

The relationship between international humanitarian law and the international criminal tribunals

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Abstract

International humanitarian law is the branch of customary and treaty-based international positive law whose purposes are to limit the methods and means of warfare and to protect the victims of armed conflicts. Grave breaches of its rules constitute war crimes for which individuals may be held directly accountable and which it is up to sovereign states to prosecute. However, should a state not wish to, or not be in a position to, prosecute, the crimes can be tried by international criminal tribunals instituted by treaty or by binding decision of the United Nations Security Council. This brief description of the current legal and political situation reflects the state of the law at the dawn of the twenty-first century. It does not, however, describe the work of a single day or the fruit of a single endeavour. Quite the contrary, it is the outcome of the international community's growing awareness, in the face of the horrors of war and the indescribable suffering inflicted on humanity throughout the ages, that there must be limits to violence and that those limits must be established by the law and those responsible punished so as to discourage future perpetrators from exceeding them.



Short historical overview

International humanitarian law has played a decisive role in this development, as both the laws and customs of war and the rules for the protection of victims fall

within its material scope. Indeed, an initial proposal to reach agreement on the establishment of an international criminal court was formulated in the nineteenth century with a view to prosecuting violations of the Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, which was adopted in 1864.

In 1907 the states codified the laws and customs of war applicable to war on land in the Hague Convention No. IV and its annexed Regulations. The Convention provides that the obligations set down in its rules are binding on the states parties, but at the end of the First World War the peace treaty signed at Versailles in 1919¹ established that Kaiser William II of Germany, whom it publicly arraigned for a supreme offence against international morality and the sanctity of treaties, and those who had carried out his orders were personally responsible. It thus recognized the right of the Allied and associate governments to establish military tribunals for the purpose of prosecuting persons accused of having committed war crimes.²

The responsibility, not only of the states but fundamentally of individuals, was thus established as a principle of international law, allowing grave breaches of international humanitarian law to be prosecuted by international tribunals established for that purpose.

The situation continued to evolve. During the Second World War various Allied governments expressed the desire to investigate, try and punish war criminals. The Moscow Declaration, adopted in October 1943, set the stage for the 1945 London Agreement to which was appended the Charter of the International Military Tribunal for the Prosecution and Punishment of the Major War Criminals of the European Axis (the Nuremberg Tribunal). The commander-in-chief of the occupying forces in Japan established the Tokyo Tribunal for the same purpose.³ Once again, therefore, it was agreed that, in the context of international law, certain kinds of conduct could qualify as crimes and that by virtue of the law those considered to be responsible for them could be prosecuted.

The adoption of the Charters of the Nuremberg and Tokyo Tribunals gave significant impetus to the codification of international humanitarian law: for the first time treaty-based rules defined a series of criminal offences for which individuals could be held accountable, and at the same time courts were instituted

1 Part VIII of the 1919 Peace Treaty sets out, in Articles 231 to 247, the obligation for Germany to pay reparations to the Allies for the damages inflicted; the amount of the reparations was to be set by a Reparation Commission.

2 See J. F. Wills, *Prologue to Nuremberg: The Politics and Diplomacy of Punishing War Criminals of the First World War*, Greenwood, Westport, Conn., 1982, and Yoram Dinstein and Mala Tabory, *War Crimes in International Law*, Martinus Nijhoff Publishers, The Hague/Boston/London, 1996, pp. 149–50.

3 For the texts of the London Agreement, the Charter of the International Military Tribunal appended thereto, the proclamation of the Commander-in-Chief of the Allied Powers in Tokyo and the Charter of the International Military Tribunal for the Far East, see M. Cherif Bassiouni, *Crimes Against Humanity in International Law*, Martinus Nijhoff Publishers, Dordrecht/Boston/London, 1992, pp. 579–86 and 604–11.

that took effective action and set out a series of universally recognized principles.⁴ It must be borne in mind, however, that at that point in the development of the law, for conduct to be considered unlawful it had to be connected with war, that is, with an armed struggle between two or more states.

In the late twentieth century, the serious violations of international humanitarian law perpetrated during the armed conflicts in the former Yugoslavia gave rise, no longer by agreement between sovereign states but rather by decision of the United Nations Security Council,⁵ to the establishment of an international criminal tribunal for the prosecution of the presumed perpetrators; shortly thereafter another ad hoc international criminal tribunal was established in the wake of the grave events that had taken place within a state: Rwanda.⁶ In other words, developments in the law that took the form of collective and effective measures to prevent and eliminate threats to peace resulted in the establishment of international jurisdictions whose mandate is to prosecute individuals accused of having committed crimes under international law. These are international bodies that do not make law or legislate in respect of the law; their role is to apply existing law.

- 4 See also *Report of the Secretary-General pursuant to paragraph 2 of Security Council resolution 808 (1993)*, S/25704, 3 May 1993, paras. 41–44, which states that the Nuremberg Tribunal recognized that many of the provisions contained in the Hague Regulations had been recognized by all civilized nations and were regarded as being declaratory of the laws and customs of war, and that the war crimes defined in Article 6(b) of the Nuremberg Charter had already been recognized as war crimes under international law, and covered in the Hague Regulations, for which guilty individuals were punishable; see *inter alia* George A. Finch, “The Nuremberg Trial and International Law”, *AJIL*, Vol. 41 (1947), pp. 20 ff.; Quincy Wright, “The Law of the Nuremberg Trial”, *ibid.*, pp. 38 ff.; F. B. Schick, “The Nuremberg Trial and the International Law of the Future”, *ibid.*, pp. 770 ff.
- 5 In Resolution 808 (1993), this time in application of the rules set forth in Chapter VII of the United Nations Charter, the Security Council decided to establish the International Criminal Tribunal for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 (ICTY), which was given jurisdiction in respect of serious violations of the 1949 Geneva Conventions, violations of the laws and customs of war, genocide and crimes against humanity. In one of its first appeal judgements, the ICTY stated that the Security Council’s establishment of an international tribunal constituted the adoption of a measure that did not involve the use of force, as provided under the terms of Article 41 of the Charter, and had been decided in the exercise of the Security Council’s mandate under Chapter VII to maintain international peace and security in the former Yugoslavia (*The Prosecutor v. Dusko Tadic*, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995). In *The Prosecutor v. Momcilo Krajisnik*, Case No. IT-00-39-PT, Decision on Motion Challenging Jurisdiction – with Reasons, 22 September 2000, the ICTY referred to that precedent, adding that although the Charter enshrines the principle of sovereignty and the non-intervention of the United Nations in matters which are essentially within the domestic jurisdiction of the state, Article 2(7) establishes an exception by providing that said principle shall not prejudice the application of enforcement measures under Chapter VII; hence, when the Security Council acts pursuant to its powers under Chapter VII, it does so on behalf of all member states of the United Nations. See *inter alia* M. Cherif Bassiouni and Peter Manikas, *The Law of the International Criminal Tribunal for the Former Yugoslavia*, Transnational Publishers, New York, 1996, and Karine Lescure, *International Justice for Former Yugoslavia: The Workings of the International Criminal Tribunal of the Hague*, Kluwer Law International, The Hague, 1996.
- 6 Resolution 955 (1994). See *inter alia* Mubiala Mutoy, “Le tribunal international pour le Rwanda: vraie ou fausse copie du tribunal pénal international pour l’ex Yougoslavie?”, *RGDIP*, Vol. 99 (1995), pp. 929 ff.; Mame Mandiaye Niang, “Le Tribunal Pénal International pour le Rwanda. Et si la contumace était possible!”, *RGDIP*, Vol. 103 (1999), pp. 379 ff.; Catherine Cissé, “The end of a culture of impunity in Rwanda?”, *Yearbook of International Humanitarian Law*, 1998, pp. 161 ff.

