

Individual criminal responsibility for violations of international humanitarian law committed in non-international armed conflicts

by **Thomas Graditzky**

Two prominent events that occurred midway through this century had a great impact on international criminal law. The first milestone in this area was the trials of the major war criminals held in Nuremberg and Tokyo in the wake of the Second World War. They highlighted the principle of individual criminal responsibility for certain serious violations of the rules of international law applicable in armed conflict; the terms “crimes against the peace”, “war crimes”, and “crimes against humanity” found formal recognition. The second event, following closely on the first, was the adoption of the four Geneva Conventions of 12 August 1949 for the protection of war victims. These instruments established a specific framework for the prevention and punishment of the most serious violations of the provisions they contain; the technical term “grave breach” was coined.

However, these well-known developments concerned only international armed conflicts.¹ In 1949 it was generally considered that an extension of the system of grave breaches to cover internal conflicts would be

Thomas Graditzky, who has a degree in international relations and a diploma in international law from the Geneva Graduate Institute of International Studies, currently works at the ICRC’s Legal Division.

Original: French

¹ With the exception of the internal dimension of crimes against humanity.

viewed as an unacceptable encroachment on State sovereignty. When the Protocols additional to the Geneva Conventions were adopted, on 8 June 1977, States had not changed their stance in this respect. Furthermore, newly independent countries feared that their new partners would take advantage of any potential opening provided by the adoption of Protocol II (relating to non-international armed conflicts) to justify excessive interest in their internal affairs.

Today, however, the majority of armed conflicts are non-international, and there is nothing to suggest that the classification of a conflict as international or non-international under international law has any effect on the conduct of the parties involved. Alas, history offers all too many examples of wantonly destructive behaviour in civil wars, with Cambodia, Somalia, and Rwanda springing to mind. Faced with such events, the international community can no longer turn a blind eye. There is a growing determination to see all perpetrators of atrocities committed in the course of armed conflict held responsible for their acts; and developments in human rights law have already made inroads into the argument of sovereignty which has blocked such aspirations in the past.

The confluence of these trends highlights the pressing need for formal recognition of universal jurisdiction for the repression of serious violations of international humanitarian law applicable in non-international conflicts. But what is the current situation? Does international law as it stands today give States jurisdiction to prosecute and try the perpetrators of such violations? If so, what form does this jurisdiction take and how is it framed?

Among the traditional range of offences incurring individual criminal responsibility in the context of international armed conflict are two that do not require lengthy consideration here, since it is now generally acknowledged that universal jurisdiction does exist for prosecution of the perpetrators. These are *genocide* and *crimes against humanity*.

With regard to genocide, it will suffice to recall briefly that the customary nature of the principles forming the basis of the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948 has been recognized since the 1950s;² that Article 1 of this instrument

² See the Advisory Opinion of the International Court of Justice concerning *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion of 18 May 1951, *Reports of Judgments, Advisory Opinions and Orders* (hereinafter *ICJ Reports*), 1951, p. 23.

states that genocide is a crime under international law “whether committed in time of peace or in time of war”; and moreover that the International Court of Justice recently confirmed that the duty incumbent on States in terms of prevention and repression pursuant to the Convention is no different whether the conflict is international or internal.³

As for crimes against humanity, it is noteworthy that the report by the United Nations Secretary-General on the draft statute of the International Criminal Tribunal for the former Yugoslavia (ICTY) indicates that they can occur in the course of an internal conflict or an international conflict.⁴ This assertion was reinforced by the adoption of the statutes of the International Criminal Tribunals for the former Yugoslavia and Rwanda (the first expressly stipulates, in Article 3, that both categories of conflict are covered by this provision, and the second mentions crimes against humanity in Article 3), and received formal recognition from the Appeals Chamber in the *Tadic* case, which stated: “It is by now a settled rule of customary international law that crimes against humanity do not require a connection to international armed conflict”.⁵

Since crimes against peace (today crimes of aggression) are a matter involving a different set of issues, we shall now turn to all the other violations of international humanitarian law applicable in non-international armed conflict and consider whether some of them have, on account of the importance attached to them by the Community of States, been established as crimes whose perpetrators incur international criminal responsibility. Can offences committed during internal conflicts be classed as “war crimes”? Does the term “grave breach” have any meaning within the context of non-international armed conflict?

Application of international obligations to individuals

Today there is no longer any doubt as to the existence of treaty-based and customary rules applicable in internal conflicts. Moreover, with regard

³ *Case concerning application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia-Herzegovina v. Yugoslavia), Preliminary Objections, Judgment of 11 July 1996, para. 31 (not yet published).

⁴ UN Doc. S/25704, *Report of the Secretary-General pursuant to paragraph 2 of Security Council Resolution 808 (1993)*, 3 May 1993, p. 13, para. 47.

⁵ International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Dusko Tadic a/k/a “Dule”*: *Decision on the defence motion for interlocutory appeal on jurisdiction*, Decision of 2 October 1995, Case No. IT-94-1-AR72, p. 72, para. 141.

to the question of whether the rules of humanitarian law are binding only on States — which would thus be held solely responsible in the event of non-observance — or whether they also apply to individuals, who could violate them directly by their conduct, it would seem that the second option clearly outweighs the first, regardless of whether the conflict is internal or international in nature.

It is worth briefly noting here that the substance of the rules contained in Article 3 common to the four Geneva Conventions of 1949 and in Protocol II additional to the Conventions (for example, Article 4 relating to fundamental guarantees) makes frequent reference to the acts of individuals;⁶ that there is an obligation to disseminate the rules (Protocol II, Article 19); and that the obligation to “ensure respect” for the provisions of humanitarian law (in this regard the State is required not only to ensure that its own agents respect these provisions, but also to ensure that all the people under its jurisdiction do so) is also applicable in internal conflicts.⁷ All these observations point to the fact that the law applicable in such conflicts also governs the conduct of individuals.

In this connection, it would be remiss not to mention the following assertion made by the International Military Tribunal at Nuremberg: “Crimes against International Law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of International Law be enforced”.⁸

International criminalization of violations of international humanitarian law

Points at issue

If the rules of international humanitarian law applicable in internal conflicts do in fact govern the conduct of individuals, it remains to be determined whether violation of those rules incurs individual criminal

⁶ See T. Meron, “International criminalization of internal atrocities”, *American Journal of International Law*, Vol. 89, 1995, pp. 559-562.

⁷ See *Military and Paramilitary Activities in and against Nicaragua*, (Nicaragua v. United States of America), Merits, Judgment of 27 June 1986, ICJ Reports, 1986, paras 220 and 255, pp. 114 and 129.

⁸ Judgment of the International Military Tribunal, in *The Trial of German Major War Criminals: Proceedings of the International Military Tribunal sitting at Nuremberg, Germany*, Part 22, London, 1950, p. 447.

responsibility and, more specifically, whether such responsibility emanates from international law as it stands today.

First, there is broad consensus that the treaty law applicable in non-international armed conflicts does not make any specific provision for the prosecution of serious violations of its rules. Common Article 3 has nothing to say in this respect, and Protocol II does not provide for any system similar to the mechanism for dealing with grave breaches established by the 1949 Conventions and supplemented by Protocol I.

