Bridging the gap between human rights and humanitarian law: The punishment of offenders

by John Dugard

In 1948, when the Universal Declaration of Human Rights was adopted, human rights and humanitarian law were treated as separate fields. Since the 1968 Tehran International Conference on Human Rights, the situation has changed dramatically and the two subjects are now considered as different branches of the same discipline. A number of factors have contributed to this merger, including the growing significance of international criminal law and the criminalization of serious violations of human rights. This is the theme of the present comment.

The law of Geneva aims to protect individuals by ensuring that those who have been placed *hors de combat* or who do not take part in hostilities are treated in a humane manner. The law of The Hague, on the other hand, seeks to restrict the freedom of belligerents by proscribing methods of warfare that cause unnecessary suffering. Although a number of non-coercive measures are employed to secure compliance with the rules of international humanitarian law, in the final resort the laws of both Geneva and The Hague contemplate prosecution and punishment of those individuals who violate their norms.

Such punishment has a long, albeit inconsistent, history. Indeed, some consider the first international war crimes trial to have been the prosecution of Peter von Hagenbach in 1474 — for atrocities committed during an attempt to compel Breisach to submit to Burgundian rule — by a

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tribunal comprising judges drawn from different States and principalities.[1] Today the rules governing the prosecution of offenders are principally to be found in the 1949 Geneva Conventions, which oblige States to try or extradite (*aut dedere aut judicare*) individuals responsible for having committed "grave breaches" of the Conventions,[2] and in Article 85 of Additional Protocol I.

Human rights law is different as it is primarily concerned with relations between States and their nationals in time of peace. The Charter of the United Nations[3] and the Universal Declaration of Human Rights expound fundamental human rights standards. Later treaties, both universal and regional, elaborate on these standards and provide mechanisms for their enforcement. Monitoring bodies have been established to consider national reports, individual petitions and, albeit rarely, inter-State complaints. These bodies have varying powers of enforcement, ranging from the legally binding orders of the European Court of Human Rights to the "views" of the UN Human Rights Committee, which was set up under the International Covenant on Civil and Political Rights. Publicity and persuasion rather than coercion ensure compliance. With the exception of the Convention against Torture,[4] human rights treaties do not contemplate enforcement by means of the punishment of offenders. "On this point", said Professor Dietrich Schindler in 1979,[5] "the difference between the law of war and the system of human rights is fundamental".

Human rights treaties are largely designed to deal with individual and not systematic violations of protected rights. In such circumstances, rectification, amendment of the law and redress for the injured person are appropriate remedies. Where, however, the violations assume systematic proportions, there is a need for a more coercive response that looks to

[1] See T.L.H. McCormack and G.J. Simpson (eds), *The law of war crimes: National and international approaches*, Kluwer Law International, The Hague/London/Boston, 1997, p. 37.

[2] Articles 49-50 of the First Geneva Convention, Articles 50-51 of the Second Geneva Convention, Articles 129-130 of the Third Geneva Convention and Articles 146-147 of the Fourth Geneva Convention.

[3] Articles 55 and 56.

[4] Article 4 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (1984) requires States to prosecute offenders under national law.

[5] Dietrich Schindler, "The International Committee of the Red Cross and human rights", *IRRC*, No. 208, January-February 1979, p. 12.

retribution and deterrence. The 1993 World Conference on Human Rights thus stated, in its Vienna Declaration and Programme of Action:

> "The World Conference on Human Rights expresses its dismay at massive violations of human rights especially in the form of genocide, 'ethnic cleansing' and systematic rape of women in war situations, creating mass exodus of refugees and displaced persons. While strongly condemning such abhorrent practices it reiterates the call that perpetrators of such crimes be punished and such practices immediately stopped."[6]

As for international humanitarian law, it was powerless to impose criminal sanctions in the case of an internal armed conflict. "Grave breaches", as defined in the Geneva Conventions and subsequently in Protocol I, occur only in international armed conflicts; and the law of The Hague is largely inapplicable in non-international armed conflicts. Moreover, neither Article 3 common to the four Geneva Conventions nor Protocol II, which deal with humanitarian standards in non-international conflicts, contemplate the prosecution of anyone who violates these standards.