The final step was the establishment by treaty of the International Criminal Court, a permanent body whose role is to prosecute what the international community as a whole considers to be the most serious misconduct, including, of course, war crimes.⁷

Thus the institution of international criminal courts authorized to prosecute individuals for their conduct when states do not want or are not in a position to do so is related to and directly influenced by the content of international humanitarian law and the definition as war crimes of grave breaches thereof. In the following pages we shall try, albeit briefly, to trace the emergence of this interrelationship step by step, in order to outline its present scope.

The present

The development of international humanitarian law has been accompanied by the formulation of principles and the adoption of multilateral treaties intended to be universal and applicable to war crimes. The rules set down in the statutes of international criminal courts and the work the courts have done and are doing within the scope of their respective mandates reflect that development and at the same time highlight the direct relationship between the object and purpose of international humanitarian law and the establishment of the tribunals. Their jurisprudence, although not an independent law-making process, is a particularly useful additional means of determining the existence of a rule of law, its meaning and its scope.

No retroactivity

The principle *nullum crimen sine lege* is one of the fundamental principles of criminal law; it holds that no one may be held accountable for an unlawful act unless it has been established that at the time the act was committed it was subject to clear rules making it a crime *ante factum*. This principle, which is applicable in domestic legal orders, is also relevant in international law. Ultimately, individuals incur international responsibility for their conduct if the said conduct is unlawful under international law, no matter what the provisions of domestic law are.⁸ At the Nuremberg Tribunal, the defence invoked the principle of non-retroactivity, which is a consequence of the *nullum crimen sine lege* principle. The Tribunal held that the Charter establishing it did not reflect the arbitrary exercise of power by the

7 The states parties to the Rome Statute of the International Criminal Court state in the preamble that they are conscious that all peoples are united by common bonds, their culture pieced together in a shared heritage, thus affirming that there are values that it is in the interests of the international community as a whole to preserve; see Bruce Broomhall, *International Justice and the International Criminal Court*, Oxford University Press, Oxford, 2003, pp. 41 ff.

8 International Covenant on Civil and Political Rights, Articles 14 and 15; Luigi Condorelli, “La définition des infractions internationales, Présentation de la IIème Partie”, in Hervé Ascensio, Emmanuel Decaux and Alain Pellet (eds.), *Droit International Pénal*, Pedone, Paris, 2000, pp. 241 ff.

victorious nations but was rather the expression of the international law in force at the time, adding that the law of war stemmed not only from treaties but also from state customs and practices that had gradually obtained universal recognition, and from the general principles of justice applied by legal scholars and military tribunals. The law was not static; it was constantly being adapted to the needs of a changing world, in such a way that many treaties do no more than reflect and define in more concrete terms existing principles of law.

Individual criminal responsibility

The Nuremberg Tribunal thus emphasized the relationship between the treaty-based and customary rules of international humanitarian law prohibiting certain forms of individual conduct and its institution as a court with a mandate to apply that positive legal order.

The 1949 Geneva Conventions for the protection of the victims of armed conflicts define a series of acts as grave breaches of their rules and stipulate that the states parties are under the obligation to search for persons alleged to have committed them or to have ordered them to be committed, and to bring them before their own courts or, if they prefer, to hand them over for trial to another state provided that state has made out a *prima facie* case against them.⁹ The Statutes of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR)¹⁰ and the Rome Statute of the International Criminal Court¹¹ also work on the assumption of individual criminal responsibility. Ultimately, because it has been generally accepted in the absence of any objections, this type of responsibility has become part of international law, which originally only regulated relations between states and under which only the states could be held accountable for the commission of an internationally unlawful act, even though the responsibility may be civil in nature.¹²

Criminal responsibility, on the other hand, falls on natural persons who commit an act specifically defined as a crime by international law. This is the field of international law that refers to the individual as such and that can therefore be assimilated to the rules of international human rights law, given that the direct object of both branches of the law – although their content and purpose are different – is the human being.¹³

Of course, this responsibility can take different forms. In the light of the provisions of the Versailles Peace Treaty, of the Charters of the Nuremberg and Tokyo Tribunals and of the 1949 Geneva Conventions, it is clear that criminal

9 GC I, Article 49; GC II, Article 50; GC III, Article 129; GC IV, Article 146.

10 ICTY Statute, Article 7, and Statute of the International Criminal Court for Rwanda (ICTR), Article 6.

11 Rome Statute of the International Criminal Court, Article 25.

12 In this regard, see United Nations General Assembly resolution A/56/83 on the responsibility of states for intentionally wrongful acts and the report of the International Law Commission on which it is based.

13 Victoria Abellán Honrubia, “La responsabilité internationale de l’individu”, RCADI, Vol. 280 (1999), pp. 172 ff.

responsibility for war crimes falls not only on the individuals who commit them, but also on those who order them to be committed, no matter what their official function. The ICTY and ICTR Statutes and the Rome Statute expressly mention both forms of responsibility; they also reflect customary law and specify the extent of that responsibility, providing that those who plan or induce the commission of the crime and those who help in any way to plan, prepare or execute it are also culpable.¹⁴ Of course, in order to consider that someone is culpable for having helped in any way whatsoever in the commission of a wrongful act, the acts of those bearing primary responsibility must be established to have a link with those alleged to have been of help.¹⁵ Thus responsibility lies not only with those who committed the crime but also with their accomplices, those who covered for them and those who ordered, proposed or induced the commission of the crime or the attempt to commit it, as the case may be.¹⁶

Furthermore, individual criminal responsibility is incurred not only by acting, but also by intentionally or imprudently ignoring a rule that stipulates a clear obligation to act in a certain way, that is, by failure to act. Examples of conduct that is punishable because there has been a failure to act are wilful killing by withholding food or assistance, and denying a prisoner the right to a fair and impartial trial. Basically, however, this form of responsibility is incurred *de jure* and *de facto* by military leaders and other superiors who fail to take the necessary and reasonable measures to prevent or suppress the commission of unlawful acts by those who are subordinate to them. This is command responsibility,¹⁷ which is incurred within a more or less well-organized structure in relation to the existence of one or several subordinates.¹⁸

14 According to the ICTY's jurisprudence, the secondary responsibility of those participating in the commission of the crime is also punishable if the participation is direct and substantial, something that is not expressly stated in the Rome Statute, Article 25(3)(a); see *The Prosecutor v. Dusko Tadic*, Case No. IT-94-1-T, Opinion and Judgment, 7 May 1997, paras. 691 and 692.

15 See ICTY, *The Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-A, Judgment, 24 March 2000, which reiterates the criteria set down in *The Prosecutor v. Anto Furundzija*, Case No. IT-95-17/1-T, Judgment, 10 December 1998, paras. 174-186.