The report by the Secretary-General on the draft statute of the International Criminal Tribunal for the former Yugoslavia refers only to international armed conflict when it introduces the article concerning grave breaches of the 1949 Geneva Conventions.⁹ In a similar vein, the ICRC expressed the following view: "According to the terms of the Geneva Conventions and Additional Protocol I, international criminal responsibility for certain violations of humanitarian law, and the relevant obligations, have been established only in respect of international armed conflict".¹⁰ In connection with the *Tadic* case, the ICTY Appeals Chamber stated: "Notwithstanding the foregoing, the Appeals Chamber must conclude that, in the present state of development of the law, Article 2 of the Statute only applies to offences committed within the context of international armed conflicts".¹¹ Thus it too rejects the idea that the scope of the provisions of the Geneva Conventions relating to grave breaches could currently be considered as extending to common Article 3.

Does this entirely rule out international criminal responsibility for serious violations of humanitarian law applicable in internal conflicts (other than those amounting to genocide or crimes against humanity)? Even recently, the answer to this question would most likely have been in the affirmative. For example, the final report issued by the United Nations Commission charged with examining and analysing information relating to serious violations of international humanitarian law in the former Yugoslavia stated, with regard to the law applicable in non-international armed conflict, that "in general (...) the only offences committed in internal armed conflict for which universal jurisdiction

⁹ *Op. cit.* (note 4), p. 11, para. 37.

¹⁰ UN 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), p. 4.

¹¹ *Tadic* decision, *op. cit.* (note 5), p. 48, para. 84.

exists are ‘crimes against humanity’ and genocide, which apply irrespective of the conflicts’ classification”.¹² Likewise, the literature has also quite recently tended towards this view on a number of occasions.¹³

However, on 2 October 1995, the ICTY Appeals Chamber decision on the defence motion for interlocutory appeal on jurisdiction in the *Tadic* case did not restrict itself to making a simple finding nor to giving a definitive ruling on the fact that common Article 3 is not subject to the system of grave breaches. This is a matter we shall come back to later.

We shall now move on to examine the elements that might indicate a trend in the area in question, by looking for a hypothetical customary rule providing for international criminalization. The International Military Tribunal at Nuremberg emphasized that individuals could be prosecuted for particularly reprehensible conduct in violation of international law, by means of a customary rule grafted onto those which deal with such conduct. After examining the jurisprudence, declarations by States and other elements, the Tribunal reached the conclusion that the conduct punishable under its Statute already entailed individual criminal responsibility at the time of the commission of the offences for which the accused were being tried.¹⁴

State practice and opinions

1. State declarations

We shall begin this section by taking a look at State declarations, focusing first of all on those made within the Security Council following the unanimous vote on resolution 827 (1993) approving the report by the Secretary-General on the establishment of the ICTY. Statements illustrative of a move towards the affirmation of individual criminal responsibility for violations of the rules applicable in non-international conflicts included that of the United States representative, who expressed the view that “the ‘law or customs of war’ referred to in Article 3 include all obligations under humanitarian law agreements in force in the territory of the former Yugoslavia at the time the acts were committed, including common

¹² UN Doc. S/1994/674 (annex), *Final Report of the Commission of Experts established pursuant to Security Council Resolution 780 (1992)*, 27 May 1994, p. 13, para. 42.

¹³ For example: E. David, “Le Tribunal international pénal pour l’ex-Yougoslavie”, *Revue belge de droit international*, 1992, pp. 574-575.

¹⁴ Judgment of the International Military Tribunal, *loc. cit.* (note 8), pp. 445-447.

Article 3 of the 1949 Geneva Conventions, and the 1977 Additional Protocols to these Conventions”.¹⁵ Before making this statement, she had remarked that other members of the Security Council shared this view. Indeed, the French representative seemed to be thinking along the same lines when he asserted that this same expression “law or customs of war” “covers specifically, in the opinion of France, all the obligations that flow from the humanitarian agreements in force in the territory of the former Yugoslavia at the time when the offences were committed”.¹⁶ While the British statement was not as clear-cut, since there was no reference to all obligations under the treaties,¹⁷ Hungary stressed “the importance of the fact that the jurisdiction of the Tribunal covers the *whole* range of international humanitarian law and the *entire* duration of the conflict *throughout* the territory of the former Yugoslavia”,¹⁸ and the Spanish representative also envisaged a very broad scope of jurisdiction in his reference to “the conflict or conflicts in that area”.¹⁹ These statements, together with the repeated assertion that current international law has to be applied, show that for these States universal jurisdiction did indeed exist for the repression of serious violations committed in the course of internal conflict; or, in the case of some of the statements, show at least that the jurisdiction of the tribunal was considered extensive and that there was absolutely no question of deliberately restricting it.²⁰

Still on the subject of the ICTY, the United States went even further. In its *amicus curiae* brief submitted in connection with the *Tadic* case, it actually asserted that the provisions concerning grave breaches of the Geneva Conventions (referred to in Article 2 of the Statute of the Tribunal) also covered non-international armed conflicts.²¹

A number of joint statements by European Community member States concerning the situation in the former Yugoslavia address the issue of

¹⁵ Statement by Mrs Albright (United States) during the 3217th meeting of the Security Council, UN Doc. S/PV.3217, 25 May 1993, p. 15.

¹⁶ Statement by Mr Mérieu (France) at the same meeting, *ibid.*, p. 11.

¹⁷ Statement by Sir David Hannay (United Kingdom), *ibid.*, pp. 17-18.

¹⁸ Statement by Mr Erdos (Hungary) (*italics added*), *ibid.*, p. 20.

¹⁹ Statement by Mr Yañez-Barnuevo (Spain), *ibid.*, pp. 39-40.

²⁰ On these statements see also the *Tadic* decision, *loc. cit.* (note 5), pp. 44-45, para. 75, and p. 54, para. 88.

²¹ See *Submission of the Government of the United States of America concerning Certain Arguments made by Counsel for the Accused in the Case of The Prosecutor of the Tribunal v. Dusan Tadic* (Case No. IT-94-I-T), 17 July 1995, pp. 35-36.

individual criminal responsibility. They progress from a single express reference to the system of grave breaches provided for in the Geneva Conventions²² to the assimilation of all serious violations, which, it becomes increasingly clear, include those committed in internal conflicts.²³ Furthermore, on the subject of Rwanda, an extract from the joint position defined by the Council reads as follows: "The European Union stresses the importance of bringing to justice those responsible for the grave violations of humanitarian law, including genocide. In this respect the European Union considers the establishment of an international tribunal as an essential element to stop a tradition of impunity and to prevent further violations of human rights".²⁴ It can thus be observed that there seems to be general recognition of universal jurisdiction over serious violations of humanitarian law applicable in internal conflict.

Although they are of the greatest interest with a view to the possible establishment of an *opinio juris*, these statements must be backed up by evidence of actual practice.

2. Military manuals

Since all armed conflict naturally involves action by armed forces or groups, it seems logical to continue our discussion with a brief look at the rules that purport to govern their conduct, in other words, the content of the relevant military manuals currently available.

Starting with the most recent of them, it is interesting to note that the 1992 German military manual includes references to Article 3 common to the Geneva Conventions and Protocol II when it gives a non-exhaustive list of grave breaches of international humanitarian law.²⁵ Likewise, the

²² Joint Statement of 6 August 1992, *Official Journal of the European Communities*, Commission, No. 7/8, 1992, pp. 108-109.

²³ Joint Statement of 5 October 1992, *op. cit.*, No. 10, 1992, pp. 91, and Joint Statement of 2 November 1992, *op. cit.*, No. 11, 1992, p. 102.

²⁴ Council Decision 94/697/CFSP concerning the common position adopted on the basis of Article J.2 of the Treaty on European Union on the objectives and priorities of the European Union *vis-à-vis* Rwanda, *op. cit.*, No. 10, 24 October 1994, p. 48.

