Responsibility of the Individual under International Law for Crimes Committed in the Context of Armed Conflicts

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RESPONSIBILITY OF THE INDIVIDUAL UNDER INTERNATIONAL LAW FOR CRIMES COMMITTED IN THE CONTEXT OF ARMED CONFLICTS

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INTRODUCTION

For more than a year now, nearly every day one can read in the newspapers about atrocities that occur in the conflict about the former Yugoslavia. Ethnic cleansing¹ and mass deportation of muslims in Banja-Luka and other villages, concentration camps², systematic rape of women of the enemy³, massacres on the civil population⁴, destruction of private and public property and cultural heritage and so on. Saddam Hussain invaded Kuwait in 1989. After his defeat, he persecuted thousands of Shiits and Kurds. For months in Somalia war lords like Mohamed Farah Aidid and Ali Mahdi Mohamed prevented the supply of food for a starving population⁵ and ordered mass killings of members of the enemy clan.⁶ In Turkey for years the government has fought with immense efforts against members of the Kurdish Workers' Party (PKK). According to Helsinki Watch "hundreds of civilians have been massacred, nine journalists have been murdered."⁷ Both, the military and the PKK are responsible. In Angola the UNITA is accused of murdering civilists.⁸ The National Patriotic Front under their Chief Charles Taylor is accused of being responsible for the death of thousands of civilians in the course of the civil war in Liberia, including the recent killing of five American nuns in a Monrovia suburb.⁹ In Kampuchea¹⁰, Sri Lanka¹¹,
Tajikistan\textsuperscript{12}, Armenia\textsuperscript{13}, Azerbaijan\textsuperscript{14}, South Ossetia\textsuperscript{15}, Guatemala\textsuperscript{16} and India\textsuperscript{17} civil war and civil strife cause the loss of human lives. Again and again newspapers give information of torture and of killing of the civilian population. The list could go on for hundreds of pages. The annual report of AI relates numerous pages of evidence of further human rights violations. Tragically, since the end of the cold war, in many regions of the world there is a proliferation of wars and civil wars. Because of this and the high actuality of the arising issues, as the title of the work reveals, the investigation will concentrate on situations of armed conflicts in the broader sense. We will investigate the special problems that arise under the consideration of actual examples of armed conflicts.

For several reasons, most of the perpetrators do not have to fear any prosecution on the national level. First, in situations of an international war any nation hesitates to destroy the picture of their own heroes and often the enemy is not in the hand of the party whose people are victims.\textsuperscript{18} Likewise, in many situations of civil war prosecution is simply factually impossible because there exists no functioning state order or, where it exists, only the insurgents are tried. The prosecution of the members of the regular armed forces is mostly in the case of a coup d'\textit{etat probable}. But even if soldiers are tried by the enemy, the danger of sacrificing impartiality exists.\textsuperscript{19} So, the question arises: Is there any evidence of international
law that establishes individual responsibility of actors or supplies any set of rules that gives the world community the opportunity to define their acts as unlawful, to prosecute, try and punish the perpetrators? If yes, the consequent issue is, who can be tried: The subordinate soldier, who committed the atrocity, the military commanders, who ordered or at least omitted to prevent them, policy makers like Slobodan Milosevic and Radovan Karadzic, Jonas Savimbi of the UNITA, Mohamed Farah Aidid and Ali Mahdi Mohamed in Somalia, Velupillai Prabhakaran of the Tamil Tigers and other state officials, rebel leaders and the inferior soldier, who turned the atrocities? The intention of this work is to show the tools existing international law provides.20

Connected questions are, who should try them: international or national tribunals? Looking back in history one finds only one outstanding example of an international tribunal: The trials of Nuernberg and Tokyo after the second World War. For many years, it seemed to be an exception without repetition. After the liberation of Kuwait from the Iraqi occupation, President Bush publicly thought about a trial against Saddam Hussain.21 This remained only an idea. However, only two years later and 50 years after the Declaration of St. James, the current occurrences in the former Yugoslavia revived the idea of an international tribunal that would try war criminals. In 1992 U.N. Resolutions 767, 771 and 780, the Security Council stated
the responsibility of the individuals committing war crimes in the former Yugoslavia. On February 22, 1993, with U.N. Resolution 808, the Security Council decided on the establishment of an international tribunal to prosecute serious violations of international humanitarian law. The problems arising in Resolution 808 are manifold and include new issues, for example, the competence of the Security Council for the establishment of the tribunal. Reports of France, Italy and the CSCE that investigated the issue of an ad hoc international tribunal for the former Yugoslavia provide interesting documents about the current state of international law on the issue.

The set of rules applicable to crimes in situations of armed conflicts is imperfect. However, since the Nuernberg trials scholars, distinctive societies of international lawyers and above all the 6th Committee of the United Nations General Assembly, the International Law Commission, worked and continues to work on a Code that establishes for different kinds of international crimes individual responsibility. After restarting its work in 1980, the first reading of the draft took place in 1991 and the comments of the members of the U.N. had to be given on January 1, 1993. The intention of the draft is to elaborate a comprehensive convention that in part codifies and in part establishes the old idea of direct individual responsibility for the most heinous crimes and, on the other hand, to deliver "an instrument intended to serve as a guide for a
political organ such as the Security Council." The views of States were divided. However, the work goes on and U.N.S.C. Resolution 808 proves that a comprehensive tool for the prosecution of certain crimes is more necessary today than ever. The legal value of the ILC Draft for our inquiry is its triple nature: Partly the draft intends to create new international law; partly it is a mere reiteration of existing conventional law; and, partly it is a codification of existing customary international law. Furthermore, the work of the ILC proves that the international community is concerned about the issue. The legal quality of this committee is assured because it consists of many distinguished international lawyers from different countries.

The structure of this paper follows a different approach than most of the existing literature. From the topic "individual responsibility for crimes under the law of wars" logically four main problems arise - apart from a number of related issues. First, determining the international instruments and documents in which individual responsibility is established and the scope ratione personae? Second, determining the actus reus under the laws of war for which individual responsibility exists (scope ratione materiae)? Third, determining how the prosecution and punishment of the perpetrators works and what organ or institution tries them? Fourth, determining the kind of armed conflicts for which the existing set of rules are
applicable. The author is well aware that from this structure there will be some disadvantages like the inevitable consequence of some overlapping and the use of several references from one Chapter to the other. However, the advantage and the purpose of this article is to give an evaluation of the current state of international law on the different issues and to speak in favor of the chosen way.

In many current articles on the subject, the qualification and evaluation of and conclusions about these different issues are confused. Additionally, the reader will be able to compare the different content of the documents and instruments. This is of special importance for the evaluation and proof of existing or emerging customary international law. For this purpose, at the beginning of each Chapter, a list of international instruments and documents and a survey of the legal and historical development is given. However, where this structure was not adequate, the author deviated from this method.