16 Both the ICTY and the ICTR, referring to the jurisprudence of the British military tribunals and German courts that acted in the wake of the Second World War and their application of Allied Control Council Law No. 10, have ruled that collaboration or aid in the commission of an unlawful act does not necessarily require a physical act; suffice it for the person to provide moral support to the person committing the crime, or to urge him to commit it, so long as such support or encouragement has a substantial effect on the person carrying out the act; ICTY, *Prosecutor v. Anto Furundzija*, above note 15; ICTR, *Le Procureur c. Jean-Paul Akayesu*, ICTR-96-4-T, Jugement, 2 September 1998.

17 This type of responsibility is part of customary law, as established in Protocol I additional to the 1949 Geneva Conventions, Arts 86 and 87, and confirmed in the jurisprudence of the ICTY and the ICTR; ICTY: *The Prosecutor v. Zeynil Delalic et al.*, Case No. IT-96-21-T, Judgment, 16 November 1998, para. 383; *The Prosecutor v. Tihomir Blaskic*, Case No. IT-95-14-T, Judgment, 3 March 2000, para. 290; *The Prosecutor v. Dario Kordic and Mario Cerkez*, Case No. IT-95-14/2-PT, Decision on the Joint Defence Motion to Dismiss for Lack of Jurisdiction. Portions of the Amended Indictment alleging Failure to Punish Liability, 2 March 1999; *The Prosecutor v. Momcilo Krajisnik*, above, note 5; ICTR: *The Prosecutor v. Jean Kambanda*, Case No. ICTR-97-23-S, Judgment and Sentence, 4 September 1998.

18 The ICTY found that the temporary nature of a military unit is not, in itself, sufficient to exclude a relationship of subordination between the members of a unit and its commander; *The Prosecutor v. Dragoljub Kunarac, Radimir Kovac and Zoran Vukovic*, Case No. IT-96-23-T and No. IT-96-23/1-T, Judgment, 22 February 2001, para. 399.

Command responsibility

The first postulate – the responsibility of military leaders – originates from the law of war and was codified in the Hague Convention No. IV of 1907 and its Regulations respecting the laws and customs of war on land.¹⁹ A military leader or someone acting as such is responsible for the conduct of those under his command or authority and over whom he has effective control,²⁰ given that he not only should but indeed is obliged to know what they are doing and to adopt the necessary and reasonable measures within his power to prevent or suppress the commission of unlawful acts;²¹ this obligation, plus the fact that the superior knows or had reason to know that the crime was going to be or had been committed and that there exists a superior–subordinate relationship, are the three constituent elements of command responsibility.²²

The extension of this kind of responsibility to other superiors who are not military leaders springs, on the other hand, from customary law, as established by the ICTY and the ICTR when they interpreted the corresponding rules of their Statutes. In their decisions, both tribunals concluded that a public official, agent or person invested with the prerogatives of the public authorities or who de facto represents the government, and who has effective control over subordinates, can be held accountable for failure to act, although in that hypothesis the person in question must have known about the acts and not just failed in his duty of vigilance and allowed the acts to happen, as is the case for the responsibility of a military leader.²³

This means, in other words, that as concerns both military leaders and other superiors, responsibility by failure to act requires that a superior–subordinate relationship exists, that the superior knew, had reason to know or,

19 Regulations, Article 1(1), according to which the members of armed forces must be commanded by a person responsible for his subordinates.

20 The ICTY is of the view that effective control emerges from the superior's capacity to give orders to those under his command, there being no requirement for the order to be given in writing or in any particular form; *Prosecutor v. Tihomir Blaskic*, above note 17; *The Prosecutor v. Dario Kordic and Mario Cerkez*, Case No. IT-95-14/2-T, Judgment, 26 February 2001, para. 388.

21 P I, Arts 86 and 87; Rome Statute, Article 28.1; see Ilias Bantekas, *Principles of Direct and Superior Responsibility in International Humanitarian Law*, Manchester University Press, Manchester, 2002, and ICTY, *The Prosecutor v. Zejnir Delalic et al.*, Case No. IT-96-21-A, Judgment, 20 February 2001, para. 241, in which the ICTY ruled that the principle that the superior is criminally responsible because he "had reason to know" that his subordinate was going to commit a crime implies that the superior is responsible only if information was available to him which would have put him on notice of offences committed by subordinates; this interpretation was reiterated in *The Prosecutor v. Tihomir Blaskic*, Case No. IT-95-14-A, Judgment, 29 July 2004.

22 ICTY, *The Prosecutor v. Zlatko Aleksovski*, above note 15, paras. 74–76.

23 ICTR: *Le Procureur c. Jean Paul Akayesu*, above note 16; *Le Procureur c. Clément Kayishema et Obed Ruzindana*, ICTR-95-1-T, Jugement et Sentence, 21 May 1999; ICTY: *The Prosecutor v. Zejnir Delalic et al.*, Case No. IT-96-21, Judgment, 16 November 1998, and above note 21, para. 241; *The Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-T, Judgment, 25 June 1999, paras. 66–81. These are some of the cases which, referring to cases tried internally in the wake of the Second World War, considered that this type of responsibility could be incurred by civilian as well as military leaders if the former used their influence to order the commission of a crime or if they did not exercise influence to prevent that crime; see Rome Statute, Article 28(2).

as the case may be, should have known that the act had been or was going to be committed, and that he negligently failed to take the necessary and reasonable measures to prevent the act or punish the perpetrators.²⁴ Of course, the responsibility they may incur is independent of that which may be incurred by their subordinates, given that it exists whether or not the wrongful act has been committed.²⁵ The case of a superior who knows that a crime is going to be committed and deliberately does not stop his subordinates from committing it is different, because in this hypothesis the superior incurs responsibility not by failing to act but rather by participating in the commission of the act.²⁶ The situation would be identical for a superior who, by virtue of his position, plans, instigates or participates in the planning, preparation or execution of crimes by his subordinates, because in all these cases his responsibility would arise from something he did.²⁷ It therefore cannot be considered that a person can at one and the same time incur responsibility as a superior and as the perpetrator of a crime; rather, his position as a superior could constitute an aggravating circumstance resulting in harsher punishment.²⁸

This aspect of individual criminal responsibility – command responsibility – is linked to the responsibility of the subordinate who commits the crime. Once again, the origins of this general principle are to be found in the Charter of the Nuremberg Tribunal, which stipulates that the fact that the defendant acted pursuant to the orders of his government or of a superior does not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal

24 The ICTY found that the superior must have had information indicating that an additional investigation was required and that it had to be determined in each case whether the superior had taken the measures that were within his material possibilities; *The Prosecutor v. Zejnil Delalic et al.*, above note 17, para. 354, in which case the Appeals Chamber specified that a de facto commander is responsible for the conduct of his subordinates when he has effective control and if information was available to him which put him on notice of their conduct, Judgment, 20 February 2001, para. 241. It subsequently specified, in respect of the offence of torture, that it is not enough that a superior has information about beatings inflicted by his subordinates on detainees, he must also have information – albeit general – which alerts him to the risk of beatings being inflicted for one of the purposes provided for in the prohibition against torture; *The Prosecutor v. Milorad Krnojelac*, Case No. IT-97-25-A, Judgment, 17 September 2003, para. 155.

25 The ICTY ruled that superiors who plan or incite or order their subordinates to commit an unlawful act are subject to an aggravating circumstance that should result in a longer sentence; *The Prosecutor v. Zlatko Aleksovski*, above note 15, para. 183.