Initially, the concepts of war crimes and crimes against humanity were considered to apply in international wars only.[7] Moreover, although Article 6 of the Nuremberg Charter clearly contemplated prosecution of the major Nazi leaders for crimes against humanity committed *before* the war, the Nuremberg Tribunal chose to link such crimes with the war in order to avoid any suggestion that the law had been applied retrospectively to cover acts committed in peacetime.

Thus, gross and systematic violations of human rights in time of peace or internal conflict were not deemed punishable under international law. Of course one may add that even had such crimes been punishable, there was no international tribunal before which they could have been tried.

Developments in international humanitarian law and international criminal law in recent years have radically changed the situation. Atrocities committed in internal armed conflicts are today punishable as a result of a new approach taken to such acts and the broader definition given to international crimes.

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[6] UN Doc. A/CONF.157/24 (Part 1), 13 October 1993, para. 28, in *International Legal Materials*, Vol. 32, 1993, p. 1661.

[7] See "Judgment of the Nuremberg International Military Tribunal", reported in the *American Journal of International Law*, Vol. 41, 1947, p. 172.

Non-international armed conflicts and international crimes

The law of Geneva distinguishes clearly between international and internal conflicts in respect of criminal sanctions. "Grave breaches" are committed only in international conflicts and they alone can give rise to prosecution or extradition. Article 1(4) of Protocol I, does, however, expand the concept of international armed conflict to cover essentially internal conflicts in which national liberation movements are engaged in a struggle against colonial domination, alien occupation or racist regimes.

Some argue that this provision, which was introduced to extend the protection of international humanitarian law to the conflicts in Rhodesia, Namibia, South Africa and Israel/Palestine, has run its course as a result of dramatic political changes in these territories. The language of Article 1(4) is, however, broad and geographically unlimited. Consequently, there is no reason why it should not be applied, for instance, to conflicts arising out of China's occupation of Tibet, Indonesia's occupation of East Timor or the struggle of ethnic Albanians against Serbian domination in Kosovo. Article 1(4) therefore has the potential to effect a substantial change in the distinction made between international and non-international conflicts as regards the imposition of criminal sanctions for grave breaches, provided that the concepts of colonial domination, alien occupation and racist regime are freed from their historical origins.

The most significant extension of criminal sanctions to acts involving the systematic violation of human rights in internal conflicts has been brought about through the broadening of the scope of international crimes.

Genocide is an international crime that may be committed "in time of peace or in time of war".[8] The crime of apartheid is likewise one that may be committed in time of peace.[9] The Convention against Torture of 1984, which requires parties either to prosecute or extradite torturers, applies in time of peace, war and "internal political instability or any other public emergency".[10]

Although hostage-taking and terrorist bombings may result in the systematic violation of human rights in internal conflicts, the instruments

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[8] Article 1 of the Convention on the Prevention and Punishment of the Crime of Genocide (1948).

[9] International Convention on the Suppression and Punishment of the Crime of Apartheid (1973).

[10] Article 2.

that criminalize these acts under international law do not provide for the punishment of offenders in all situations. The 1979 International Convention against the Taking of Hostages, which obliges parties to prosecute or extradite hostage-takers, is apparently designed for peacetime use only as it provides that it shall not apply where "the Geneva Conventions of 1949 (...) or the Additional Protocols to those Conventions are applicable to a particular act of hostage-taking, and in so far as States Parties to this Convention are bound under those conventions to prosecute or hand over the hostage-taker".[11] The prohibitions on hostage-taking found in common Article 3 and Protocol II,[12] unlike those concerning acts listed as "grave breaches",[13] are not, however, subject to the obligation of *aut dedere aut judicare,* which means that the International Convention against the Taking of Hostages must apply in non-international conflicts. The Convention nevertheless provides that it is not applicable where the hostage-taking occurs within a single State, where both the offender and the victim are nationals of the same State, and where the offender is arrested in that State.[14] In such situations the offender is beyond the reach of international law but will, presumably, face prosecution under domestic law.