Considerable space is dedicated to introductory remarks at the beginning of the chapters to explain different terms used in the relevant field of international law. Despite limited space the author regards this necessary to provide a sufficient understanding of the overall system and the position of the different issues within this system. Likewise, it may help to clarify any confusion that may exist because of the different use and understanding of certain terms in the literature used.
Consequently, the paper will begin by investigating the existence of individual responsibility in conventional and customary international laws of war. Then, it will examine the scope *ratione personae* that the current international law on individual responsibility covers, how it is related, and what mode of conduct is embraced. At the end of this first chapter, the most important exception to responsibility is given consideration. With the result of Chapter I in mind, turn to the issue of what *actus reus* individual responsibility is provided for, i.e., the scope *ratione materiae*. Chapter III examines the kind of conflicts for which the available set of rules are applicable. This problem arises mainly with regard to the Geneva rules. Chapter IV addresses the enforcement mechanism, i.e., issues like the implementation, prosecution, penalty and punishment, and institution that will try the perpetrators. Finally, problems arising from involvement of the United Nations in the conflict will be discussed.
CHAPTER I

INDIVIDUAL RESPONSIBILITY


Originally subjects of international law were "first and foremost ... State[s] besides corporate entities." However, because of corporate entities in the 20th century, the individual human being became more and more the subject of international law. According to the realistic school that is prevailing today among writers, the primary subject of international law remains states; but, the individual can also, be under certain circumstances, be the subject of international law. On the one hand the individual may be the indirect subject of international law as the "duties and rights of States are only duties and rights of the members who compose them". In this case we deal not with true rights and duties, but with a reflex of the rights and duties of states. Because of that, the individual may also be direct subject of international law. In the words of Yoram Dinstein: "[T]he individual human being is not merely the indirect subject of international law. Sometimes, he bears international rights and duties directly, without the interposition of the legal personality." Consequently,
duties and obligations, in other words responsibility of the individual human being may be imposed on the individual either directly as a subject of international law or indirectly through the State. As we will see, the current state of international law producing individual responsibility is far from being conclusive. Nevertheless, one should bear in mind that the "transformation of the position of the individual is one of the most remarkable developments in contemporary international law."\textsuperscript{36}

The duties of the individual under international law may classified into four groups:\textsuperscript{37} (1) Responsibility of privates other than of a criminal nature, e.g instruction for the employees of international organizations like the OECD or the United Nations, (2) general duties of the individual to the community as a whole and (3) in particular the protection of human rights,\textsuperscript{38} (4) and finally criminal responsibility. Only the latter one is the main object of this paper. However, in the field of non-international conflicts the protection of human rights accomplishes the lack of provisions that supply criminal responsibility.

Criminal responsibility may be established either direct and indirect. There are duties of the individual of which the actus reus is defined in international law, but penalty, punishment and prosecution only exist after the implementation of international law into municipal law. In these cases the individual is punishable on ground of the municipal legal order. Like in the Geneva Conventions of
1949, States have only the obligation (or choice) either to try or to extradite the perpetrator. On the other hand responsibility, penalty, prosecution and punishment of the individual perpetrator may exist on grounds of international law (e.g. trials of Nuernberg and Tokyo). Clearly, the first case is only an indirect responsibility under international law, whereas the latter case is purely a direct one. Disputed among commentators is the qualification of the cases in between, as most international instruments are. For our purpose the dispute has not been resolved. We will investigate both indirect and direct individual responsibility.

2. Sources of Individual Responsibility in International Laws of War

Individual responsibility for crimes under the laws of war is for centuries a concern of municipal legal orders. The first proofs for conventional international law that addresses to this issue appeared in the second half of the 18th century. Since then several instruments and documents deal with this problem. The following list of instruments and documents is neither conclusive nor complete. However it reflects the important sources of international law:

1. Art. 47, 59 of the Lieber Instructions of 1863
3. Art. 229 of Peace Treaty of Versailles (1919)
4. Inter-Allied Declaration of St. James, signed 13 January 1942.
5. Moscow Declaration of 1943
7. Art. 1 and 6 of the Charter of the International Military Tribunal (which is on grounds of Art. 2 of the London Agreement an integral part of the latter).
8. Control Council Law No. 10, 20 December 1945
10. Special Proclamation of the Supreme Commander in the Far East for the Allied Powers of January 1946 (Tokyo Military Tribunal)
11. Art. 4 of the Genocide Convention
14. Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity

2.1. History and Legal Development

One of the first sources that provides individual responsibility for crimes against the laws of war are the Lieber Instructions of 1863. The Lieber Code was drafted by Professor Francis Lieber during the American Civil War. It is significant because it is one of the first attempts to codify the laws of war and "correspond to a great extent to the laws and customs of war existing at that time." Furthermore it had decisive impact on the subsequent codification of the Laws of War like The Hague Conventions of 1899 and 1907. Articles 47 and 59, paragraph 1, of the Lieber Code are one of the first regulations that provide individual responsibility. The wording of the grave breaches system in the Geneva Law 1949 reveals remarkable similarities. The regulations were addressed to American as
well as the enemy soldiers, who committed certain unlawful acts in the course of the American Civil War.

The Hague Conventions of 1899 and 1907 do not contain provisions that establish individual responsibility for war crimes. The reason for this was that the competence to try his own nationals for war crimes was a long existing customary law and part of the Sovereignty of State Doctrine. The Hague Conventions of 1899 and 1907, however, are not more than an already existing codification of customary international law. However, beyond the competence to try his nationals, Article 41 of Convention No. II of 1899 and Article __ of Convention No. IV of 1907 provides that "[a] violation of the terms of the armistice by private individuals acting on their own initiative, only confers the right of demanding the punishment of the offender...." Whether this obligation to try its own nationals for certain war crimes was already existing customary international law or constituted the development of new conventionary international law is not fully clear. Here is one of the decisive differences to the Geneva Law of 1949 that reflects the principle of universality and provides the obligation to try or extradite its own as well as foreign nationals that are accused of war crimes. This obligation with regard to foreign nationals was, however, not absolutely known: "[A] specific duty for states to take legislative measures for the repression of certain infractions was laid down for the first time in the Geneva Wounded and Sick Conference of..."
1906, and the next year at the Second Hague Peace Conference (X) for the Adoption to Maritime Warfare of the Principles of the Geneva Convention."\(^5^0\) However, until 1949, neither Geneva nor The Hague Law contained any further regulations establishing a responsibility of the individual.

After the end of the first World War another attempt to hold individuals responsible for crimes against the laws of war was not very successful. Articles 227-230 of the Versailles Peace Treaty of 1919\(^5^1\) provided a certain individual responsibility. Article 229, paragraph 1, provides that:

> Persons guilty of criminal acts against the nationals of one of the Allied and Associated Powers will be brought before the military tribunals of that Power.\(^5^2\)

Indeed, this provision does not explicitly provide that the individual is responsible for crimes against the laws of war; however, one may conclude from the recognition of the German Government that the Allies have the right to prosecute German perpetrators "accused of having committed acts in violation of the laws and customs of war."\(^5^3\) The Treaty of Sevres\(^5^4\) between the Allied Powers and Turkey also contained individual responsibility. However, this provision of both treaties was never executed.\(^5^5\) But even in the case of the application of Article 229 one can merely speak of a responsibility of the individual on grounds of international law as the judgement of the military tribunal "should nonetheless be based on preexistent municipal
law...." If one agrees that individual responsibility in international law, regardless of whether it is direct or indirect, is the definition of the scope *rationae personae* and *materiae* in international instruments and is prerequisite, then one hardly can speak of an example for our purpose.