26 See also ICTY, *The Prosecutor v. Milorad Krnojelac*, Case No. IT-97-25-A, Appeal Judgment, 17 September 2003, para. 52, and *The Prosecutor v. Radislav Krstic*, Case No. IT-98-33-A, Appeal Judgment, 19 April 2004, paras. 137–40.

27 See also ICTY, *The Prosecutor v. Radovan Karadzic and Ratko Mladic*, Case No. IT-95-5, Review of the Indictments Pursuant to Rule 61 of the Rules of Procedure and Evidence, 11 July 1996, para. 83; *Prosecutor v. Dario Kordic and Mario Cerkez*, above note 20, para. 371; *Prosecutor v. Tihomir Blaskic*, above note 21, in which the ICTY ruled that superiors who order an act or failure to act in the knowledge that a crime will probably be committed in the discharge of that order have the necessary *mens rea* to be considered individually culpable for the crime in relation to the order they gave. In this case it was the ICTY's opinion that issuing an order with such knowledge is tantamount to acceptance of the crime.

28 See also ICTY, *The Prosecutor v. Dario Kordic and Mario Cerkez*, Case No. IT-95-14/2-A, Appeal Judgment, 17 December 2004, para. 34, which reiterates the opinion set down in *Prosecutor v. Tihomir Blaskic*, above note 21, paras. 90–91, and *Prosecutor v. Zlatko Aleksovski*, above note 15, para. 183.

determines that justice so requires.²⁹ The ICTY and ICTR Statutes,³⁰ using roughly similar wording, also provide that the fact that an accused person acted pursuant to an order of a government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires.³¹ Although obeying orders is inherent in a military-type system, every individual is responsible for acts freely committed in full possession of his mental faculties, which supposes that he has verified the lawfulness of the order received, that is, whether it is contrary to international customary or treaty-based law, and is in a position so to judge.

War crimes in all situations of armed conflicts

While individual criminal responsibility for the commission of war crimes is a principle of general international law set down in the Versailles Peace Treaty and in the Charter of the Nuremberg Tribunal, it must not be forgotten that the crimes referred to in the former and tried by the latter were violations of the laws and customs of war committed specifically during a war. The 1949 Geneva Conventions and their Additional Protocols extend the scope of application to any international armed conflict but contain no provisions on whether such crimes can also be perpetrated in non-international armed conflicts. In this respect, the case-law of the ICTY and the ICTR is especially valuable for determining the scope of international humanitarian law, since these were the first international courts called on to prosecute such crimes.

When the Security Council adopted Resolution 827 (1993) approving the ICTY Statute, the United States expressed the view, shared by the United Kingdom and France, that the article of the Statute that gave the Tribunal jurisdiction over violations of the laws and customs of war covered the obligations established by the international humanitarian law in force on the territory of the former Yugoslavia at the time those acts were committed, including Article 3 common to the four 1949 Geneva Conventions and the two Additional Protocols of 1977. This meant that, in the view of those three permanent members of the Security Council, war crimes can be committed in the context not only of an international armed conflict, but also in that of an armed conflict that is not international in character,

29 Charter of the Nuremberg Tribunal, Article 8; see O. Sara Liwerant, "Les exécutants", in Ascencio, Decaux and Pellet, above note 8, pp. 211 ff., and M. J. Osiel, "Obeying orders: atrocity, military discipline, and the law of war", *Cal. Law Rev.*, Vol. 86 (1998), pp. 939 ff.

30 ICTY Statute, Article 7.4, and ICTR Statute, Article 6.4.

31 Before the ICTY, the defence invoked the argument of the duty to obey an order given under duress, it being understood that in that hypothesis there should be a case-by-case examination whether the accused did not have the duty to disobey, whether he had the moral choice to do so or to try to do so; it was added that duress does not afford a complete defence to a soldier charged with a crime against humanity and/or a war crime involving the killing of innocent human beings, *The Prosecutor v. Drazen Erdemovic*, Case No. IT-96-22-T, Sentencing Judgment, 12 November 1996, para. 19, and Judgment in the Appeals Chamber, 7 October 1997, para. 19; see Peter Rowe, "Duress as a Defence to War Crimes after Erdemovic: A Laboratory for a Permanent Court?", *Yearbook of International Humanitarian Law*, Vol. I (1998), pp. 210 ff.

given that both common Article 3 and 1977 Additional Protocol II regulate such conflicts and prohibit certain kinds of conduct.

However, the rules of Protocol II are applicable in a specific kind of armed conflict that is not international in character: the conflict must take place on the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement the Protocol.³² Common Article 3, on the other hand, stipulates that it applies in the case of an armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, with no further conditions, leaving its scope open to interpretation. One could infer that the situations to which it applies are not limited to those referred to in Protocol II, even though the rights and obligations established constitute a minimum that each party to the conflict is bound to apply.

In this respect, the ICTY considered that its Statute gave it jurisdiction only in respect of the law of war relating to the conduct of hostilities, but also in respect of violations of common Article 3, given that if the prohibitions set down in common Article 3 constitute the minimum to be applied by the parties involved in an armed conflict that is not international in character, then that minimum must be applied in any kind of armed conflict. In its view, under customary law, which stipulates that all violations of the rules of international humanitarian law entail individual criminal responsibility, violations of the prohibitions set down in common Article 3 constitute war crimes.³³ It must be pointed out that in the case which gave rise to this jurisprudence, the prosecution had based the charges in this respect on violations of common Article 3 and of the Regulations respecting the laws and customs of war on land annexed to the Hague Convention No. IV of 1907, namely the prohibition of pillage, framing them within the jurisdiction attributed to the ICTY to prosecute violations of the laws and customs of war. In reaching its conclusion, the ICTY first considered that the Statute was to be construed as giving it jurisdiction to prosecute any violation of international humanitarian law that was not covered in another of its provisions, that is, in either the so-called Law of Geneva – essentially the four Geneva Conventions, partially supplemented by the two additional Protocols – or in what is known as the Law of The Hague, essentially the rules adopted in 1907 supplemented by other rules of the Protocols. Moreover, in the sentence it recalled the customary law nature of the content of common Article 3, referring expressly to the

32 P II, Article 1(1).

33 Article 3 of the Statute stipulates that the International Tribunal shall have the power to prosecute persons violating the laws or customs of war; see also ICTY, *The Prosecutor v. Dusko Tadic*, above note 5; ICTY, *The Prosecutor v. Zejnir Delalic et al.*, above note 17, a view confirmed by the Appeals Chamber, Judgment, 20 February 2001, paras. 140–3; ICTY, *The Prosecutor v. Dario Kordic and Mario Cerkez*, Case No. IT-95-14/2PT, Decision on Joint Defence Motion to Dismiss the Amended Indictment for Lack of Jurisdiction based on the Limited Jurisdictional Reach of Articles 2 and 3, 12 March 1999.

jurisprudence in this respect of the International Court of Justice³⁴ and of the ICTR,³⁵ to the report submitted by the United Nations Secretary-General to the Security Council pursuant to Resolution 808 (1993), and to the statement made by the United States on the Statute's adoption and to which no objections had been raised. Moreover, in response to defence allegations that such an interpretation violated the principle *nullum crimen sine lege*, it stated that the crimes established in common Article 3 also constituted crimes in the national legislation in force at the time when the acts in question had been committed. It therefore considered that the list of offences in the Hague Convention of 1907 contained in Article 3 of its Statute was explicit and gave it the capacity to try any violation of customary international humanitarian law not considered in that legal instrument to constitute a grave breach of the 1949 Geneva Conventions, genocide or crimes against humanity.³⁶ In the Tribunal's opinion, the object of those provisions was to prevent it from being unable to prosecute a crime and to ensure that the purpose for which it had been established by the Security Council was met, in other words, that the guilty did not go unpunished no matter what the context in which they had perpetrated the violations. The teleological method of interpretation and the rule of effectiveness are obvious in the Tribunal's reasoning.