²⁵ (Deutsches) Bundesministerium der Verteidigung, *Humanitäres Völkerrecht in bewaffneten Konflikten*, Handbuch, August 1992, para. 1209 (also in English: Federal Ministry of Defence, *Humanitarian Law in Armed Conflicts*, Manual, August 1992). However, a commentary on this manual specifies that Protocol II does not provide for a system of grave breaches and that the repression of violations of the rules of Protocol II ensues solely from national criminal law. Rüdiger Wolfrum, "Zur Durchsetzung des humanitären Völkerrechts", in D. Fleck, ed., *Handbuch des humanitären Völkerrechts in bewaffneten Konflikten*, Munich, 1994, paras 1201 and 1209 (also in English: D. Fleck, ed., *Handbook of Humanitarian Law in Armed Conflicts*, Oxford University Press, 1995). The limits imposed by German criminal law on prevention and punishment are discussed below.

Annotated Supplement to the US *Commander's Handbook on the Law of Naval Operations* makes several references to Protocol II when providing examples of "war crimes".²⁶ The 1991 Italian military manual uses a lapidary formula to introduce a list of examples of grave breaches, indicating that such violations of the Conventions and Protocols also constitute war crimes.²⁷

Several military manuals, taking a different approach, group all violations of the law of armed conflict under the term "war crimes". While undoubtedly excessive in the strictest sense of international law, this conception does allow an interpretation whereby grave breaches of humanitarian law applicable in non-international armed conflicts can be included within the operative scope of the legal notion of "war crimes". Examples of this can be found both in earlier manuals, such as those issued in Great Britain in 1958²⁸ and in the United States in 1956,²⁹ and in more recent documents such as the draft manual prepared by Canada.³⁰

However, while the more recent of these manuals are probably indicative of a new trend in favour of the criminalization of serious violations of humanitarian law applicable in internal conflicts, or leave the door open to such a course by the general nature or imprecision of their definition of war crimes, the legal framework for any resulting prosecution is another matter. While very useful, even essential, for understanding the rules governing the conduct of troops in the theatre of operations, something often difficult to define with precision, military manuals are considerably less pertinent when it comes to more visible elements linked to the repression and punishment of violations of such rules. Therefore, before examining the jurisprudence in this regard, we shall take a look at the

²⁶ *Annotated Supplement to The Commander's Handbook on the Law of Naval Operations*, NWP 9 (REV.A)/FMFM 1-10, Washington D.C., 1989, para. 6.2.5. Issued by the Office of the Judge Advocate General and consisting mainly of legal references added to the text of the handbook itself, this supplement is not an official publication of the Department of the Navy or the United States government. Moreover, it will be recalled that the United States is not party to the Additional Protocols.

²⁷ "Sono considerati crimini di guerra anche le infrazioni gravi alle Convenzioni internazionali ed ai Protocolli aggiuntivi alle stesse." Stato Maggiore della Difesa, *Manuale di diritto umanitario* (Vol. I: *Usi e Convenzioni di Guerra*), Rome, 1991, p. 28, para. 85.

²⁸ War Office, *The Law of War on Land*, Part III of the *Manual of Military Law*, 1958, para. 626.

²⁹ Department of the Army, *The Law of Land Warfare*, FM 27-10, 1956, para. 499.

³⁰ Canadian Forces, *Law of Armed Conflict Manual*, Second Draft, 1988, paras 1701-1704.

relevant legal instruments, that is, laws applying the Geneva Conventions (and the Protocols thereto), general criminal law, and military penal codes.

3. National legislation

Among the instruments of national legislation, one of the most significant for our discussion is undoubtedly the Belgian law of 16 June 1993 regarding grave breaches,³¹ heralded as a “world legal first” by publicists who believe that *Belgium* has become “the first State to specifically classify as ‘war crimes’ certain serious violations of international humanitarian law committed in the course of a non-international armed conflict”.³² Offences considered to constitute grave breaches are the acts or omissions listed under Article 1 (paras 1 to 20) when committed against persons protected by the Geneva Conventions or their Additional Protocols. Article 7 of the same law specifies that the jurisdiction of Belgian courts is not territorially limited, and there is no requirement relating to nationality. Although the original bill made no reference to Protocol II, the scope of application was extended to conflicts governed by the latter with government approval and on the basis of the following justifications put forward by the authors of the amendment: the need to fill a potential legal vacuum; reasons of morality and image in respect of public opinion; and, above all, the absence of any particular legal problems, since the adoption of the amendment was in line with current trends in humanitarian law.³³

Given the provisions of this law and the terms it uses, its adoption would seem to point to formal recognition of the international criminalization of serious violations of the law applicable in non-international conflict. However, it is worth noting that a commentary on the law specifies that “there is no rule of international law (except, perhaps, in respect of certain specific offences such as torture and hostage-taking) that defines the acts referred to in the law of 16 June 1993 as international breaches when they are committed in the context of a non-international conflict”.³⁴ According to the

³¹ “Loi relative à la répression des infractions graves aux Conventions internationales de Genève du 12 août 1949 et aux Protocoles I et II du 8 juin 1977, additionnels à ces Conventions (16 June 1993)”, in *Moniteur belge*, 5 August 1993, pp. 17751-17755.

³² A. Andries, E. David, C. Van Den Wijngaert, J. Verhaegen, “Commentaire de la loi du 16 juin 1993 relative à la répression des infractions graves au droit international humanitaire”, *Revue de droit pénal et de criminologie*, 1994, p. 1133, para. 2.24 (ICRC translation).

³³ E. David, “La loi belge sur les crimes de guerre”, *Revue belge de droit international*, Vol. XXVIII, 1995, pp. 668-671.

³⁴ *Op. cit.* (note 32), p. 1174 (ICRC translation).

same authors, the new jurisdiction granted to Belgian courts can, however, be considered compatible with the rules of international law, provided that the prosecution of acts or omissions committed abroad by a foreigner in an internal conflict situation respects the principle of legality; in particular, the act in question must be an offence both in the country where it is prosecuted and in the country where it was committed.³⁵

In any event, at this stage it will suffice to raise two further points in relation to this law. First, there is still some doubt as to the threshold of the non-international conflicts considered (owing to the uncertainty as to whether there can be grave breaches of Article 3 common to the Geneva Conventions, whose threshold of application is lower than that of Protocol II).³⁶ Secondly, certain acts carried out in the context of a non-international conflict could be considered as crimes under the Belgian law even when there are no provisions prohibiting them in international humanitarian law.³⁷

Thus Belgium has adopted a legal instrument that is innovative on more than one count. However, *Spain* follows closely on its heels. With the recent adoption of a new penal code,³⁸ it has taken a step in the same direction. The chapter dealing with the law of armed conflict opens with an article enumerating the persons protected thereunder and continues with various provisions detailing punishable acts. Article 608 includes among protected persons those who are protected by virtue of Additional Protocol II of 1977.³⁹ The penal code does not stipulate any special restrictions with regard to jurisdiction *ratione personae* or *ratione loci*. On the other hand, the 1985 law on the judiciary⁴⁰ indicates that the jurisdiction of Spanish courts may extend to offences committed by anybody anywhere, if the acts in question can be classified under Spanish

³⁵ *Ibid.*, pp. 1174-1175.

³⁶ The answer should nevertheless lean towards conflicts covered by Protocol II alone. See E. David, *op. cit.* (note 33), p. 671, and A. Andries *et al.*, *op. cit.* (note 32), pp. 1134-1135.

³⁷ The judge should therefore pay particular attention to the principle of *nullum crimen sine lege* when exercising jurisdiction over acts committed by a foreigner outside Belgian territory.