**The Trials of Nuernberg and Tokyo**

Already in 1942 Governments of nine European States signed the Declaration of St. James⁵⁷, which was "reiterated in official statements by the U.S.A., Great Britain and USSR and other Allied Governments."⁵⁸ They agreed that "those guilty or responsible...are sought out, handed to justice and judged...."⁵⁹ On October 7, 1942, the establishment of an United Nations War Crimes Commission (UNWCC) for the investigation of war crimes was announced and one year later realized. On August 8, 1945, the four Allied signed the London Agreement⁶⁰, which provided in Article 1 the establishment of

... an International Military Tribunal for the trials of war criminals whose offenses have no particular geographical location whether they be accused individually or in their capacity as members of organizations or groups or in both categories.⁶¹ This wording reflects that according to the Moscow Declaration of 30 October 1943⁶² crimes with geographic location should be judged on grounds of municipal law in the country, where the crime was committed. Article 6 of the IMT⁶³ then stated that for "[t]he following acts, ...[thereafter cited the actus reus of crimes against peace, humanity and war crimes] there shall be individual responsibility."⁶⁴
However this international individual responsibility (and prosecution by the IMT) was manifoldly restricted. As the title of the London Agreement already indicates, the scope ratione personae was in two ways narrowed: First only war criminals of the European Axis powers were prosecuted, and, the trials were restricted to the major war criminals. All other 'minor' war criminals should be individual responsibility and should be judged on grounds of the municipal law of the country, where the atrocities were committed. This idea was reconsidered in connection with the establishment of a war crime tribunal for the former Yugoslavia. The scope rationae tempore was limited to war crimes during the second World War and for the trials of the Nuernberg Tribunal. In January 1946, for the war criminals of the Far East the Tokyo Military Tribunal was established by Special Proclamation of the Supreme Commander of the Far East (General McArthur) of the Allied Powers. The regulations of the Special Proclamation of the Supreme Commander in the Far East was substantially identical.

The new quality of Nuernberg and Tokyo with regard to individual responsibility is that, first, never before and since then have such a number of individuals been held individually responsible for their wrong-doing on the basis of an international instrument. In the words of Frits Kalshoven, Nuernberg and Tokyo constitute the "high-water-mark" of individual responsibility for crimes against the laws of war. Second, the IMT - and the subsequent
tribunals that followed them - rejected the arguments of the defendants that international law cannot impose duties on the individual.\textsuperscript{69}

2.2. Current State of Law

a. Conventional International Law

Because of the scope ratione temporis the London Agreement and Charter of the IMT is not a valid international instrument.\textsuperscript{70} One of the most important currently valid Conventions establishing individual responsibility is the Genocide Convention, which is ratified by the majority of States.\textsuperscript{71} It was inspired by the Nazis' "Endlosung" for the Jewish people and should in the future prevent any recurrence of attempts to exterminate ethnic or religious groups. It is applicable in time of peace as well as in time of war, and especially in the latter case it gains great importance.\textsuperscript{72} Article 4 of the Genocide Convention\textsuperscript{73} says that

Persons committing genocide or any other acts enumerated in Article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.

Beside the Genocide Convention the four Geneva Conventions of 1949\textsuperscript{74} and the Additional Protocols of 1977\textsuperscript{75} are the most important instruments in the humanitarian laws of war. Article 49 of Convention (I), Article 50 of Convention (II), Article 129 of Convention (III) and Article 146 of Convention (IV) constitute the implementation mechanism of the Geneva Conventions.
Moreover, they set forth a system of indirect individual responsibility. Article 146, paragraph 1, of the Third Geneva Convention, e.g., states:

The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, ordering to be committed, any of the grave breaches of the present Convention defined in the following Article.

Only the actus reus is defined in international law, but penalty, prosecution and punishment are left to municipal law. One may argue that the Geneva Conventions are not examples of indirect responsibility of individuals because no provision establishes it explicitly. Nevertheless, Article 49 of Convention I, Article 50 of Convention II, Article 129 of Convention III and Article 146 of Convention IV oblige the High Contracting Parties to provide penal sanctions for the perpetrators, who committed "grave breaches" of the Conventions. From this wording, at least indirectly, follows that the Geneva Conventions regard the individual as responsible for the acts constituting grave breaches. One of the weaknesses of the Geneva Conventions is that no provision like Article 8 of the Charter of IMT deals with justifications, excuses or mitigating circumstances. All this remains in the field of domestic law of the State that judges the perpetrator. Whereas the Geneva Conventions, and Additional Protocol I that enlarges the Conventions, provide at least the system of indirect individual responsibility, Additional Protocol II, that applies to non-international conflicts, does not
provide any implementation mechanism. Consequently, Additional Protocol II confers no obligation on the High Contracting Parties to try to prosecute perpetrators in non-international conflicts. This, and the failure of direct and indirect individual responsibility in Additional Protocol II, are the most criticized weaknesses of the Geneva law.

Apart from the foregoing indirect responsibility approach, it should be added that one may also assume that there exists direct individual responsibility for the committing of grave breaches of the Geneva Law. As we will see the notion "grave breaches" is a synonym for "war crimes." If one accepts the view of most commentators that the Nuernberg Principle of direct individual responsibility under international law for war crimes is today customary international law, then, the commitment of "grave breaches" against the Geneva Conventions and Additional Protocols also produces direct individual responsibility of the perpetrators on grounds of customary international law. This approach could be of important relevance with regard to non-international conflicts, i.e., Article 3 common of the four Geneva Conventions and above all Additional Protocol II, that does not foresee an implementation-system like the four Conventions. Moreover this approach would make it possible to judge perpetrators by international organs on grounds of grave breaches of the Geneva Conventions.
Especially in the conflict about the former Yugoslavia (e.g., destruction of historic center of Dubrovnic) another international instrument providing indirect international responsibility (i.e., by means of implementation) has to be considered: The Hague Convention on Cultural Property. Article 28 of The Hague Convention confers upon the HIGH CONTRACTING PARTIES the obligation to

...take, within the framework of their ordinary criminal legislation, all necessary steps to prosecute and impose penal or disciplinary sanctions upon those persons, of whatever nationality, who commit or order to be committed a breach of the present Convention.

b. Customary International Law

As has been seen, individual responsibility as specified in the Londoner Agreement was restricted to war crimes during World War II. Questionable is whether apart from existing treaty law there exists customary international law that provides individual responsibility for crimes against the laws of war (1) in general, or, if at least the Nuernberg principle of direct individual responsibility (2) for the herein mentioned crimes respectively (3) some of them - (a) was already at this time or (b) has become apart from the Geneva Law binding customary international law. In the Commentary to the Nuernberg Principles the ILC asserted

the Commission adopted a formulation of the principles of international law which were recognized in the Charter of the Nuernberg tribunal and the Judgement of the Tribunal.
That is to say that following the ILC, individual responsibility was already recognized before the Nuernberg trials. For individual responsibility in general, as we saw, this assertion is without sufficient proof. Therefore, the title "Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and the Judgement of the Tribunal" is misleading. The task of the ILC was "not to express any appreciation of these principles as principles of international law, but merely to formulate them."