It is clear from the Tribunal's jurisprudence that the provisions of common Article 3 constitute minimum obligations to be met by the parties involved in any situation of armed conflict. This being so, and given that Additional Protocol II was adopted to develop and supplement those rules, the logical conclusion is that an armed conflict that is not international in character and to which common Article 3 is to be applied does not necessarily need to meet all the requirements of Protocol II for the Protocol's provisions to apply. This, indeed, is what the ICTY concluded when it established that an armed conflict exists whenever armed force is used between states or protracted armed violence breaks out between government authorities and organized armed groups or between such groups on the territory of a state.³⁷ This final option is not, of course, part of the material scope of application of Protocol II, as it is not a form

34 ICJ, *Case concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States)*, ICJ Reports 1986.

35 ICTR, *Le Procureur c. Jean Paul Akayesu*, above note 16.

36 The "umbrella" nature of this rule of the Tribunal's Statute was reiterated in *The Prosecutor v. Anto Furundzija*, above note 15, in which a Bosnian Croat leader was also accused of violating the laws and customs of war against Bosnian Muslims; the Tribunal found that in this case torture and outrages against human dignity, including rape, were crimes it had jurisdiction to prosecute under the provisions of Article 3 of its Statute. It expressed the same opinion in *The Prosecutor v. Zlatko Aleksovski*, above note 15, in which the commander of a Bosnian Serb camp was accused, by virtue of command responsibility, of violating the laws and customs of war in the form of outrages on personal dignity and of physical and psychological ill-treatment of detainees, and in *The Prosecutor v. Goran Jelusic*, Case No. IT-95-10-T, Judgment, 14 December 1999, in which the accused was charged with murder, cruel treatment and pillaging as violations of the laws and customs of war and murder and other inhumane acts as crimes against humanity.

37 ICTY, *Prosecutor v. Dusko Tadic*, above note 5.

of hostilities involving government armed forces. The provisions of common Article 3 are nevertheless binding.³⁸

For this reason the ICTY, referring to the practice of states, state military handbooks, national legislation to implement the obligations undertaken in the 1949 Geneva Conventions, the intention of the Security Council, the logical interpretation of its Statute and customary law, considered that under general international law criminal responsibility is also incurred by those committing serious breaches of common Article 3, whether by failing to provide the victims with the protection to which they are entitled or by violating the rules governing the methods and means of combat. It concluded that it has jurisdiction over such breaches irrespective of whether the alleged acts were committed in the context of an internal or an international armed conflict. Taking the interpretation a step further, it specified that under customary law this rule is definitely applicable to any kind of conflict, whether international in character or not, as it encompasses the minimum obligations to be respected by the parties involved.³⁹

An expanded notion of war crimes?

Consequently, since the material jurisdiction attributed to the ICTY by the Security Council concerns rules that, at the time of its establishment, formed part of both international customary and treaty-based law, the ICTY's decisions will tell us whether in the years since the institution of the Nuremberg Tribunal the notion of war crime has been expanded. In fact, that notion applies not only to grave breaches of international humanitarian law committed in the context of a war as such, but also to acts perpetrated in connection with an armed conflict, be it international or not; this is true even in cases in which the only protagonists of the protracted armed violence are organized armed groups on the territory of a state.⁴⁰

This interpretation is confirmed by the fact that when the Security Council instituted the ICTR it gave it jurisdiction specifically to prosecute violations not just of common Article 3 but also of Protocol II;⁴¹ both apply in the case of an armed conflict that is not international in character. The ICTR

38 See Paul Tavernier, "The experience of the International Criminal Tribunals for the former Yugoslavia and for Rwanda", *International Review of the Red Cross*, No. 321, Nov.-Dec. 1997, pp. 605–21. This interpretation was reiterated by the ICTR in *Le Procureur c. Jean Paul Akayesu*, above note 16, in which it ruled that international humanitarian law should make a clear distinction, in respect of its scope of application, between situations of international armed conflict, in which all its rules are applicable, situations of armed conflict that are not international in character and in which common Article 3 and Additional Protocol II apply, and armed conflicts that are not international in character and in which only the provisions of common Article 3 apply.

39 ICTY: *The Prosecutor v. Anton Furundzija*, Case No. IT-95-17, Decision on the Defendant's Motions to Dismiss Counts 13 and 14 of the Indictment (Lack of Subject Matter Jurisdiction), 29 May 1998; *Prosecutor v. Zejnir Delalic et al.*, above note 21, para. 143.

40 See Djamchid Momtaz, "War crimes in non-international armed conflict under the Statute of the International Criminal Court", *Yearbook of International Humanitarian Law*, 1999, pp.177 ff., and Daryl Robinson and Herman von Hebel, "War crimes in internal conflicts: article 8 of the ICC Statute", *ibid.*, pp. 193 ff.

41 ICTR Statute, Article 4.

established that the intensity of such a conflict does not depend on the subjective opinion of the parties involved, adding that common Article 3 is customary in nature and establishes individual criminal responsibility for serious violations, meaning violations of a rule protecting important values and entailing serious consequences for the victim.⁴²

The ICTR Statute stipulates that such violations include, but are not limited to, violence to the life, health and physical or mental well-being of persons, in particular murder and cruel treatment such as torture, mutilation or any form of corporal punishment, collective punishment, the taking of hostages, acts of terrorism, outrages against personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault, pillage, the passing of sentences and the carrying out of executions without a previous judgment pronounced by a regularly constituted court and without affording all the judicial guarantees which are recognized as indispensable by civilized peoples, and threats to commit any of those acts. It is interesting to note that the violations mentioned are forms of conduct prohibited in roughly the same terms in Protocol II⁴³ and in common Article 3⁴⁴ in respect of all those who do not or no longer participate directly in the hostilities, whether deprived of their freedom or not.

Common Article 3 stipulates that protection is extended to persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention or any other cause, without any adverse distinction.⁴⁵ The ICTY considered that violations of this rule committed against people detained by the forces of the adverse party, no matter what the nature of their participation in the hostilities up to that time, should be deemed to have been committed against members of the armed forces placed *hors de combat* by detention. Ultimately, such people are entitled to benefit from the protection of the rules of customary international law applicable to armed conflicts, such as those set down in common Article 3.⁴⁶

From the Statutes of the ICTY and the ICTR and from their jurisprudence interpreting international humanitarian law, it emerges that violations of the prohibitions contained in common Article 3 constitute war crimes in any situation of armed conflict. It must be borne in mind, however, that the ICTY Statute has

42 ICTR, *Le Procureur c. Jean Paul Akayesu*, above note 16; it must be pointed out, as the Tribunal did in this sentence, that Rwanda had acceded to the Geneva Conventions on 5 May 1964 and to Additional Protocol II on 19 November 1984. According to General Dallaire, one of the witnesses in the case, the territory of Rwanda was the scene of a civil war between the governmental forces (FAR) and the RPF under the command of General Kagame, both of which were organized armed groups. The RPF started to increase their control over the territory in mid-May 1994 and sustained military operations were carried out until the ceasefire of 18 July 1994; the sentence therefore states that the requirements had been met for the application of Protocol II.