³⁸ *Código Penal*, Law 10/1995, of 23 November.

³⁹ Cases of internal armed conflict more broadly covered by common Article 3 are apparently excluded.

⁴⁰ *Ley orgánica 6/1985*, of 1 July, of the Judiciary, Art. 23, para. 4.

criminal law as offences that should be prosecuted in Spain pursuant to international treaties and conventions. It should also be noted that no adverse distinction is made in regard to situations covered by Protocol II and that, on the contrary, they seem to be fully integrated in the articles governing armed conflict in general. Further, these articles are among the provisions grouped under the heading “*Delitos contra la Comunidad internacional*”.

Although it provides a less precise, less structured description of acts that amount to criminal conduct, the *Finnish* penal code is equally noteworthy. It effectively encompasses all armed conflict situations and all violations of treaty and customary rules of humanitarian law, qualifying all these offences as war crimes. Moreover, Finnish courts have jurisdiction over such acts wherever and by whomever they are committed.⁴¹

Similarly, Section 11 of Chapter 22 of the *Swedish* penal code clearly regards any serious violation of international humanitarian law (treaty or customary) as a crime against international law, whether committed during a war or during any other type of armed conflict. Such acts fall within the jurisdiction of Swedish courts even if they are committed in another country by non-nationals and against non-nationals (Chapter 2, Section 3, para. 5).⁴²

Article 1, para. 3, of the *Netherlands Criminal Law in Wartime Act* (*Wet Oorlogsstrafrecht*) plainly states that civil war should be included under the term “war”, while Article 12 gives Dutch courts universal jurisdiction.⁴³ A case relating to the conflict in the former Yugoslavia, which we shall discuss below, recently clarified the scope of these provisions.

The *Swiss* military penal code also grants national military courts jurisdiction to hear cases involving violations of humanitarian law applicable in non-international armed conflicts, even if such violations are

⁴¹ *Penal Code of Finland* (translated by M. Joutsen), in *American Series of Foreign Penal Codes*, Vol. 27, Wayne State University Law School, Rothman/Sweet&Maxwell, Littleton (Colorado)/London, 1987, Chap. 1, Art. 3, para. 2.1, p. 17; Chap. 13, Arts 1 and 2, pp. 48-49. See also L. Hannikainen, R. Hanski, A. Rosas, *Implementing humanitarian law applicable in armed conflicts: The case of Finland*, Nijhoff, Dordrecht/Boston/London, 1992, pp. 116-118.

⁴² *Swedish Penal Code*, National Council for Crime Prevention, Stockholm, 1986, pp. 9 and 68.

⁴³ *Wet Oorlogsstrafrecht, Nederlandse Wetboeken*, Suppl. 226, 1991, pp. 161-167.

committed in another country and do not directly affect the interests of the Swiss Confederation. In general terms, all violations of international conventions or other laws and customs of war are punishable; whether they amount to a “crime” under national law depends on the seriousness of the offence. There is just one limitation: the second paragraph of Article 108, which permits extension to non-international armed conflict, provides only for violations of international agreements, thus excluding customary rules. The military courts are given relatively broad jurisdiction under Article 2, para. 9, which states that in peacetime persons who can be prosecuted under the military penal code include “civilians who, in the course of an armed conflict, commit offences against the law of nations”,⁴⁴ with references to the relevant articles of the code. As in the case of the Netherlands, we shall return to this subject later.

Under the heading “*Delitos de carácter internacional*”, Article 551 of the *Nicaraguan* penal code adopts a very comprehensive approach to the prosecution of any violation of humanitarian law, whether committed, in the words of the provision itself, in time of international war or civil war. Article 16, para. 3(f), of the code gives Nicaraguan courts jurisdiction over offences included under this heading, irrespective of who committed them and where.⁴⁵

A recently adopted amendment to the *United States War Crimes Act of 1996* extends the jurisdiction of national courts to violations of Article 3 common to the Geneva Conventions, classifying them as “war crimes”.⁴⁶ At first sight, the current position of the United States on this matter therefore seems clear. However, it could be argued that the wording of the text is such that it implies that this term is used to refer solely to US domestic legislation and does not mean that the US considers the concept of “war crimes”, as understood in international law, valid for internal conflicts. Nevertheless, it does seem significant that violations of common Article 3 are accorded the same status as grave breaches of the Geneva Conventions. Unlike another draft amendment presented at the same time,

⁴⁴ *Code pénal militaire*, Federal Law of 13 June 1927, 321.0, Federal Chancellor’s Office, 1995 (ICRC translation).

⁴⁵ *Ley de Código penal de la República de Nicaragua*, Bibliografías Técnicas, 1997, pp. 4 and 148.

⁴⁶ *War Crimes Act of 1996*, Public Law 104-192, 21 August 1996. For the 1997 amendment see also: *Congressional Record — Senate*, November 9, 1997, p. S12362 and *Congressional Record — House*, November 12, 1997, p. H10728.

this text did not provide for application of the principle of universal jurisdiction, with the result that US legislation still falls short of the system established by the Geneva Conventions for grave breaches. However, due note should be taken of the US government's support for the idea of removing the limitations imposed on the jurisdiction of national courts by the requirement that either the victim or the perpetrator must be a US national or a member of the US armed forces, also in regard to violations of common Article 3.

While the new German military manual seems rather progressive, the *German* penal code fails to meet expectations in this regard. Indeed, none of its provisions refers specifically to armed conflict. The question of the different categories of violations of international humanitarian law incurring individual criminal responsibility is considered to be covered by the normal provisions of criminal law.⁴⁷ With the exception of the case of German servicemen outside Germany, to whom the *Wehrstrafgesetz* extends the applicability of the penal code as a whole,⁴⁸ the only grounds of any interest for broadening the scope of application of the provisions to acts committed abroad refer to those "which are made punishable by the terms of an international treaty binding on the Federal Republic of Germany".⁴⁹ The extraterritorial jurisdiction of German courts over serious violations of humanitarian law applicable in non-international armed conflicts therefore seems far from guaranteed because of the need for a treaty provision attributing individual criminal responsibility for such acts. However, there is nothing to prevent criminal charges being brought against perpetrators of serious violations of the rules applicable in internal conflicts committed in the context of a conflict occurring on the national territory.⁵⁰

When read together, Articles 12 and 356 of the new *Russian* Penal Code of 13 June 1996 lead to similar conclusions. Indeed, while Article 356 refers in very general terms to conduct prohibited by treaties to

⁴⁷ See R. Wolfrum, *op. cit.* (note 25), p. 433.

⁴⁸ *Wehrstrafgesetz*, Art. 1, para. a, in G. Erbs, M. Kohlhaas, eds., *Strafrechtliche Nebengesetze*, Vol. IV, Munich 1990.

⁴⁹ *Penal Code of the Federal Republic of Germany* (translated by J. Darby), *American Series of Foreign Penal Codes*, *op. cit.*, (note 41), Vol. 28, Art. 6, para. 9, p. 50.