More serious, however, is the question that since Nuernberg, does customary international law provide individual responsibility in general for crimes against the laws of war. Article 38 of the Statute of the ICJ mentions as prerequisites for customary international law the existence of state practice and the recognition as legally binding. Since Nuernberg a considerable amount of international documents has reiterated the principle of individual responsibility for certain crimes against the laws of war. For our purpose we will concentrate on the two major sources, United Nations Resolutions and the Drafts of the ILC.

As early as in 1946 the General Assembly "affirmed" the principles of international law recognized by the Charter of the Nuremberg Tribunal and the judgment of the tribunal." Some remarks are necessary in advance as to the legal quality of Resolutions of the General Assembly. Before World War II "the word 'resolution' was normally used
in the sense of a binding decision made by an international organization...." However, Resolutions of the General Assembly have no binding force. The system of the Charter of the United Nations only in Chapter VII gives the Security Council the power to make mandatory decisions in the case of a threat of breach of peace or acts of aggression. The view of Third World Countries and the former Communist Block that G.A.-Resolutions are a new source of law is neither proved by the system of the Charter of the United Nations nor reflects the practice of states. However, they may either convert into international law if State practice treats them as legally, and not morally, binding or may be an indicator for State practice with respect to emerging international law. Resolution 95 (I) may be qualified as a first step. Since 1950 the ILC worked on a codification of the Principle of individual international responsibility.

In 1950, they released the Formulation of the Nuremberg Principles on grounds of the direction by the G.A. in Resolution 95 (I). Principle I, that is based on Article 6 of the Charter of the IMT, provides that "[a]ny person who commits an act which constitutes a crime under international law is responsible therefore and liable to punishment." The new quality is, that in the future not only the perpetrators of the vanquished state are liable. Furthermore, the ILC attempted to introduce individual responsibility as general principle for any crime under international law. However, this proposal was never adopted by the General Assembly. In
the consequent years the ILC elaborated the "Draft Code of Offenses Against the Peace and Security of Mankind." 94 Article 1 states that "[o]ffenses against the peace and security of mankind, as defined in this Code, are crimes under international law, for which the responsible individuals shall be punished." However, in 1954, the work on the Code was postponed for several reasons. 95 In 1980 the General Assembly called on the ILC to revive its work on the Draft Code. 96

Until its 43rd session, the ILC under its special rapporteur DouDou Thiam comprehensively enlarged the number of crimes for which individual responsibility should be provided. 97 After its first reading, the draft was given to the member States of the United Nations to make their comments and proposals, which should be handed in until January 1, 1993. Article 3, paragraph 1, holds that "[a]n individual who commits a crime against the peace and security of mankind is responsible therefore and is liable to punishment." According to Mr. Rosenstock, Legal Advisor of the United States at the United Nations and a member of the ILC, the comments were mostly negative because of the far-reaching and different crimes that should be included. Therefore, at present it seems unlikely that the draft will be adopted in its current shape or presented as convention. In short, individual responsibility under international law for crimes in general is not feasible at the current state of international law. Therefore, individual responsibility
in general for crimes against the laws of war is currently not part of customary international law.\textsuperscript{98}

For war crimes the situation is different. Most commentators recognize that because of the various repetitions in international documents individual responsibility for war crimes forms today part of customary international law. "Individual responsibility for war crimes has become widely accepted as an international legal norm...."\textsuperscript{99} The Committee of French Jurists, in a letter dated from February 10, 1993, to the United Nations takes this view also.\textsuperscript{100} Explaining the legitimacy of the establishment of an International Criminal Tribunal - and herein to affirm direct international individual responsibility - to judge the (war)\textsuperscript{101} crimes committed in the former Yugoslavia, they conclude that

\begin{quote}
[n]owadays, ...punishment is also justified by indisputable norms of international customary law, thanks to the development of international law that has since taken place as a result of both domestic and international case law, treaty practice and United Nations resolutions;\textsuperscript{102}
\end{quote}

This view may also be approved from the theoretical outset for customary international law. Indeed, all of the mentioned documents lack binding force. However, as for every actus reus the intention or consciousness is difficult to be proved. It is unlikely to prove that States regard the content of these documents as legally binding. Therefore, some scholars recognize that lack of this prerequisite can be compensated in a case where the practice
is "virtually uniform." Finally some remarks concerning the issue of war crimes jurisdiction in customary international law should be made. In as early sources as article 71 of the Lieber Instructions the rule of customary international law is laid down that from the 
"... right of the belligerents to enforce the laws of war" the war crimes jurisdiction over its own and the enemy soldiers derives. "War crimes jurisdiction [, therefore,] is optional," i.e., offenders of the laws of war that are within one States territory may be tried by this State. Against the former enemy State one has the right to demand the prosecution of war criminals.

For the substantive content of the crimes against humanity the situation is easier. The actus reus is nowadays embraced by the Genocide Convention in part and by the grave breaches of the Geneva Convention in part and grants individual responsibility as shown in context with instruments. Individual responsibility for crimes against peace is most disputed. Here, it may be only mentioned that the answer will be presumably negative.

2.3. United Nations Security Council Resolution

In the conflict about the former Yugoslavia, a third source of binding international law apart from conventional and customary international law emerged that may establish (direct) individual responsibility: Mandatory resolutions of the Security Council under Chapter VII.
In U.N.S.C. Resolution 771\textsuperscript{112} (1992) the Security Council reaffirmed

that all parties to the conflict are bound to comply with their obligations under international humanitarian law and in particular with the Geneva Conventions of 12 August 1949, and that persons who commit or order the commission of grave breaches of the Conventions are individually responsible in respect such breaches;\textsuperscript{113}

At first glance, the resolution only repeats existing international law. However, there also could arise a constituting character. In the case of the former Yugoslavia with regard to the Geneva Conventions this is without relevance because all parties in the conflict gave declaration that they accept the Geneva Conventions.\textsuperscript{114} However, the Genocide Convention remains that only Yugoslavia signed, however, not the successor states. From the standpoint of international law with regard to succession in treaties, the successor states Serbia and Montenegro, Croatia, Bosnia-Herzegovina and Slovenia are not automatically bound to these instruments. With the reiteration that all parties of the conflict are bound, especially to the Geneva Convention. Second, the resolution indicates that in contrast to the system of indirect individual responsibility in the Geneva Conventions, the judgement and prosecution may not be handled by municipal courts, but by an ad hoc international tribunal. This was decided, on February 1993, by the Security Council in Resolution 808 (1993).\textsuperscript{115} The author will discuss this issue in more detail later in this manuscript.
3. Scope ratione personae