43 P II, Article 4(2).

44 GC I-IV, Article 3(1), in particular (d).

45 GC I-IV, Article 3(1).

46 ICTY, *The Prosecutor v. Zejnil Delalic et al.*, above note 17.

two distinct rules, one granting it jurisdiction to prosecute violations of the laws and customs of war,⁴⁷ the other to try grave breaches of the 1949 Geneva Conventions.⁴⁸ In connection with the latter, the Tribunal has the power to prosecute any of the acts listed and committed against persons or objects protected by the provisions of the Conventions; in this case, this refers to acts connected with a type of armed conflict, namely international armed conflicts.

The question of control

In this respect the ICTY stated that for this provision of its Statute to apply – as opposed to the provision referring to violations of the laws and customs of war – the conflict would have to be international. This would be the case if the conflict concerned clashes between two states but also if a third state sent in troops or one of the parties to the conflict acted in the interests of another state; it further recalled that paramilitary forces and other irregular troops can be considered combatants if they belong to one of the parties to the conflict, if that party exercises control over them and if there is a relationship of allegiance and dependence between the two. In the ICTY's opinion, the control required for the units concerned to be considered *de facto* agents of the state involves not only financing and equipping such units but also the planning and supervision of military operations. The state concerned does not, however, have to issue orders or instructions for every individual military action; in other words, it must exercise overall control.⁴⁹

The characterization of an armed conflict as international because of the intervention in an internal conflict of a third state exercising overall control over one of the parties involved is particularly relevant as concerns the application of the rules of the 1949 Geneva Conventions regarding grave breaches, because for a form of conduct to be defined as a war crime the victims have to be protected persons within the meaning of the Conventions. In this respect, Article 4 of the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War provides that persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a party to the conflict or occupying power of which they are not nationals. In other words, one of the conditions for the Convention's application is that the detainee not be a "national" of the detaining authority. In the opinion of the ICTY, and in view of the object and purpose of the Fourth Geneva Convention, protection should be extended to people who find themselves in the power of a party that does not grant them diplomatic protection and to detainees who do not owe it allegiance.⁵⁰ In this interpretation, the criterion used

47 ICTY Statute, Article 3.

48 *Ibid.*, Article 2.

49 ICTY, *The Prosecutor v. Dusko Tadic*, Case No. IT-94-1-A, Judgment, 15 July 1999; *The Prosecutor v. Zlatko Aleksovski*, above note 15, paras. 145–51.

50 ICTY, *The Prosecutor v. Dusko Tadic*, Case No. IT-94-1-A, above note 49; *The Prosecutor v. Zlatko Aleksovski*, above note 15, paras. 151–52.

is that of effective nationality, established many years earlier by the International Court of Justice.⁵¹ The logical conclusion, therefore, is that only if nationality reflects a genuine connection between the person and the state does it have effects in international law; in the case at hand, the effect is to prevent the person being granted the treatment to which he is entitled under international humanitarian law.⁵²

The connection to the armed conflict

War crimes are therefore serious violations of an international treaty-based or customary rule that enshrines basic values, entails serious consequences for the victim and incurs the perpetrator's responsibility. Such crimes must be perpetrated in direct connection with the armed conflict, be it international or not international in character. However, this link between the conduct and the conflict does not necessarily mean that the act must have been carried out in the combat zone or in the course of an attack. Indeed, the application of the rules of international humanitarian law does not depend on the will of the parties involved but rather on the objective fact of the existence of an armed conflict.⁵³ The ICTY specified the scope of the obligations thus assumed, adding that the fact that the accused's action had to be related to the conflict did not imply that it had been carried out in the combat zone; the laws of war apply throughout the territory of the parties to the conflict or, in the case of armed conflicts not international in character, throughout the territory under the control of one of the parties, until such time as peace is restored or – in the second hypothesis – a peaceful solution is found to the issue placing the parties in opposition to each other.⁵⁴ The ICTY reiterated that opinion in a subsequent decision, adding that there were a number of factors for determining whether the acts concerned had sufficient bearing on the armed conflict to constitute war crimes: whether the perpetrator was a combatant; whether the victim was a non-combatant or a member of the adverse party; whether it could be alleged that the act had furthered the purpose of a military campaign; and whether the crime was committed as part or in the context of the official duties of the accused.⁵⁵ The victims can be members of the enemy armed forces, civilians from the adverse party, or internationally protected persons

51 ICJ, *Nottenbohm case, Liechtenstein v. Guatemala*, ICJ Reports 1955.

52 The ICTY, in view of the evidence produced, considered in the *Tadic* case that the victims were protected persons in that they did not owe allegiance to the Federal Republic of Yugoslavia, and that the conflict was international because the Bosnian Serb forces were acting in the interests of the Federal Republic of Yugoslavia. In the *Aleksovski* case it ruled that the conflict was international because of the participation of Croatia and that the victims – Bosnian Muslims – were protected persons, adding that in certain circumstances protected persons had to be granted that status even though they had the same nationality as their captors.

53 Article 1 common to the four 1949 Geneva Conventions stipulates that the High Contracting Parties undertake to respect the Conventions in all circumstances.

54 ICTY, *The Prosecutor v. Dusko Tadic*, above note 5, para. 70.

55 ICTY, *The Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vucovic*, Case No. IT-96-23 and IT-96-23/1A, Appeals Judgment, 12 June 2002, para. 59.

– those not or no longer playing a direct part in the hostilities⁵⁶ – and the crime committed take the form either of violence against a human being or the employment of prohibited methods and means of combat.

The jurisdiction of the International Criminal Court

Many of the principles of international humanitarian law highlighted in the jurisprudence of the ICTY and the ICTR, interpreting the rules contained in their Statutes in the light of developments in that branch of positive law, and many provisions of the multilateral treaties adopted with a view to limiting violence were taken into account when the conference convened in Rome in 1998 under the auspices of the United Nations adopted the Statute of the International Criminal Court (Rome Statute). The Court was given the power to exercise its jurisdiction over persons⁵⁷ whose conduct was a crime under the Court's jurisdiction at the time it occurred;⁵⁸ the official capacity of a person does not exempt that person from responsibility;⁵⁹ and, while the Rome Statute establishes the responsibility of commanders and other superiors,⁶⁰ it also provides that, in principle, the fact that the crime was committed pursuant to an order of a government or of a superior does not relieve the person concerned of responsibility.⁶¹

The Court has jurisdiction *inter alia* over war crimes.⁶² While the Rome Statute, it is true, has the most extensive list of war crimes, it deals with them somewhat differently because a state, on becoming party to the Statute, may declare that, for a period of seven years after the Statute comes into force for it, it does not accept the jurisdiction of the Court with respect to war crimes when a crime is alleged to have been committed by its nationals or on its territory.⁶³ Moreover, it is only in respect of war crimes that the accused can claim to be exempt from responsibility because of an order given by a government or a superior if he was under a legal obligation to obey the order, he did not know the order was unlawful and the order was not manifestly unlawful.⁶⁴ And it is only in connection with war crimes that self-defence can be invoked not for the person but for an object essential to that person's survival or to the accomplishment of a military mission.⁶⁵

The Rome Statute, reflecting developments in customary law highlighted by the Statutes and jurisprudence of the ICTY and the ICTR, defines four

56 ICTY, *The Prosecutor v. Miroslav Kvočka, Milojica Kos, Mlado Radic, Zoran Zigid and Dragoljub Prac*, Case No. IT-98-30/1-T, Judgment, 2 November 2001, para. 124.