The 1998 International Convention for the Suppression of Terrorist Bombings follows a similar pattern: it is inapplicable to armed forces during an armed conflict, when international humanitarian law applies,[15] and in situations where the crime occurs entirely within a single State.[16] Strangely, the Convention is also inapplicable in respect of "the activities undertaken by the military forces of a State in the exercise of their official duties",[17] which means that these forces may be exempt under international law from prosecution for wanton bombings causing loss of life unless these acts qualify as war crimes. Although the two conventions suffer from imperfections, they nevertheless illustrate the determination of the international community to extend the reach of international criminal law to acts that

[11] Article 12.

[12] Article 4(2)(c).

[13] Article 147 of the Fourth Geneva Convention.

[14] Article 13.

[15] Article 19.

[16] Article 3.

[17] Article 19(2).

constitute serious violations of human rights but fail to qualify as "grave breaches" under the Geneva Conventions and Protocol I.

War crimes and crimes against humanity, which were the main charges brought against Nazi and Japanese war leaders, are historically tied to international armed conflicts. However in recent times these two crimes, which have their origins in both custom and convention, have been freed from this limitation and their scope extended to non-international armed conflicts.

As already mentioned, under the Nuremberg Charter crimes against humanity were intended to include peacetime acts. Yet the Nuremberg Tribunal, in order to avoid any suggestion that it had applied the law retrospectively, interpreted the concept narrowly to mean only crimes committed during the war. Subsequent developments have, however, made it clear that crimes against humanity can also occur in peacetime.[18] The International Law Commission's 1996 Draft Code of Crimes against the Peace and Security of Mankind (Article 18) defines crimes against humanity as comprising acts such as murder, torture, enslavement and forced disappearance "when committed in a systematic manner or on a large scale and instigated or directed by a government or by any organization or group, without making any reference to the nature of the conflict.[19] As for the Statute of the International Criminal Tribunal for the former Yugoslavia, it expressly gives the Tribunal jurisdiction over crimes against humanity "when committed in armed conflict, whether international or internal in character, and directed against any civilian population".[20] Moreover, the Appeals Chamber of the Tribunal stated, in *Prosecutor v.Tadic:* "It is by now a settled rule of customary international law that crimes against humanity do not require a connection to international armed conflict. Indeed (...) customary international law may not require a connection between crimes against humanity and any conflict at all".[21]

By their very nature, war crimes are acts that are committed in international armed conflicts. Yet, here too, there has been a relaxation of this

[18] Cherif Bassiouni, *Crimes against humanity in international criminal law*, Nijhoff, Dordrecht, 1992.

[19] Report of the International Law Commission, 48th Session, UN Doc. A/CN.4/L. 522, 31 May 1996.

[20] Article 5.

[21] Decision of 2 October 1995, Case No. IT-94-1-AR72, p.72, para 141. See *International Legal Materials*, Vol. 35, 1996, p. 35.

requirement in recent years.[22] In *Prosecutor v. Tadic*, the Tribunal accepted the principle that "grave breaches" — now equated with "war crimes"[23] — are committed in international armed conflicts only[24] (although Judge Abi-Saab, in a separate opinion, suggested that a "strong case" might be made for the proposition that such crimes were committed in internal conflicts too).[25] However, in the same decision the Appeals Chamber held, on the basis of State practice, that the provision in the Statute of the Tribunal dealing with violations of the laws or customs of war applied to both internal and international armed conflicts.[26] The International Law Commission's 1996 Draft Code of Crimes against the Peace and Security of Mankind moreover accepts that certain acts committed in violation of the laws or customs of war — acts prohibited under common Article 3 and Protocol II — and severe damage to the natural environment unjustified by military necessity constitute war crimes when committed in internal conflicts.[27]

The punishment of systematic human rights violations

The blurring of the distinction between international and non-international armed conflicts and the expansion of the definition of international crimes have led to the criminalization of human rights violations, particularly where they are committed in a systematic manner or on a large scale. Efforts are now underway to extend the reach of criminal law still further through the adoption of a multilateral treaty — drafted along the lines of the conventions on hostage-taking and terrorist bombings — that will punish the crimes of developing, producing, stockpiling or using biological or chemical weapons.[28]

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[22] See generally on this subject, Thomas Graditzky, "Individual criminal responsibility for violations of international humanitarian law committed in non-international armed conflicts", *IRRC*, No. 322, March 1998, pp. 29-56.