After examining to what extent international law provides individual responsibility, the next step is to consider who may be responsible and closely related to this, what mode of conduct is covered by individual responsibility. The scope ratione personae extends to three levels: (1) Head of States and officials of the State, (2) Military Commanders and (3) the subordinate soldier. For each level special problems arise. The following instruments and documents address in particular to one or more of the different levels:

1. Art. 227 of Peace Treaty of Versailles
2. Art. 6 para. 3 and Art. 7 of Charter of the International Military Tribunal
3. Principle III and IV of Nuremberg Principles in G.A.-Res. 3(I) and 95(I) of 1950
4. Art. 3 of ILC Draft of 1954
5. Art. 12, 13 of the ILC Draft of 1991
6. Art. 86 para.1 and 2 and art. 87 para. 1 of Protocol I of Geneva Conventions
7. Art. IV of Genocide Convention
8. Art. 2 of Convention on Statutory Limitations

3.1. Head of States and official position

With regard to responsibility of Head of States and officials of States two main issues arise: (1) Head of State or official position as freeing from punishment on grounds of immunity because of the Act of State Doctrine and (2) responsibility of Head of State or officials for the mere formulation (as mode of acting) of crimes under laws of war.
a. Immunity According to the Act of State Doctrine

Legal Development and History

Before World War I under "customary international law... Heads of State were above the law and could not be punished...."116 After the defeat of Napoleon I, Prussian General Gneisenau suggested "to put the Emperor...on trial for the wars he had initiated."117 The same intention can be found in Article 227, paragraph 1, of the Peace Treaty of Versailles, which states that

The Allied and Associated Powers publicly arraign Wilhelm II of Hohenzollern, formerly German Emperor, for supreme offenses against international morality and the sanctity of treaties.118

The trial of the German Emperor, however, never took place. Wilhelm III was given asylum in The Netherlands. With this experience after World War II the Allied provided in Article 7 of the Charter of the IMT that

The official position of defendants, whether as Heads of States or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment.119

Regardless of this provision, in the trials one common argument of the defendants belonging to the policy making level was that the Act of State Doctrine as part of international law grants immunity. The IMT dismissed this and said:

The principle of international law which under certain circumstances protects the representatives of a State cannot be applied to acts which are condemned as criminal by international law120 [i.e. where]... the State in authorizing action moves outside its competence under international law.
Current State of Law

One of the great achievements of Nuernberg surely is that nowadays it is unquestioned that the Act of State Doctrine, at least, does not grant immunity from criminal conduct. Indeed this is laid down only in few international instruments. Apart of Article 4 of the Genocide Convention, only Article 2 of the Statutory Limitation Convention can be mentioned. The Geneva Conventions and the Additional Protocols remain silent on this issue. However the relevant consecutive documents since World War II reiterated this principle and prove at least for criminal action the conclusion of the French Commission of Jurists that immunity on grounds of "Act of State does not exist" as part of customary international law. Notwithstanding, one should keep in mind, that this does not preclude that the official position may be regarded as mitigating circumstance by the tribunal. In all the Nuernberg trials following drafts the ILC omitted the passage of Article 7 of the Charter of the IMT "or mitigating punishment" as it "considers that the question of mitigating punishment is a matter for the competent Court to decide." If one follows with the majority of commentators this view of the ILC, then leaders like Saddam Hussain, Slobodan Milosevic and Radovan Karadzic or Charles Taylor were responsible under international law for war crimes they committed. As they will not commit the crimes themselves,
however, they will defend that they never committed the crimes. Hence, it is necessary to define different modes of conduct that establish individual responsibility.

3.2 Mode of Conduct: commitment, ordering, incitement and omission, complicity, conspiracy.

With the consciousness that no immunity is granted, we can step forward to examine what mode of conduct is embraced by individual responsibility. To avoid any confusion, the author wants to point out that the following consideration only investigates existing individual responsibility, as stated above under point 2. This must especially for the section of customary international law be kept in mind. The mode of committing is without further problem embraced. However, in most cases only the subordinate soldier commits the crime. An effective deterrent and also equilibrated justice, however, only can be achieved if beside the subordinate level also the policy-making level and the intermediate level of the superior Military Commanders are considered to be individually responsible for their conduct. Hence, different modes of conduct have to be investigated. Military Commanders in general only ordered the commitment or even less, they only omitted to prevent the atrocity. High ranking state officials probably incited or formulated a policy that encouraged the crimes. Besides, other modes of conduct like attempt, conspiracy or complicity will be addressed.
History and Legal Development

Let us begin with the "high-water mark"\textsuperscript{126} of individual responsibility, the trials of Nuernberg and Tokyo. Article 6, paragraph 1, of the Charter of the IMT covered the commitment of the crime. After the experience with the Leipzig Trial, this time regulations were issued that should ensure to cover also the policy making level. Article 6, paragraph 3, of the IMT, therefore, provides:

Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such a plan.\textsuperscript{127}

By including participating in the formulation of a common plan to commit crimes against the laws of war, the prosecution of the policy-level was ensured. This is one decisive new element. Modes of conduct like conspiracy, complicity and incitement always depend on the proof of the actual committed crime. This gives in trial very often a difficult burden of proof. Consequently, the Charter preferred to declare the mere "participation in the formulation" as unlawful act without any link to the actual execution of the crime. Whether this is a mere mode of conduct\textsuperscript{128} or a separate form of crime ("crime of conspiracy")\textsuperscript{129} does not have to be resolved for our purpose.

For the liability of the intermediate level of military commanders conspiracy as mode of unlawful action covered the
ordering of the crimes.\textsuperscript{130} Beside these two modes of conduct originally the IMT did not affirm responsibility of higher ranking officers or officials for omission. E.g. in the case of Commander on the Sea Admiral Doenitz the court did not investigate with regard of the killing of shipwrecked survivors neither if "Doenitz knew about them [nor if] he could have given orders for the piracy to be stopped"\textsuperscript{131} The issue of omission was first addressed by the United Military Commission in Manila in the Yamashita case.\textsuperscript{132} The historical background was the lack of proof of orders of the Commanders in cases of the Military Tribunal for the Far East. The Tribunal held that the laws of war imposed on an army a duty to take such appropriate measures as were within his power to control the troops under his command and prevent them from committing actions in violation of the laws of war.\textsuperscript{133}

Weakness of this decision was that the Tribunal neither considered the issue of whether Yamashita had control over the crimes nor if he knew of them. In the trials against Japanese foreign ministers Hirota, Shigemitsu and Togo the Tribunal elaborated criteria to affirm criminal responsibility for omission:

"[T]he principle of criminal responsibility for omission to act cannot be denied, when the man in authority knew, or should have known, that crimes were regularly being committed, had the power of interfering with the criminal practices, and had special responsibility for the field in question."\textsuperscript{134}

Consequently there are two possibilities that create individual responsibility of omission. One possibility is
that the military superior knew of the crime. This, however, is difficult to prove in a trial. Therefore, the second alternative, that is similar to the principle of negligence in municipal penal law, was of decisive importance. It was sufficient if the responsible superior had under consideration of all circumstances the possibility to know and to prevent the crime. This holding was generally accepted in the following trials. The IMT of Nuremberg ruled similarly in the Hostage case,135 High Command trial,136 Pohl trial137 and "Einsatzgruppen trial."138

Current State of Law139

Conventional International Law

The grave breaches system of the 1949 Geneva Conventions embrace (only) the mode of committing or ordering to commit.140 Other modes of conduct are left to the municipal legal order. Article III of the Genocide Convention141 is wider and also includes modes of conduct like incitement, conspiracy, attempt and complicity to commit genocide. Like in Article 6, paragraph 3, of the Charter of the IMT the adoption of incitement and conspiracy as modes of conduct should ensure a deterrence to the policy making level. Questionable, however is if this concept grants that political leaders like Karadzic or Milosevic can be held responsible on grounds of the mere formulation of a certain policy like ethnic cleansing. Because of the problems of burden of proof with modes of conduct like incitement and conspiracy, some scholars prefer to find a
formulation that does not require the link to the actual committed crime. The Committee of French Jurists, therefore, proposed in its report investigating the legal framework for a war crimes tribunal in former Yugoslavia to create a separate crime that reads:

The crimes referred to article VI shall be deemed to have been committed by any individual who... [p]articipated in drawing up a common plan to commit the crime or have it committed, was associated in some way with its implementation or its transmission to persons called upon to execute it or gave general or specific instructions for its execution, even in part.\textsuperscript{142}

The Genocide Convention does not explicitly mention orders of military commanders, but according to the experience of the Nuernberg Trials this should be covered by "complicity." However, it should be mentioned that this solution has two weak points. First, it requires precise orders to establish complicity and, second, no unlawful conduct exists if the order is not executed. Especially in the cases that the order was without any influence or knowledge of the superior not executed the lack of sanction for the order seems not to be justifiable.\textsuperscript{143} One possible solution could be "to define [orders] as an offense in itself the decision to use authority in a criminal fashion...."\textsuperscript{144}

A first step toward the recognition of omission is laid down in the Statutory Non-Application Convention of 1968. Beside the mode of incitement and conspiracy Article 2 provides also that "representative of the State authority
who tolerate their commission" may be punishable. However, the term tolerate seems only to cover omission if the superior has knowledge of the crime. The first international instrument that extends the responsibility of commanders to omission quite similar to the holdings in the War Crimes Tribunals was Article 86, paragraph 2, of 1977 Additional Protocol I. It is important to keep in mind that the provisions of Additional Protocol I also apply to the Geneva Conventions. Consequently, under conventional law, military commanders may be punished for omission to prevent grave breaches of the four Conventions and for the ordering of Genocide if the mentioned prerequisites are fulfilled.

Customary International Law

As we saw, the solution to cover order of superiors by complicity, is not in any case a satisfying solution. Therefore, it remains important, that "ordering" a crime is an unlawful mode of action itself. Today it is undisputed that "order" as a mode of conduct is covered by individual responsibility. Indeed, e.g., the Nuernberg Principles do not include any specific reference to "orders." However, complicity is regarded as to embrace "orders" as mode of conduct. Yet, we saw that this solution is not satisfying in every case. Complicity requires that the crime was actually executed. Besides, individual responsibility for complicity and attempt also may be regarded as part of customary international law. Complicity was adopted in both, Principle 7 of the Nuernberg Principles and Article 2, paragraph
Article 3, paragraph 2, of the 1991 Draft also includes complicity as mode of conduct. The achievement of the ILC is that the members agreed to formulate in the draft article the definition that aids, abets or provides the means for the commission of a crime are forms of complicity. In municipal criminal law, the problem arose as to what time the complicity had to be given. Consent could be achieved that complicity "prior to the perpetration of the crime or during its commission constituted obvious cases of complicity." With most commentators the conclusion that complicity is included, in cases where customary international law provides individual responsibility, seems legitimate.

Conspiracy and incitement are the same sources of international documents as for complicity can be mentioned. It is remarkable that in the Nuernberg Principle conspiracy was only considered for crimes against peace. Article 3, paragraph 2, of the ILC Code of 1991 also contains conspiracy and incitement. With regard to the definition of incitement, two features are important to mention: According to the members of the ILC, incitement "did not have to be public in order to be punishable...[but afforded] the inten[tion] to encourage the perpetration of certain crimes." Since Nuernberg, the content of conspiracy has been unanimously regarded as "participation in a common plan for the commission of a crime...."
Whether both modes of conduct are part of customary law remains uncertain.\textsuperscript{156}

Lastly, mode of conduct attempt will be addressed. There are very few sources on this subject. Only the Drafts of the ILC contain considerations about this.\textsuperscript{157} However, the members of the ILC were divided in the opinion as to whether attempt should be punishable for all crimes or if an "article-by-article analysis"\textsuperscript{158} would be more adequate. At this point, customary international law is not in existence at the current state.

More difficult is the issue on "omission." In some municipal law orders omitting was and is punishable. An example may be paragraph 501 of US Field Manual of 1958.\textsuperscript{159} Among the relevant major international documents only the ILC Draft of 1991 considers the problem of omission. Beside Article 2,\textsuperscript{160} that mentions omission, Article 12 of the ILC Draft of 1991 explicitly considers the issue:

The fact that a crime against the peace and security of mankind was committed by a subordinate does not relieve his superior of criminal responsibility, if they knew or had information enabling them to conclude, in the circumstances at the time, that the subordinate was committing or was going to commit such a crime and if they did not take all feasible measures within their power to prevent or repress the crime.\textsuperscript{161}

Regardless of the desirability and necessity, the author hesitates to qualify the given examples as proof that omission is a mode of conduct that customary international law provides individual responsibility. In the commentary of the ILC to Article 12, only the above mentioned trials after
World War II\textsuperscript{162} are listed as proof. Perhaps it is more adequate to state that omission, as an unlawful act for crimes against the laws of war in general, is emerging as customary law on its way into existence.