57 Rome Statute, Arts 1 and 25.

58 *Ibid.*, Arts 22 and 23.

59 *Ibid.*, Article 27.

60 *Ibid.*, Article 28.

61 *Ibid.*, Article 33.

62 *Ibid.*, Article 5.

63 *Ibid.*, Article 124.

64 *Ibid.*, Article 33.

65 *Ibid.*, Article 31(1)(c).

categories of war crimes, two in respect of international armed conflicts⁶⁶ and two in respect of conflicts not international in character.⁶⁷ However, the Elements of Crimes adopted by the Assembly of States Parties to assist in the interpretation and application of the Court's jurisdiction⁶⁸ specify that there is no requirement for a legal evaluation by the perpetrator as to the existence of an armed conflict or its character as international or non-international, nor is there a requirement for awareness by the perpetrator of the facts that established the character of the conflict as international or non-international; there is only a requirement for the awareness of the factual circumstances that established the existence of an armed conflict because a war crime must occur in the context of such a conflict and be associated with it.

However, although in customary law war crimes can be committed by a person acting on his own and not having received an order to perpetrate them, for the Court to exercise its jurisdiction over this kind of crime the Rome Statute requires "in particular" that such crimes be "committed as part of a plan or policy or as part of a large-scale commission of such crimes".⁶⁹ The term "in particular" allows the Court itself to interpret the scope of this rule, given that any judge is judge of his own jurisdiction and on that basis may have to decide whether there are legal grounds for prosecuting individual cases.⁷⁰

The first category of crimes defined in respect of situations of international armed conflict is grave breaches of the 1949 Geneva Conventions.⁷¹ The Elements of Crime, pursuant to the ICTY's interpretive jurisprudence, specify that it is not necessary for the perpetrator to know the nationality of the victims, but only that they belong to the adverse party, because, for example, even if the victims have the same nationality as the perpetrator, the state concerned may no longer protect them because they belong to an ethnic minority. The second category of crimes concerns other serious violations of the laws and customs applicable in international armed conflicts, "within the established framework of international law".⁷² The reference to international law could lead one to construe that an individual incurs responsibility whenever he violates principles of international humanitarian law, such as the principle of distinction between combatants and civilians, the principle of proportionality and the principle of military necessity.

The crimes identified are related to the Law of The Hague⁷³ and are considered to be war crimes under Protocol I additional to the Geneva

66 Ibid., Article 8(2)(a) and (b).

67 Ibid., Article 8(2)(c) and (e).

68 Ibid., Article 9.

69 Ibid., Article 8(1).

70 H. Von Hebel and D. Robinson, "Crimes Within the Jurisdiction of the Court", in Roy Lee (ed.), *The International Criminal Court: The Making of the Rome Statute, Issues, Negotiations, Results*, Kluwer Law International, The Hague, 1999, on this point in particular, p. 124.

71 Rome Statute, Article 8(2)(a)(i-viii).

72 Ibid., Article 8 (2)(b).

73 Regulations respecting the laws and customs of war on land, annexed to the 1907 Convention, Articles 23 and 28.

Conventions.⁷⁴ However, this category also includes acts that violate the right to protection of humanitarian assistance or peacekeeping missions conducted in accordance with the United Nations Charter, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict, that is, so long as they do not participate directly in the hostilities.⁷⁵ In addition, intentionally launching an attack in the knowledge that such attack will cause widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated,⁷⁶ and intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives,⁷⁷ are also war crimes over which the Court has jurisdiction. It is interesting to note, in direct connection with the rules specifically protecting cultural property in the event of armed conflict, that this provision of the Rome Statute only refers to intentional attacks against one kind of such property: buildings dedicated to art or monuments. No account appears to have been taken of archaeological sites, books or other movable or immovable property of great significance to the cultural heritage of peoples.⁷⁸ The transfer, directly or indirectly, by the occupying power of parts of its civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory, is

74 P I, Articles 11, 85(2), (3) and (4), even though the wording is not exactly identical.

75 Ibid., Article 8(2)(b)(iii); Convention on the Safety of United Nations and Associated Personnel, 1994.

76 Ibid., Article 8(2)(b)(iv); in P I, Article 35(3) – a fundamental rule – prohibits the use of methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment, and Article 55 stipulates that care is to be taken in warfare to protect the natural environment against such damage and prohibits attacks against the natural environment by way of reprisals. In 1976, the United Nations adopted the Convention on the prohibition of military or any hostile use of environmental modification techniques.

77 Ibid., Article 8(2)(b)(ix).

78 1954 Convention on the Protection of Cultural Property in the Event of Armed Conflict, Article 1. Articles 10 and 15 of the Convention's Second Protocol, adopted in 1999, stipulate that each state party must establish as criminal offences under its domestic law *inter alia* attacks against cultural property, as defined in the Convention, that is cultural heritage of the greatest importance for humanity, that is protected by adequate domestic legal and administrative measures recognizing its exceptional cultural and historic value and ensuring the highest level of protection, and that is not used for military purposes or to shield military sites, the party which has control over the cultural property having confirmed that it will not be so used. P I, Article 85(4)(d), provides that it is a war crime to make the clearly recognized historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples and to which special protection has been given the object of attack, when such property is not located in the immediate proximity of military objectives. The ICTY, on the basis of P I, Articles 52 and 53, on the general protection of civilian objects and the protection of cultural objects and places of worship, ruled that there are two kinds of protection, one general, the other special. The first applies to civilian objects, which, by virtue of that protection, must not be the object of attack or reprisals unless they constitute a military objective affording the attacking side a definite military advantage at the time of the attack. Special protection, for its part, shields cultural property and places of worship that are part of the cultural or spiritual heritage of peoples; it is absolutely prohibited to commit acts of hostility against such property. In the ICTY's opinion, schools and places of worship benefit from general protection; ICTY, *Prosecutor v. Dario Kordic and Mario Cerkez*, above note 28, paras. 89–90.

also listed as a war crime.⁷⁹ Other provisions in this article refer to the prohibition to use certain weapons – poisons, asphyxiating, toxic or other gases, expanding bullets – that was set down in international treaties in 1899 and 1925 and has become part of customary law.⁸⁰ However, when it comes to modern weapons – such as nuclear weapons, anti-personnel landmines, or chemical and biological weapons – which are of a nature to cause superfluous injury or unnecessary suffering and which have inherently indiscriminate effects, their use would only be a crime under the Court’s jurisdiction if in the future they were the subject of a comprehensive prohibition included in an annex to the Rome Statute adopted seven years after its entry into force by the Assembly of States Parties or by a Review Conference.⁸¹ Another important rule in the light of recent developments on the international stage is that which considers it a crime to recruit or enlist in the national armed forces children under the age of 15 or to use them to play an active part in the hostilities. The antecedents for this provision are the Convention on the Rights of the Child and Protocol I additional to the 1949 Geneva Conventions.⁸² Other types of conduct prohibited in the Conventions or in Protocol I but which are not defined by them as grave breaches or war crimes for which individual criminal responsibility is incurred are defined as such by the Rome Statute, to wit: outrages on personal dignity, in particular humiliating and

