda, which deals solely with atrocities committed in non-international armed conflicts, 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."[243]

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[238] Statement by Mr Merimee (France) at the same meeting, ibid, at 11.
[239] Statement by Mr Erdos (Hungary) at the same meeting, ibid, at 20.
[240] On these statements see also *the Prosecutor v. Tadic*, Appeals Chamber, Decision of 2 October 1995, at 88.
[241] Joint Statement of 6 August 1992, Official Journal of the European Communities, Commission, No. 7/8, 1992, at 108-109.
[242] Joint Statement of 5 October 1992, Official Journal of the European Communities, No, 10, 1992, at 91, and Joint Statement of 2 November 1992, Official Journal of the European Communities, No. 11, 1992, at 102.
[243] 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

Thus, it can be stated that there is a general recognition of individual criminal responsibility for atrocities committed in non-international armed conflicts.

2. Military manuals

The 1992 German military manual includes references to common Article 3 and Additional Protocol II. It regards, beyond any doubt, breaches of these rules as punishable.[244] Interestingly, a previous edition of the German military manual did not contain any such provision.[245] Furthermore, the "Interim Law of Armed Conflict Manual" of New Zealand of 1992 provides that:

"While non-application [i.e. breaches of common Article 3] would appear to render those responsible liable to trial for war crimes, trials would be held under national criminal law, since no 'war' would be in existence."[246]

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 for war crimes.[247] The 1991 Italian military manual uses a general formula to introduce a list of examples of grave breaches, indicating that such violations of the Conventions and the Additional Protocols also constitute war crimes.[248]

European Union towards Rwanda, Official Journal of the European Communities, No. 10, 24 October 1994, at 48.

[244] Humanitaeres Voelkerrecht in bewaffneten Konflikten – Handbuch, August 1992, at 1209.

[245] Kriegsvoelkerrecht – Allgemeine Bestimmungen des Kriegsfuehrungsrechts und Landkriegsrechts, March 1961, at 12; Kriegsvoelkerrecht – Allgemeine Bestimmungen des Humanitaetsrechts, August 1959, at 15-16, 30-32; see also *the Prosecutor v. Tadic*, Appeals Chamber, Decision of 2 October 1995, at 131.

[246] New Zealand Defence Force Directorate of Legal Services (1992), at 112; Interim Law of Armed Conflict Manual, at 1807/8; see also *the Prosecutor v. Tadic*, Appeals Chamber, Decision of 2 October 1995, at 131.

[247] *Annotated Supplement to the Commander's Handbook on the Law of Naval Operations* (1989), at 6.2.5.

[248] *Manuale di diritto umanitario* (Vol. I: *Usi e Conventioni di Guerra*) (1991), at 85.

It is obvious that these manuals indicate a tendency towards the criminalization of violations of humanitarian law applicable in non-international armed conflicts.

3. National legislation

Attention should also be drawn to national legislation designed to implement the Geneva Conventions, some of which go so far as to make it possible for national courts to try persons responsible for violations of rules concerning non-international armed conflicts.[249]

The Criminal Code of the socialist Federal Republic of Yugoslavia of 1990 makes the 1949 Geneva Conventions applicable at the national level. Article 142 (on war crimes against the civilian population) and Article 143 (on war crimes against the wounded and sick) expressly apply "at the time of war, armed conflict or occupation". This would seem to imply that they also apply to internal armed conflicts.[250]

The Belgian law of 16 June 1993 for the implementation of the 1949 Geneva Conventions and the two Additional Protocols provides that Belgian courts have jurisdiction to adjudicate breaches of Additional Protocol II.[251] Offences considered to constitute grave breaches are the acts or omissions listed under Article 1 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. The extension to conflicts governed by Protocol II is based on following justifications: 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 the line with current trends in humanitarian law.[252]

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[249] See *the Prosecutor v. Tadic*, Appeals Chamber, Decision of 2 October 1995, at 132.
[250] *The Prosecutor v. Tadic*, Appeals Chamber, Decision of 2 October 1995, at 132.
[251] *Loi relative a la repression des infractions graves aux Conventions internationales de Geneve du 12 aout 1949 et aux Protocoles I et II du 8 juin 1977, additionnels a ces Conventions (16 juin 1993).*
[252] David, *"La loi belge sur les crimes de guerre"*, Revue belge de droit international, Vol. XXVIII (1995), at 668-671.

Article 1 paragraph 3 of the Netherlands Criminal Law in Wartime Act states that civil war should be included under the term "war", while Article 12 gives Dutch courts universal jurisdiction.[253] Also the United States War Crimes Act of 1996 extends the jurisdiction of national courts to violations of common Article 3, classifying them as "war crimes".[254]

Interestingly, while the German military manual criminalizes atrocities committed in non-international armed conflicts, the German penal code does not offer any regulation in this regard. The question of the different categories of violations of international humanitarian law entailing individual criminal responsibility is considered to be covered by the normal provisions of criminal law.[255] However, according to Article 6 (9) of the German Criminal Code atrocities, which were committed outside Germany, are only punishable if they are made punishable by an international treaty binding on Germany. Thus, the extraterritorial jurisdiction of German courts is limited on treaty provisions that criminalize those acts.