3.3. Defenses and Excuses

In the course of war criminal trials, defendants introduced certain defenses and excuses that should prevent individual responsibility. The most frequent arguments put forward were limitation, non bis in idem,\textsuperscript{163} nulla poene sine lege, duress,\textsuperscript{164} mistake,\textsuperscript{165} military necessity\textsuperscript{166} and reprisal.\textsuperscript{167} The latter two may be qualified as indirect defenses because they refer to the level of State action. However, "the effect of a defence successfully maintained by the State may....[also] exempt individuals from criminal responsibility."\textsuperscript{168} This work will concentrate on two defenses that are still debated today and will find consideration in most of the relevant international documents and instruments: the defense of superior order and conformity of the action with internal law. "Nulla poene sine lege" (also called the principle of non-retroactivity) played a major role in the trials after World War I as well as in the trials of Nuernberg and Tokyo.\textsuperscript{169} However, the current state of conventional and customary international law\textsuperscript{170} is sufficiently developed so that in future trials tribunals would not have to argue about this principle of all major internal legal orders. Also, in the relevant instruments and documents the principle of "nulla poene sine
"lege" is laid down and may, therefore, be regarded as part of internal law.

3.3.1. Obedience to Superior Orders

The defense of superior order is one of oldest and most frequently used. Early examples are the trial of Peter von Hagenbach (Breisach Trial) of 1474, United States v. Wirz after the American Civil War and Landover Castle Case before the Supreme Court of Leipzig after World War I. The experience of the Leipzig trials after World War I, where many defendants excused themselves with the argument they were acting pursuant to superior orders, led to a different approach after the defeat of the European Axis powers. All in this part regarded instruments and documents reveal a tendency towards:

1. Art. 8 of Londoner Agreement
2. Ex Parte Quirin
3. Principle 4 of Nuremberg Principles
4. Art. 4 of ILC Draft of 1954
5. Art. 11 of ILC Draft of 1991
6. Art. 7 para. 3 of the French Report
7. Art. 5 of the Italian Report

a. History and Legal Development

During the Nuernberg trials defendants argued that they acted under the orders of Hitler. However, Article 8 of the Charter of the IMT ordered that

[the fact that the Defendant acted pursuant to order of his government or of a superior shall not free him from responsibility, but may be considered in mitigating the punishment if the Tribunal determines that justice so requires.

This "middle of the road approach" was intended to give consideration to the difficult situation of combatants.
First, on grounds of municipal law, they are obliged to comply with superior orders and will be punished if they refuse to execute them. Second, for the normal soldier, in many situations it may be difficult to decide if an order is contrary to international law. But, on the other hand, the prosecution was restricted to the "major" war criminals. The second the IMT stated:

The provisions of this Article [8] are in conformity with the laws of all nations. That a soldier was ordered to kill or torture in violation of the international law of war has never been recognized as a defence to such acts of brutality though, as the Charter here provides, the order may be urged in mitigation of the punishment. The true test, which is found in varying degrees in the criminal law of most nations, is not the existence of the order, but whether moral choice was in fact possible.174

The statement of the IMT is in contrast to the opinion juris before World War II. According to British and American Army manuals of after World War "it was a complete defense for a soldier to plead that the acts he committed were in pursuance of an order from a superior officer."175 Nevertheless, the criterion of "moral choice" seemed to be an adequate mean of distinction, whether the excuse has to be taken into consideration.

b. Current State of Law

Originally, a provision similar to Article 8 of the Charter of the IMT should be implemented in the 1949 Geneva Conventions and 1977 Additional Protocol I. However, neither the 1949 Diplomatic Conference nor the 1977 Diplomatic Conference adopted the provisions in the final
drafts.\textsuperscript{176} Also the Genocide Convention is lacking a provision dealing with the issue.

In contrast to this, in the relevant international documents the barring of the defense of superior order has found consideration. Two different approaches were used. Principle IV of the Nuernberg Principle adopted the version of the IMT; i.e., except in cases where no moral choice was possible, superior orders do not relieve individual responsibility.\textsuperscript{177} In Article 4 of the ILC Draft of 1954 and Article 11 of the 1991 Draft (both, have substantially identical wording) the criterion of "moral choice" was replaced by the formulation, that the perpetrator had the possibility not to comply with the order of his superior.\textsuperscript{178} Whether this rule nowadays constitutes binding international law is questionable.\textsuperscript{179} As we see, any proof for conventional international law is missing. Both Principle IV of Nuremberg as well as Article 4 of the Draft were not approved by the General Assembly and the result of the ILC Draft of 1991 remains to be seen. The ILC seems to approve the existence of customary international law.\textsuperscript{180} From this view we have cases like of Field Marshall List and others\textsuperscript{181} that applied the rule that, basically, the defense of superior order does not relieve individual responsibility. It seems to be right when Levie writes that, nevertheless, "something similar to the provisions set forth ...[in Article 8] will be followed in any future trials...:"\textsuperscript{182} The reports of the Italian and French
Commission of Jurists, both, implemented in their Reports a regulation that reflects Article 13 of the ILC Draft of 1991.  

3.3.2 Conformity with internal law

This defense goes back to the very roots of the relationship between international and municipal law. Without discussing the different theories, the reader may be satisfied with the statement that nowadays among the overwhelming majority of international lawyers and in most constitutions of nations the principle of supremacy of international law over municipal law is undisputed. This outset is also decisive for the defense of conformity of the criminal act with internal law. In the commentary to Principle II of the Principles of Nuernberg the ILC consequently took the view that

[t]he principle that a person who has committed an international crime is responsible therefor and liable to punishment under international law, independently of the provisions of internal law, implies what is commonly called the "supremacy" of international law over national law.

Relevant international documents indicate the same opinion. Hence, it may be concluded that it is customary international law that the conformity with internal law relieves individual responsibility. This principle applies also to the two most important instruments for individual responsibility, the Geneva Conventions and Additional Protocols and the Genocide Convention. Indeed, both set of rules do not contain an explicit formulation of
this rule. However, it is out of the question that "the perpetrators of such violations cannot legitimately claim to have acted in accordance with national law..."\textsuperscript{190}
CHAPTER II

THE ACTUS REUS OF CRIMES UNDER THE LAWS OF WAR


1.1. Concept, Origin and Nature of International Criminal Law; Criteria for International Crimes

Basic international criminal law is the part of international law that imposes prohibitions on a certain form of conduct of states or - nowadays - individuals. "The international crime concept is based on the philosophical and pragmatic notion that certain rules must be upheld in the relations of nations if civilized intercourse is to be possible among peoples of the world." Violations of these rules are considered "contrary to jus gentium" with the consequence that every state and individual is obligated to refrain from such conduct. Hence, responsible perpetrators may be either a State or an individual. The very outset of international criminal law goes back to customary international rules. Sources reveal that acts like piracy and war crimes have been forbidden even before Christ. Crimes can be divided in crimes in peace time and crimes in war time, the so-called crimes under the laws of war.
Basic questions of every inquiry in the field of international criminal law are (1) what is the content, (2) how one may qualify an international instrument as international criminal law and (3) what are the characteristics of international criminal law. The latter one has long been debated among scholars. Eight criteria were developed.\textsuperscript{198} Levie refined this result and enlarged the penal characteristics to the number of ten.\textsuperscript{199} If one or more of these prerequisites are fulfilled, an international instrument belongs to international criminal law "even though it may not be so specifically stated in that instrument."\textsuperscript{200} Another expression sometimes used by scholars is international offenses\textsuperscript{201} However, the content and understanding are the same.\textsuperscript{202}