79 Rome Statute, Article 8(2)(b)(viii), a rule which Israel considered, when the text of the Rome Statute was adopted, did not reflect the customary law in force at the time, since it referred not only to the transfer of people in the occupied territory but also to the transfer by the occupying power of its own population into the occupied territory, on which grounds Israel decided to vote against the text of the Statute. However, the ICTY has maintained that the unlawful deportation or transfer of civilians can be defined as a war crime since it is a grave breach of the Fourth Geneva Convention. It added that the material element of the crime is constituted by an act or failure to act the aim of which is to transfer the person from the occupied territory or to the occupied territory and that is not based on the safety of the population or on imperative military necessity. The subjective element is the intention of the perpetrator to transfer the person; ICTY, *The Prosecutor v. Naletilic and Martinovic*, Case No. IT-98-34-T, Judgment, 31 March 2003, paras. 519–21.

80 Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, 1925; Declaration of The Hague concerning Expanding Bullets, 1899.

81 Rome Statute, Article 8(2)(b)(xx). Account should nevertheless be taken of the adoption of multilateral international humanitarian law treaties limiting the means of combat: the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, 1972; the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, 1980, and its Protocols (Protocol I on Non-Detectable Fragments, Protocol II on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, Protocol III on Prohibitions or Restrictions on the Use of Incendiary Weapons, Protocol IV on Blinding Laser Weapons, Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996); Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, 1993; Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, 1997; 2001 amendment of the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects and its Protocols I, II and III, 1980; Protocol on the Explosive Remnants of War, 2003.

82 Rome Statute, Article 8(2)(b)(xxvi); Convention on the Rights of the Child, Article 38, and P I, Article 77.

degrading treatment;⁸³ rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization or any other form of sexual violence also constituting a grave breach of the Geneva Conventions;⁸⁴ utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations;⁸⁵ intentionally using starvation of civilians as a method of warfare;⁸⁶ or intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law.⁸⁷

The Rome Statute also defines two categories of war crimes committed in armed conflicts that are not international in character. The first is made up of serious violations of common Article 3,⁸⁸ it being specified that the relevant article of the Rome Statute does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.⁸⁹ The second refers to other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law.⁹⁰ It is specified that the rules apply to armed conflicts that take place in the territory of a state when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups,⁹¹ and the participation of the governmental armed forces is therefore not necessary in order to define the conflict to that end. This category includes as war crimes some of the acts prohibited in Additional Protocol II that are directed intentionally against the civilian population as such or against civilians not participating directly in the hostilities,⁹² against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law,⁹³ and against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives.⁹⁴ Other acts listed as war crimes are sexual and gender crimes,⁹⁵ conscripting or enlisting children under the age of 15

83 Rome Statute, Article 8(2)(b)(xxi); P I, Article 75(2)(b).

84 Rome Statute, Article 8(2)(b)(xxii); GC IV, Article 27.

85 Rome Statute, Article 8(2)(b)(xxiii); GC IV, Article 28; P I, Article 51(7).

86 Rome Statute, Article 8(2)(b)(xxv); P I, Article 54(1).

87 Rome Statute, Article 8(2)(b)(xxiv); GC I Articles 19, 20, 24, 35, 53; GC II, Articles 22, 23, 36, 39, 41–45; GC IV, Articles 18, 20–22; P I, Articles 8, 12, 18, 21, 22, 24, 38, 85(3)(f), in that it defines perfidious use of the emblem as a war crime; these emblems, the red cross and the red crescent, are of signal importance in international humanitarian law because in time of armed conflict they are the visible manifestation of the protection conferred by the Conventions and the Additional Protocols on medical personnel and means of transportation, and the states must adopt internal regulations for their use.

88 Rome Statute, Article 8(2)(c).

89 *Ibid.*, Article 8(2)(d); P II, Article 1.2.

90 Rome Statute, Article 8(2)(e).

91 *Ibid.*, Article 8(2)(f).

92 *Ibid.*, Article 8(2)(e)(i); P II, Articles 13.2.

93 Rome Statute, Article 8(2)(e)(ii); P II, Articles 9, 10, 11(1) and 12.

94 Rome Statute, Article 8(2)(e)(iv); P II Article 16.

95 Rome Statute, Article 8(2)(e)(vi), as long as they also constitute a grave breach of common Article 3.

into armed forces or groups or using them to participate actively in hostilities,⁹⁶ ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demands,⁹⁷ pillaging a town or place, even when taken by assault,⁹⁸ and subjecting persons who are in the power of another party to the conflict to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons.⁹⁹ Lastly, the Rome Statute includes as war crimes in situations of armed conflict that are not international in character some of the prohibitions as to methods of combat set down in the Regulations annexed to the Hague Convention No. IV of 1907, such as killing or wounding treacherously a combatant adversary,¹⁰⁰ declaring that no quarter will be given¹⁰¹ or destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict,¹⁰² and intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict.¹⁰³

Conclusions

Grave breaches of international humanitarian law constitute war crimes that incur the individual criminal responsibility of those who commit them by their action or failure to act.

Of course, this system of legal rules is applicable in situations of international armed conflict, that is, when recourse is had to armed force between states. But it can also apply in a conflict that breaks out on the territory of a state when a third state sends in its troops or one of the parties acts in the interests of another state that has overall control over it.

Situations of internal unrest and strife, on the other hand, are not covered by this system, for it is the responsibility of the state to maintain or restore order and defend its territorial unity. However, if protracted armed violence takes place between governmental authorities and organized armed groups or between such

96 *Ibid.*, Article 8(2)(e)(vii); P II, Article 4.3.c.

97 Rome Statute, Article 8(2)(e)(viii); P II, Article 17.

98 Rome Statute, Article 8(2)(e)(v); P II, Article 4(2)(g).

99 Rome Statute, Article 8(2)(e)(xi); P II, Article 5(2)(e).

100 Rome Statute, Article 8(2)(e)(ix); Regulations, Article 23(b).

101 Rome Statute, Article 8(2)(e)(x); Regulations, Article 23(d) and P II, Article 4, final paragraph.

102 Rome Statute, Article 8(2)(e)(xii); Regulations, Article 23(g).

103 Rome Statute, Article 8(2)(e)(iii); Convention on the Safety of United Nations and Associated Personnel, 1994.

groups on the territory of a state, the parties involved have the rights and duties established by international humanitarian law and, ultimately, their engagement in prohibited conduct is also a war crime.

Responsibility for prosecuting the perpetrators falls first and foremost to the states, but if they do not wish or are not in a position to do so, practice has led to the establishment of international criminal tribunals so that those engaging in prohibited conduct do not go unpunished, no matter what the context in which the conduct took place. Punishing those responsible obviously constitutes effective application of the law, giving full effect to rules that are of interest to the entire community. It may thus be possible in the future to provide the victims with better protection, it being utopian to think that human beings will decide to eradicate violence once and for all.