[23] See Protocol I, Article 85(5).

[24] *Supra* (note 21), p. 48, para. 84.

[25] *Supra* (note 21), Separate Opinion of Judge Abi-Saab, p. 5.

[26] *Supra* (note 21), p. 71, para 137.

[27] *Supra* (note 19), Article 20(e)-(g).

[28] On 1-2 May 1998 a meeting was held at the Lauterpacht Research Centre for International Law, Cambridge (U.K.), to discuss the proposal for a convention on the prevention and punishment of the crime of developing, producing, stockpiling or using biological or chemical weapons. The meeting was organized in association with the Harvard Sussex Programme on Chemical and Biological Weapons Armament and Arms Limitation and the Common Security Programme on Disarmament and Security. Professor Matthew Meselson, Department of Molecular and Cellular Biology of Harvard University, is the driving force behind the proposal.

The question of universal jurisdiction over international crimes is controversial. While it is generally accepted that such jurisdiction arises in respect of war crimes committed in international armed conflicts and crimes against humanity, it is doubtful whether the same can be said for acts held to be crimes under treaties that confer jurisdiction on the States parties only. Moreover, it is difficult to contend that contemporary international law recognizes universal jurisdiction for war crimes perpetrated in non-international conflicts.

The debate over the extent of universal jurisdiction is of little practical importance, however. What is important is whether persons guilty of systematic human rights violations in an internal conflict will be prosecuted and, if so, before which court.

There is a growing momentum in favour of the establishment of a permanent international criminal court. Although such a court will probably have jurisdiction over genocide, war crimes and crimes against humanity only, the modern definitions of war crimes and crimes against humanity are wide enough to encompass the acts of torture, hostage-taking and wanton terrorist bombings as defined in various treaties. Whether the court would have jurisdiction over war crimes committed in internal armed conflicts remains to be seen.

A permanent international criminal court will clearly have limited powers. Moreover, many years will go by before it receives sufficient ratifications to make it a realistic forum for the punishment of international crime. In these circumstances the need remains for domestic courts to prosecute international crimes and for States to enact legislation giving effect to their obligations under international law. While many States have adopted legislation to comply with their duty under the Geneva Conventions to prosecute grave breaches that occur in international armed conflicts, few have gone so far as to take legislative action regarding crimes against humanity and war crimes committed in non-international conflicts. In 1993 Belgium enacted a law that classifies as war crimes serious violations of international humanitarian law that take place in non-international armed conflicts[29] and a number of other countries have war crimes statutes that draw no clear distinction between international and

[29] Law of 16 June 1993. See A. Andries, E. David, C. Van den Wyngaert, J. Verhagen, "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.

internal conflicts.[30] Domestic legislation of this kind is not, however, common.

National courts have a poor record when it comes to the prosecution of war crimes and other international crimes arising out of armed conflicts.[31] Where the offender is a national, and particularly a member of the security or armed forces of the State, there are usually political reasons for non-prosecution. Moreover, successor regimes that favour reconciliation (for example, South Africa) or that fear a resurgence of the military (for example, Chile and Argentina) often prefer amnesty, despite its dubious validity under international law, to prosecution. Although domestic statutes may permit prosecution of non-nationals for crimes committed abroad, there is usually little political incentive for such action and in practice it is rare.

Human rights law has borrowed the institution of *aut dedere aut judicare* from international humanitarian law. Today, the systematic violation of human rights is thus punishable — at least in theory. This is a far cry from the situation in 1948 when the Universal Declaration of Human Rights proclaimed certain standards for the behaviour of States in respect of human rights. Such an achievement should not, however, blind us to the fact that there is still much to be done to make the prosecution and punishment of human rights violators a reality. The challenge of the next millennium will be to establish a viable international criminal court and effective domestic procedures for the prosecution of those who commit systematic or large-scale violations of human rights — whether in international or internal armed conflicts.

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[30] See Thomas Graditzky, *supra* (note 22), pp. 38-44.

[31] Antonio Cassese, "On the current trends towards criminal prosecution and punishment of breaches of international humanitarian law", *European Journal of International Law*, Vol. 9, 1998, pp. 5-6.