⁵⁰ For a discussion of the problems relating to internal conflicts on the territory of States without specific provisions, see M. Bothe "War crimes in non-international armed conflicts", *Israel Yearbook on Human Rights*, Vol. 24, 1994, pp. 243-244.

which the Russian Federation is a party (thus excluding the rules of customary law), without specification as to the type of conflict, Article 12 allows the jurisdiction of the Russian courts to be extended beyond the national territory and to non-nationals if the interests of the Russian Federation are affected or in the event that such an extension of jurisdiction is provided for in an international agreement. The case of nationals, stateless persons, and servicemen is dealt with in the preceding paragraphs of the same article.⁵¹

Generally applicable in time of war, armed conflict, and occupation, Articles 241 and 242 of the *Portuguese* penal code cover some aspects of humanitarian law (war crimes against civilians and the destruction of monuments, respectively). However, Article 5 extends jurisdiction beyond the national territory and to non-nationals only in certain specified cases, which, curiously enough, include only the second of the above-mentioned articles, or when such jurisdiction is imposed by international treaty provisions.⁵²

Other legal instruments that should be briefly mentioned include the penal codes of *Ethiopia* (1957),⁵³ *Yugoslavia* (1990; also adopted by *Bosnia-Herzegovina* in 1992),⁵⁴ and *Slovenia* (1995),⁵⁵ which all provide for the criminalization of certain acts classed as war crimes, regardless of the type of conflict. The *Norwegian* military penal code penalizes all violations of the rules protecting persons and property that are set out in the four Geneva Conventions and the two Additional Protocols thereto,⁵⁶ and the Irish Geneva Conventions Act of 1962 makes all violations of the Conventions of 1949 punishable, including, therefore, common Article 3. This legal instrument provides for jurisdiction over acts committed abroad

⁵¹ *Criminal Code of the Russian Federation*, No. 63-FZ of 13 June 1996, Garant-Service, 1996, Arts 12 and 356.

⁵² *Código Penal Português* (anotado e comentado: M. Maia Gonçalves), Livraria Almedina, Coimbra, 1996, pp. 93, 727-728.

⁵³ *Penal Code of the Empire of Ethiopia*, Proclamation No. 158 of 1957, in *Negarit Gazeta*, Gazette Extraordinary, Addis Ababa, 1957, Arts 282-284, pp. 87-88.

⁵⁴ *Penal Code of the Socialist Federal Republic of Yugoslavia*, 1990, Art. 142-143. On this point, see: *Tadic* decision, *loc. cit.* (note 5), para. 132, pp. 76-77.

⁵⁵ *Penal Code of Slovenia*, 1 January 1995 (unofficial translation by the Ministry of Justice), Chap. 35: Criminal offences against humanity and international law, pp. 117-118, Arts 374-377.

⁵⁶ *Militaer Straffelov* of 22 May 1902, No. 13, Art. 108 (as incorporated by the law of 26 November 1954, No. 6, and amended by the law of 12 June 1981, No. 65).

by non-nationals, although the scope of that jurisdiction is limited to cases of grave breaches of the Conventions. The Irish Act does not, however, explicitly rule out the hypothesis of the commission of grave breaches in relation to common Article 3.⁵⁷

4. Jurisprudence of national courts

In addition to the War Crimes Act of 1996 and the *amicus curiae* brief submitted to the ICTY in connection with the *Tadic* case,⁵⁸ a third element, this time of a jurisdictional nature, should be mentioned to illustrate the position of the US. In a torts claim filed by Bosnian victims against Radovan Karadzic, a US court of appeal had to give a ruling on the issue of war crimes in an internal conflict. Although this was a civil action, the line of reasoning followed by the court provides points of interest that are relevant to our discussion. The court considered it necessary to establish clearly that the acts in question constituted violations of international law, so as to establish whether the matter fell within the jurisdiction of the US courts pursuant to the Alien Tort Act of 1789. To this end, the court examined the question of attributing individual responsibility for violations of the law of war under international law. Under the heading of “war crimes”, the court measured the alleged acts against the requirements contained in common Article 3. It clearly situated its reasoning in the context of non-international armed conflict and acknowledged the existence of individual responsibility, referring in particular to the judgment delivered by the International Military Tribunal at Nuremberg. In reaching its ruling, the court incidentally touched on matters of criminal law. On the basis of this individualization of responsibility, and setting aside its primarily criminal aspect, the court inferred that national courts had jurisdiction in civil actions relating to acts constituting war crimes. In regard to the principle of universal jurisdiction, the court acknowledged its relevance to war crimes, essentially in relation to criminal law, but used it as a basis for asserting that “international law also permits states to establish appropriate civil remedies”.⁵⁹ In any event, the court seemed

⁵⁷ *Geneva Conventions Act*, 1962, No. 11, Sections 3 and 4.

⁵⁸ See note 21 above.

⁵⁹ Court of Appeals for the Second Circuit, Decision of 13 October 1995 in the case of *S. Kadic v. R. Karadzic*, in *International Legal Materials*, Vol. 34, 1995, p. 1601. See also pp. 1604-1605. Other decisions relating to this case: US District Court for the Southern District of New York, Decisions of 7 September 1994 and of 2 December 1997 in the case of *Jane Doe v. R. Karadzic*.

convinced that the notion of war crimes, together with the principle of universal jurisdiction, also covered certain violations of the law applicable in non-international armed conflicts.

A case in which a Bosnian Serb was accused of committing acts including deportation, murder and rape in Bosnia-Herzegovina in June 1992 raised several interesting points in connection with the interpretation of the relevant provisions in *Netherlands* legislation. The military division of the district court of Arnhem, Netherlands, was required to rule on whether there was sufficient basis in law to proceed with the prosecution by military courts of a non-national for acts committed outside the national territory. Classifying the hostilities in question as civil war, and invoking the fact that this type of conflict falls within the definition of “war” within the meaning of the Criminal Law in Wartime Act (Article 1, para. 3), the court pointed out that there was no requirement to establish a link with the national territory (Article 12, para. 1), adding that the notion of a link with the Netherlands State is required only in very specific cases, none of which applied in this instance (Article 1, para. 2). Consequently, it acknowledged the jurisdiction of the Netherlands courts, military courts in the first instance. Following an initial appeal to the Supreme Court, the case was remitted to the district court for reconsideration because of a procedural irregularity. This time round the military division of the Arnhem district court took the opportunity to rule in favour of granting jurisdiction to ordinary courts. A second appeal finally led to confirmation by the Supreme Court that the jurisdiction of the Netherlands courts is not subject to any limitations relating to territory or nationality (of victims or perpetrators). It expressed the opinion that an accurate interpretation of Article 3 of the Criminal Law in Wartime Act, concerning the jurisdiction of the national courts, implies the non-validity of any restriction imposed by the terms of Article 1. Nevertheless, the Supreme Court remitted the case to the military courts.⁶⁰

In April 1997 a case concerning war crimes was brought before a *Swiss* military court for the first time. It involved a Bosnian Serb accused of violence to the physical and mental well-being and outrages on the personal dignity of prisoners and civilians interned in the camps of Omarska and Keraterm. In this particular case, the court finally acquitted the ac-

⁶⁰ Arrondissementsrechtbank te Arnhem, militaire kamer, Decision of 21 February 1996; Hoge Raad der Nederlanden, Strafkamer, Decision of 22 October 1996; Arrondissementsrechtbank te Arnhem, militaire kamer, Decision of 19 March 1997; Hoge Raad der Nederlanden, Strafkamer, 11 November 1997.

cused for lack of conclusive evidence. Two points are worth highlighting here. First, the indictment refers explicitly (but not exclusively) to Additional Protocol II and to Article 3 common to the Geneva Conventions, even though the alleged acts were committed outside the territory of the Confederation and did not involve a Swiss national. Secondly, although in its judgment the court expressed the view that the conflict in the former Yugoslavia should be considered globally and therefore classified as an international conflict, it also implied that, even if the conflict were otherwise classified, this would not have a decisive effect on jurisdiction by virtue of Articles 108 and 109 of the military penal code.⁶¹