4. Resolutions

Of great relevance to the formation of customary law to the effect that violations of general international humanitarian law governing non-international armed conflicts entail the criminal responsibility of those committing or ordering those violations are certain resolutions unanimously adopted by the Security Council. Thus, for instance, in two resolutions on the civil war in Somalia the Security Council unanimously condemned breaches of humanitarian law and stated that those committing or ordering the commission of violations of humanitarian law shall be held individually responsible.[256] Resolutions adopted in

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[253] *Wt Oorlogsstrafrecht, Nederlandse Wetboeken*, Suppl. 226 (1991).
[254] *War Crimes Act of 1996*, 21 August 1996.
[255] Wolfrum, *"Zur Durchsetzung des humanitaeren Voelkerrechts"*, Fleck (ed.), *"Handbuch des humnaitaeren Voelkerrechts in bewaffneten Konflikten", at 433.*
[256] S.C. Res. 794 (3 December 1992); S.C. Res. 814 (26 March 1993); see also *the Prosecutor v. Tadic*, Appeals Chamber, Decision of 2 October 1995, at 133.

connection with the conflict in Rwanda also criminalize atrocities committed in non-international armed conflicts.[257]

The adoption of these resolutions shows that the Security Council clearly considers the criminal responsibility of individuals committing or ordering the commission of those violations to be an issue of international concern, and suggests that this principle of individual criminal responsibility is already well established.

5. Statutes

The Statute of the International Tribunal for the former Yugoslavia does not really confirm the opinion that atrocities committed in non-international armed conflicts entail individual criminal responsibility. However, the circumstances of its adoption by the Security Council (e.g. the statements of representatives of states)[258] and the judgement of the Tribunal in the Tadic case[259] can lead to the conclusion that there is a strong movement towards the criminalization of the mentioned atrocities. But even if we can see a move in this direction, the Statute itself is not a clear assertion of the state of law in this regard.

We discussed above that the Rwanda Statute stands in sharp contrast to the Yugoslavia Statute: the Yugoslavia Tribunal's subject matter jurisdiction under the Statute covers rules of international humanitarian law that are applicable to international armed conflicts, whereas the jurisdiction of the Rwanda Tribunal under Article 4 of the Rwanda Statute derives from instruments governing non-international armed conflicts.[260] Thus, under Article 4 the Tribunal may prosecute persons who have committed serious violations of common Article 3 of the Geneva Conventions and of Additional Protocol II. A report by the UN Secretary-General recognizes that

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[257] S.C. Res. 935 (1 July 1994); S.C. Res. 955 (8 November 1994) and S.C. Res. 978 (27 February 1995).
[258] See discussion above.
[259] *The Prosecutor v. Tadic*, Appeals Chamber, Decision of 2 October 1995.
[260] Meron, *"International Criminalization of Internal Atrocities"*, 89 AJIL (1995), at 559.

"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. Article 4 of the Statute, accordingly, includes violations of Additional Protocol II, which, as a whole ahs not been universally recognized as part of customary international law, and for the first time criminalizes common Article 3..."[261]

Consequently, with the adoption of Article 4 the Security Council made an essential contribution towards criminalization of atrocities committed in non-international armed conflicts.

The Rome Statute is also a very important contribution towards the recognition of criminal individual responsibility in non-international armed conflicts. Interestingly, the Statute does not distinguish between international and non-international conflicts. Article 25 (1), which deals with individual criminal responsibility in general, states:

"The Court shall have jurisdiction over natural persons pursuant to this Statute."

Since Article 8 of the Statute covers atrocities committed in international and non-international armed conflicts,[262] the Statute recognizes the existence of individual criminal responsibility of perpetrators committing atrocities in non-international armed conflicts. Thus, according to the Rome Statute, war crimes are punishable no matter whether they are committed in an international or non-international armed conflict.

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[261] *Report of the U.N. Secretary-General*, U.N. Doc. S/1995/134 (1995), at 12.
[262] See discussion above.

After listing up several examples for the recognition for individual criminal responsibility of war crimes committed in non-international armed conflicts, it can be stated that this principle is part of customary law. Thus, war crimes committed in non-international armed conflicts entail individual criminal responsibility.

Chapter 6 Conclusion

The introductory question was whether war crimes are punishable no matter where or by whom they are committed. After reading this dissertation we can answer in the affirmative. International humanitarian law provides a large body of rules that form part of international customary law.

International armed conflicts are covered by a multitude of provisions that also entail individual criminal responsibility. The customary character of these provisions developed early in this century and was supplemented by the 1949 Geneva Conventions and the 1977 Additional Protocol I.

Interestingly, non-international armed conflicts can also be regarded as covered by international customary law. But there exists less provisions than for international armed conflicts. Moreover, only a core of rules and principles form part of customary law. However, the development which was made in the past 20 years can lead to the conclusion that in future the protection of victims of non-international armed conflicts will improve constantly. There are still lots of obstacles ahead. But the Rome Statute indicates that the community of states is willing to bridge the gap between international and non-international armed conflicts. It will be interesting to see whether this development will result in punishments of more perpetrators than in present.

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