In *Denmark*, a Bosnian Croat was indicted on numerous charges of ill-treating, and even causing the death, of persons held in a prison camp. He was tried and found guilty on various counts on the explicit basis of the articles relating to grave breaches of the Third and Fourth Geneva Conventions, together with the relevant articles of the Danish penal code.⁶² It is interesting to note that, while the offences all took place in July and/or August of 1993 in the context of a conflict that was, on the face of it, non-international, the court did not rule on the nature of the conflict, from which it can be deduced that it did not consider this question pertinent to the application of the system of grave breaches.⁶³

The same line of reasoning seems to have been followed in *France*, without, however, reaching the stage of a judgment on the merits. Replying to a request filed by Bosnian nationals alleging ill-treatment in a Serb-run detention camp in the town of Kozarac, the High Court of Paris found that it did not have jurisdiction in regard to the charges of genocide and crimes against humanity, but that it did have jurisdiction over charges of torture and war crimes. With regard to the latter, the court examined the articles relating to grave breaches, without considering the nature of the conflict and inferring its jurisdiction from the obligation stipulated in those articles that defendants have to be committed to the national courts (or have to be extradited).⁶⁴ The Public Prosecutor lodged an appeal and

⁶¹ Divisional Military Court No. 1, Decision of 18 April 1997 in the case of Judge Advocate *v. G. Grabec*.

⁶² *Ostre Landsret* (Eastern Division of the Danish High Court), Court 3, Decision of 25 November 1994 in the case of Prosecutor *v. R. Saric*.

⁶³ On this point see the *Tadic* decision, *loc. cit.* (note 5), p. 46-47, para. 83.

⁶⁴ Tribunal de grande instance de Paris, Order establishing partial lack of jurisdiction and the admissibility of a civil suit of 6 May 1994 in the case of *E. Javor, K. Kussuran, M. Softic, S. Alic et M. Mujdzic v. X*.

the decision was overturned. With regard to war crimes, jurisdiction was rejected on the grounds that the provisions of the Geneva Conventions that were invoked were not directly applicable because of their wording, and that there was no text adapting French legislation to those provisions. The criminal division of the Court of Cassation subsequently confirmed this ruling.⁶⁵

In *Belgium*, a case involving a Rwandan accused of having committed, in Rwanda, crimes defined as grave breaches of international humanitarian law by the Belgian law of 16 June 1993 gave various courts the opportunity to confirm the jurisdiction of Belgian courts over acts punishable under that law, even if they are committed in an internal conflict outside the national territory and do not involve Belgian nationals.⁶⁶

Required to rule on the constitutionality of a bill concerning the procedure for the repression of criminal offences committed during the events of 1956 and, more specifically, on the question of their imprescriptibility, the *Hungarian* Constitutional Court stated that violations of common Article 3 could be subject to imprescriptibility under Hungarian constitutional law, which provides for an exception to the rules on statutory limitations in respect of war crimes and crimes against humanity as defined by international law. Having made this assertion, the court itself classified violations of common Article 3 as crimes against humanity, but without precisely delimiting the concept. However, the reasons given for reaching this conclusion clearly revealed that the court did not consider such violations to constitute grave breaches within the meaning of the Geneva Conventions of 1949. In this respect, it drew attention to the confusion that could result from the wording of Article 2 of the bill under examination, provided indications as to a possible interpretation, but refrained from declaring it unconstitutional (which it did in respect of Article 1). Subsequently, the Hungarian Parliament incorporated the wording of Article 2 intact in a new law and the Constitutional Court, called upon once again to rule on the matter, annulled the legislative text in its entirety on the grounds of the unconstitutionality of this article as

⁶⁵ Fourth Indictment Division of the Paris Court of Appeal, Appeal against an Order establishing partial lack of jurisdiction and the admissibility of a civil suit of 6 May 1994 in the case of *E. Javor, K. Kussuran, M. Softic, S. Alic et M. Mujdzic v. X*; Criminal Division of the Court of Cassation, Decision of 26 March 1996 (same case).

⁶⁶ Brussels Court of Appeal, Indictment Division, Decision of 17 May 1995 in the case of *V. Nt.*; Court of Cassation, Second Chamber, F., Decision of 31 May 1995 (same case); District of Brussels Court of First Instance, Council Chamber, Order of 22 July 1996 (same case).

it stood. In its reasoning, it reiterated its position on the absence of a link between violations of common Article 3 and the provisions concerning grave breaches. The fact that the contested article of the national law established such a link was one of the considerations that prompted the court to declare it unconstitutional.⁶⁷

Finally, we should mention the few cases involving rebels or members of the Nigerian army who were tried on the basis of the "Operational code of conduct of the Nigerian armed forces", adopted in 1967 during the civil war against the Biafran rebels.⁶⁸ They clearly reveal a trend towards criminalization of certain types of conduct that violate the rules of humanitarian law applicable in internal conflicts, but the narrow scope of application limits the significance of these examples.

Other sources

1. Security Council resolutions

Other elements that might point to the existence of an *opinio juris* on international criminalization of flagrant violations of humanitarian law applicable in internal conflicts include two resolutions adopted unanimously by the Security Council concerning events in Somalia. In these resolutions the Security Council asserts that those committing or ordering the commission of violations of humanitarian law shall be held individually responsible.⁶⁹ Certain resolutions adopted in connection with the conflicts in Rwanda and Burundi contain assertions along the same lines.⁷⁰ Similarly, a few resolutions concerning the former Yugoslavia are relevant to this discussion insofar as they address internal conflict situations.⁷¹

⁶⁷ Constitutional Court of the Republic of Hungary, Decision No. 53/1993 (X. 13.) AB and Decision No. 36/1996 (IX.4.) AB.

⁶⁸ See paras 106, 125, and 130 of the *Tadic* decision, *loc. cit.* (note 5), pp. 58, 67 and 68.

⁶⁹ See resolutions S/RES/794 (3 December 1992) and S/RES/814 (26 March 1993).

⁷⁰ For Rwanda, see S/RES/935 (1 July 1994), S/RES/955 (8 November 1994) and S/RES/978 (27 February 1995). For Burundi, see S/RES/1012 (28 August 1995) and S/RES/1072 (30 August 1996).

⁷¹ S/RES/787 (16 November 1992), S/RES/808 (22 February 1993), S/RES/819 (16 April 1993), S/RES/820 (17 April 1993), S/RES/827 (25 May 1993), S/RES/859 (24 August 1993), S/RES/913 (22 April 1994), S/RES/941 (23 September 1994), S/RES/1010 (10 August 1995), S/RES/1019 (9 November 1995), and S/RES/1034 (21 December 1995).

The adoption of such resolutions shows that the Security Council clearly considers the criminal responsibility of individuals committing or ordering the commission of the violations in question (in the context of an internal conflict) to be an issue of international concern, and suggests that this principle of individual responsibility is already well established. Although one may occasionally be perplexed by the terms used, because of their rather imprecise nature or because of the range of violations covered, in general it seems that what the Security Council is addressing in these resolutions is what we call “serious violations” of humanitarian law (applicable, in this case, in non-international armed conflicts).

2. Statutes of the two ad hoc international criminal tribunals

The Statute of the International Tribunal for the former Yugoslavia, the result of a rather cautious drafting procedure, does not actually come down in favour of or against the possible criminalization of serious violations committed in internal conflicts. However, the circumstances of its adoption by the Security Council, the task entrusted to the Tribunal by the latter, the competence *ratione temporis* defined in Article 1 of the Statute, and the Council’s awareness of the mixed nature of the conflict (involving elements of both an international and an internal conflict), suggest “that the Security Council intended that, to the extent possible, the subject-matter jurisdiction of the International Tribunal should extend to both internal and international armed conflicts”.⁷² However, even if we can infer that the Security Council wished to move in this direction, what we do not have (by the simple fact of the adoption of the Statute) is a clear assertion as to the state of the law in this regard.

The adoption of the Statute of the International Criminal Tribunal for Rwanda is another matter. Indeed, “in that latter respect, the Security Council has elected to take a more expansive approach to the choice of the applicable law than the one underlying the statute of the Yugoslav Tribunal, and included within the subject-matter jurisdiction of the Rwanda Tribunal international instruments regardless of whether they were considered part of customary international law or whether they have customarily entailed the individual criminal responsibility of the perpetrator of the crime”.⁷³ With the adoption of Article 4 regarding serious

⁷² *Tadic* decision, *loc. cit.* (note 5), p. 44, para. 78.

⁷³ United Nations, *Report of the Secretary-General pursuant to paragraph 5 of Security Council resolution 955 (1994)*, 13 February 1995, UN Doc. S/1995/134, pp. 3-4, para. 12.

violations of Article 3 common to the Geneva Conventions and of Additional Protocol II, the Security Council effects what could be regarded as an act of faith in respect of the existence of a law attributing individual criminal responsibility. This sudden development could very well have been anticipated in the light of the preliminary report by the Commission of Independent Experts for Rwanda, which readily classified the situation as a non-international armed conflict, going on to address the issue of individual responsibility.⁷⁴ Although somewhat vague in the report, the link could easily be established.

3. Work of the International Law Commission

The International Law Commission (ILC), which is an ideal forum for expounding legal doctrine, incidentally had occasion to approach the issue under discussion from two different angles. The need to frame a statute for an international criminal court (a draft was adopted before the draft code on crimes against the peace and security of mankind, even though work on it was begun later) led the Commission to examine the question of non-international conflicts with a view to defining the scope of the jurisdiction of the future court.

In addition to crimes against humanity, genocide and crimes of aggression, the court would also exercise jurisdiction, according to the draft, over serious violations of the laws and customs applicable in armed conflicts and crimes that are defined as such or are governed by the treaties enumerated by the ILC. This list excludes Protocol II because it does not meet the criteria established by the ILC, one of which requires “that the treaty created either a system of universal jurisdiction based on the principle *aut dedere aut judicare* or the possibility for an international criminal court to try the crime, or both, thus clearly recognizing the principle of international concern”.⁷⁵ The commentary on the subparagraph referring to serious violations of the laws and customs applicable in armed conflicts gives no clear indication as to whether it is intended to cover the notion of “war crimes”,⁷⁶ nor

⁷⁴ United Nations, *Preliminary report of the Independent Commission of Experts established in accordance with Security Council resolution 935 (1994)*, UN Doc. S/1994/1125, 4 October 1994, p. 20, paras 89-91.

⁷⁵ United Nations, *Report of the International Law Commission on the work of its forty-sixth session (2 May-22 July 1994)*, UN Doc. A/49/10, p. 78. However, the exclusion of Protocol II leaves aside the question of possible “grave breaches” of common Article 3, which could, in this respect, fall within the jurisdiction of the court.

⁷⁶ The ILC believes, for example, that conduct classified as a “grave breach” (and therefore to be regarded as a “war crime”) would not necessarily constitute a “serious violation” within the meaning of this article. *Ibid.*, pp. 74-75.

whether non-international conflicts are also included (which the text itself seems to imply). On this last point, the ILC makes particular reference to its draft code on crimes against the peace and security of mankind, as adopted on first reading. The commentary on the latter explains that: “The expression ‘armed conflict’, on the other hand, was clear and precise and required no explanation. The definition of war crimes as violations of the ‘rules of international law applicable in armed conflict’ covered both conventional law and customary law, as well as *all types of armed conflict*, to the extent that international law was applicable to them”.⁷⁷

The second ILC draft that interests us here is precisely the draft code on crimes against the peace and security of mankind. After some hesitation on this point,⁷⁸ the Commission finally adopted a draft that dealt, in paragraph (f) of the article entitled “War crimes”, with acts committed in violation of humanitarian law applicable in internal conflicts.⁷⁹ In its commentary on this article, it stresses that there is now general recognition of the principle of individual criminal responsibility for such violations.⁸⁰ The above-mentioned paragraph (f), not content with following the current trend of developments in the law, went even further, moving in the direction of the possible recognition that crimes against the peace and security of mankind, in the eyes of the ILC an extremely serious category which incurs application of the principle *aut dedere aut judicare*, can be committed in the context of internal conflicts.⁸¹ In a distinctly innovative vein, the Commission specifies in its commentary that paragraph (g) of Article 20 (damage to the environment) should be understood as encompassing both international and non-international conflicts, even though it admits to not being totally convinced that this is necessarily a war crime under the law as it currently stands.⁸²

⁷⁷ Report of the International Law Commission on the work of its forty-first session, in *Yearbook of the International Law Commission*, 1989, Vol. II, Part 2, p. 53, para. 105 (our italics).

⁷⁸ After the above-mentioned comment (note 77), the Commission backtracked briefly. See for example the *Report of the International Law Commission on the work of its forty-seventh session (2 May-21 July 1995)*, UN Doc. A/50/10, p. 54.

⁷⁹ UN Doc. A/CN.4/L.532, 8 July 1996.

⁸⁰ *Report of the International Law Commission on the work of its forty-eighth session (6 May - 26 July 1996)*, UN Doc. A/51/10, pp. 118-119.

⁸¹ *Ibid.*, pp. 116-117.

⁸² *Ibid.*, pp. 119-120.

Terminological aspects

Before concluding, it is important to draw attention, once again, to the lack of uniformity in respect of the vocabulary used: should one talk of “war crimes” or can the term “grave breaches” be used in cases of conduct substantially covered by the treaty provisions relating to this category of violations?

The decision of the Tribunal for the former Yugoslavia in the Tadic case

The Appeals Chamber of the ICTY was required to rule on this issue in its decision of 2 October 1995 in the *Tadic* case, and we shall begin with a brief account of its reasoning and conclusions.

As one of the grounds for its appeal, the defence filed a motion contending that, owing to the internal nature of the conflict in question, Articles 2 (Grave breaches of the Geneva Conventions of 1949), 3 (Violations of the laws or customs of war), and 5 (Crimes against humanity) of the Statute were not applicable. With regard to Article 2, the Appeals Chamber states that the system of grave breaches to which it refers is confined to the persons and property protected by the Geneva Conventions and can in no way be considered as applying to situations covered by common Article 3. It adopts an apparently very strict position on this point, asserting that this is in fact the only possible interpretation of the pertinent provisions. However, referring to the *amicus curiae* brief submitted by the US, it qualifies its position, stating that “a change in customary law concerning the scope of the ‘grave breaches’ system might gradually materialize”.⁸³ With regard to Article 3 of the Statute, it begins by pointing out that it should be interpreted as a “general clause” intended to cover any law meeting the enumerated criteria.⁸⁴ It goes on to examine in depth a number of customary rules relating to internal conflicts and then addresses the issue of individual criminal responsibility. On this point, it admits the existence of a customary rule, and this leads it to the following conclusion: “In the light of the intent of the Security Council and the logical and systematic interpretation of Article 3 as well as customary

⁸³ *Tadic* decision, *loc. cit.* (note 5), p. 47, para. 83.

⁸⁴ To be liable to prosecution under Article 3, the conduct in question must contravene a rule of international humanitarian law that is of a customary nature (or a treaty rule, depending on the conditions), must constitute a serious violation and must entail the individual criminal responsibility of the perpetrator. *Ibid.*, pp. 54-55, para. 94.

international law, the Appeals Chamber concludes that, under Article 3, the international Tribunal has jurisdiction over the acts alleged in the indictment, regardless of whether they occurred within an internal or an international armed conflict”.⁸⁵

Although it does not actually use the term, the Chamber therefore seems to take the view that today “war crimes” can exist in the context of internal conflicts. However, in view of the current state of the law, it refuses to admit that “grave breaches” can be committed in such situations.

While this is the majority position of the Chamber, Judge Abi-Saab issued a separate opinion, stating “on the basis of the material presented in the Decision itself, that a strong case can be made for the application of Article 2, even when the incriminated act takes place in an internal conflict”.⁸⁶ In order to explain the shift from the “traditional” interpretation of “grave breaches” towards the new scope of this term, two possibilities are considered (the first being preferable): (1) the “subsequent practice” and *opinio juris* of the States party to the Conventions have led to a new teleological interpretation whereby non-international conflicts have come to be included in the system of “grave breaches”; (2) the new normative substance has established “a new customary rule ancillary to the Conventions, whereby the regime of ‘grave breaches’ is extended to internal conflicts”.⁸⁷

State practice and opinions

As far as vocabulary is concerned, it has to be admitted that the expression “grave breach” is used with considerable frequency. We have taken note of the position of the United States as set out in its *amicus curiae* brief submitted in connection with the *Tadic* case, the texts of German and Italian military manuals, the Belgian law of 16 June 1993, the decision reached by the High Court of Paris, and the judgment handed

⁸⁵ *Ibid.*, p. 71, para. 137. It can be noted that in its judgment of 7 May 1997, the court of first instance essentially declared *Tadic* guilty on the charges of crimes against humanity and violations of common Article 3. International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Dusko Tadic a/k/a “Dule”*: *Opinion and judgment*, 7 May 1997, Case No. IT-94-1-AR72, p. 300.

⁸⁶ International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Dusko Tadic a/k/a “Dule”*: *Separate opinion of Judge Abi-Saab on the defence motion for interlocutory appeal on jurisdiction*, 2 October 1995, Case No. IT-94-1-AR72, p. 5.

⁸⁷ *Ibid.*, p. 7.

down by the Danish Supreme Court. It is by no means coincidental that all these texts are dated later than 1990.

However, every one of these contributions has a weak point: the US position is not underpinned by any tangible element; the German manual is not supported in its ambitions by the legislative framework; and the French decision and the Danish judgment are not explicit as to the nature of the conflict concerned. Hungary stands out on its own with its unequivocal opposition to the use of the expression “grave breaches”, its Constitutional Court favouring the term “crimes against humanity”.

In any event, the position most commonly adopted (although sometimes implicitly), and perhaps the most convincing in many cases, is to place serious violations under the broader terminological umbrella of “war crimes”, even when the acts in question could also be classified as grave breaches if committed in the context of an international conflict.

Although from the terminological point of view the balance therefore seems to be tipped in favour of the generic term “war crimes”, one must be careful not to overlook the importance of the real meaning States attribute to the terms they use. It is worth pointing out here that when it is clearly a question of grave breaches according to the “traditional” concept, States also sometimes adopt a circumspect and original approach. In any event, and in particular following the adoption of Protocol I, which marked an important move towards bringing what is known as “the law of The Hague” and “the law of Geneva” into line with each other (or the gradual inclusion of one in the other), it is becoming increasingly difficult to make any distinction between the two notions on the basis of the range of behaviours they encompass. In point of fact, it is probably their respective mechanisms of repression that most clearly differentiate one from the other.

In this regard, one point is evident: even though some States assume the right to prosecute non-nationals for serious violations of international humanitarian law applicable in internal conflicts committed in other countries (and even though the work of the ILC and the statutes and jurisprudence of the ad hoc international criminal tribunals are also based on the principle of universal jurisdiction), it still seems very difficult to conclude that a sufficiently significant number of States initiate prosecutions by virtue of a hypothetical obligation to do so. It cannot therefore be asserted that a system of grave breaches currently exists for situations of internal conflict.

Conclusion

In the last analysis, it does not seem unreasonable to assert that serious violations of humanitarian law applicable in internal conflict do in fact constitute “war crimes” under international law as it stands today, the corollary to this change in status being the principle of universal jurisdiction.

Furthermore, doctrine, which serves as a subsidiary means for the determination of the rules of international law, appears to substantiate that opinion.⁸⁸ Indeed, very recent developments seem to support the idea that the customary rule we are seeking has now clearly emerged. Indeed, in mid-February 1997 the ICRC submitted a rather circumspect working paper on war crimes to the Preparatory Committee for the Establishment of an International Criminal Court. After considering grave breaches and other serious violations of international humanitarian law applicable in international armed conflict, the document devotes a third section to what the ICRC, in the statement attached thereto, describes as war crimes committed in the course of non-international armed conflicts.⁸⁹

This paper, presented by New Zealand and Switzerland and supported by several other delegations, was initially selected, along with the US proposal (which also contained a section on non-international conflicts), as a basis for discussion and as one of the sources for a draft consolidated text on war crimes.⁹⁰ At the beginning of December 1997, the Preparatory Committee pursued its examination of the issue. A new draft article on war crimes (Article 20C), which includes numerous options, contains two sections devoted to non-international armed conflict. Section C deals with

⁸⁸ For example: M. Bothe, *op. cit.* (note 50), p. 247; C. Meindersma, “Violations of common Article 3 of the Geneva Conventions as violations of the laws or customs of war under Article 3 of the Statute of the International Criminal Tribunal for the former Yugoslavia”, *Netherlands International Law Review*, Vol. XLII, 1995, p. 396; T. Meron, *op. cit.* (note 6).

⁸⁹ ICRC, *War Crimes*, working paper prepared by the ICRC for the Preparatory Committee for the Establishment of an International Criminal Court, New York, 14 February 1997, 4 pp., and ICRC, *Statement of the ICRC before the Preparatory Committee for the Establishment of an International Criminal Court*, New York, 14 February 1997, 2 pp.

⁹⁰ See: United Nations, Preparatory Committee for the Establishment of an International Criminal Court, Working group on the definition of crimes, *Written proposal submitted by New Zealand and Switzerland*, 14 February 1997, UN Doc. A/AC.249/1997/WG.1/DP.2, *Written proposal submitted by the United States*, 14 February 1997, UN Doc. A/AC.249/1997/WG.1/DP.1, *Draft consolidated text*, 20 February 1997, UN Doc. A/AC.249/1997/WG.1/CRP.2.

serious violations of common Article 3, and section D enumerates several other violations of the law applicable in internal armed conflicts.⁹¹

Many States were agreeable to the inclusion of the first or both sections (with minor divergences as to the content of the second). Only a small number were reticent, and very few were totally opposed to the inclusion of any provisions at all relating to internal armed conflict. Further, the objections raised by these States did not necessarily refer to the pertinence of the notion of war crimes in non-international armed conflict.⁹² They might well be linked solely to the scope of the future court's jurisdiction.

In any event, there is no disputing that during the past five years developments in this area have moved extremely rapidly towards the attribution of individual criminal responsibility to perpetrators of serious violations of international humanitarian law committed in the course of non-international armed conflicts.

⁹¹ *Ibid.*, *War Crimes*, 12 December 1997, UN Doc. A/AC.249/1997/WG.1/CRP.9.

⁹² It is noteworthy that major States such as India and Indonesia are clearly moving in this first direction.