\textbf{a. Categories of International Crimes}

Similar to the criteria for the qualification of an international crime the number of categories of international crimes is answered in different ways by scholars and commentators. M. Cherif Bassiouni\textsuperscript{203} listed twenty and Levie listed twenty-two categories of international crimes. For our purpose both scholars found the same distinction:\textsuperscript{204}

\begin{enumerate}
  \item Protection of Peace: Aggression (corresponds with "Crimes against peace")
  \item Humanitarian Protection During Armed Conflicts, the regulation of Armed Conflicts, and the Control of Weapons
\end{enumerate}
(a) War Crimes
(b) Unlawful Use of Weapons; Unlawful Emplacement of Weapons

(3) Protection of Fundamental Human Rights
(a) Crimes Against Humanity
(b) Genocide
(c) Racial Discrimination and Apartheid

This paper will adopt this classification for the purpose of this investigation. The set of rules described next belong both to the humanitarian law:


Sometimes in the literature commentators only refer to the pair of expression law of The Hague (droit de la Haye) in contrast to law of Geneva (droit de Geneve). The former set of rules refers basically to The Hague Conventions of 1899 and 1907. These instruments regulate the behavior of states or belligerent in situations of war on land and sea and limited the means of warfare, whereas the law of Geneva contains the Geneva Conventions of 1864, 1868, 1906, 1929 and 1949 and deals with the protection of civilians during armed conflicts, of injured combatants and the protection of prisoners of war (PoW). For our inquiry they are of interest because part of this system of protection are articles that define "war crimes" and provide indirect international individual responsibility. The Additional Protocols of 1977 to the Geneva Conventions of
1949 adopted rules of the Law of The Hague as well as of the Conventions of Geneva and, therefore, for the first time created a symbioses of both. Already here may be indicated that the Geneva Law can be divided into two set of rules: One that is applicable in international, the other in non-international conflicts. As we later will see this gives reason for numerous problems and endless discussions.

The common goal of both, The Hague and the Geneva Law is to improve the situation of the individuals participating in or affected of war. Therefore, among most commentators they are called humanitarian law. However, whereas the Geneva Law directly forbids certain acts against certain groups of persons the Hague Law regulates the use of weapons and warfare and thus indirectly improves the situation of the individual.

1.4. Humanitarian Law - Human Rights Law

The notion of humanitarian law (droit humanitaire) is highly disputed among commentators. Three problems arise: the relation between humanitarian law and human rights law, the content of each set of rules and, finally, determining to which set The Hague Law and the Geneva Law belong.

Picet uses the notion of "humanitarian law" as notion covering both laws of war and human rights law. Schindler differentiates between the law of The Hague and the law of Geneva so that only the latter should form humanitarian law. As discussed earlier, the Law of Geneva
and of the Hague serves the same goal - only by different tools: the protection of the individual in times of war. Therefore, the approach of Schindler is not convincing. It is better to follow the authors\textsuperscript{217} that draw under the notion "humanitarian law" the Law of Geneva as well as that of The Hague. This seems to be a reasonable classification. Picet's proposal, despite his undeniable capacity, blurs the frontiers between humanitarian law and human rights law: In distinction to humanitarian rules of law, human rights law (droit de l'homme) is applicable in peace-time and (partly) in time of war.\textsuperscript{218} Hence, beyond victims of war every human being is protected. We deal, therefore, with different bodies of law in respect to ratione personae and ratione temporis: Human rights law covers humanitarian law, in part, but not vice versa.

1.5. Crimes under the Law of War - War Crimes

The title of this work refers to crimes under the laws of war. This notion covers three groups of crimes that goes back to the traditional distinction between the Law applicable in time of war and the Law applicable in peacetime. The laws of war is "the body of rules which governs relationships in war."\textsuperscript{219} Under the former category three different groups of crimes are classified:\textsuperscript{220}

(1) Crimes against Peace,

(2) War Crimes and

(3) Crimes against Humanity.
Whereas crimes against peace refers to the Law regulating the right (today better the prohibition) to resort to war (jus ad bellum, respectively jus contra bellum), war crimes contain the law prohibiting certain conducts during the time of war (jus in bello). Crimes against Humanity includes Genocide, but connected with situations of war.

Finally, some remarks on the conclusiveness of the "laws of war." Ingrid Detter de Lupis prefer to use the notion in its singular form, "law of war," to express that this set of rules is "homogeneous." This author is not so optimistic as to give this high award to the existing body of rules applicable in armed conflicts or wars. Doubtless international law has been very successful with regard to the laws of war in the past century. So, for example, waging war today is absolutely prohibited. Furthermore, indeed, the Geneva law and the development of humanitarian law is a great success in favor of those who suffer most under wars: the civilian populations and prisoners of war. Nevertheless under realistic view there remain many gaps that have to be filled in future. Examples may be the failure of an international criminal court, the full applicability of the Geneva Law in non-international armed conflicts and the permanent efforts to create a Convention that provides for crimes under the laws of war direct individual responsibility.
2. Crimes against Peace (=Aggression)

This first category of crimes under the laws of war is relatively new. Originally waging war was not a crime, but the traditional right of every state emerging from its sovereignty as State. Clausewitz called war the continuation of politics by other means and this formula represented the attitude of the majority of Nations. Consequently, before the 20th century there existed no crime against peace except the jus ad bellum, i.e., the right to start war. Whether the doctrine of "just war" (bellum justum) was a restriction of the jus ad bellum is debatable. Indeed, this doctrine required "a just cause in defense of legitimate interests, impossibility of peaceful solution, and proportionality between the wrong done and the planned war." However, the fulfillment of these prerequisites decided only the concerned states themselves. At the beginning of this century, conventional international law appears that is the beginning of a development towards the prohibition of aggression:

1. Drago Porter Convention (Convention II of The Hague 1907)
2. Article 11, 12, 15 para 7 and 8 of the Charter of the League of Nations
3. Article 227 paragraph 1 of Peace Treaty of Versailles
4. Multilateral Treaty for Renunciation of War, signed at 27 August 1928 (Kellogg-Briand Pact)
5. Article 6 (a) of the Charter of the IMT of Nuernberg
6. Article 5 of the Charter of the International Military Tribunal for the Far East
7. Article 2 paragraph 1 (a) of Control Council Law No. 10
8. Principle 6 (a) of Nuernberg Principles
9. Article 2 of the ILC Draft of 1954
10. Article 5 (2) of General Assembly Resolution 3314 (XXIX): Definition of Aggression
11. Article 15 and 16 of the ILC Draft of 1991

2.1. History and Legal Development: From Jus Ad Bellum to Jus Contra Bellum

Together with the Conference of 1899, the Peace Conference of The Hague of 1907\textsuperscript{225} was one of the first, although failing, attempts to restrict the right to wage war by certain rules. Convention I of 1907 contained a declaration on obligatory arbitration for dispute settlement. Convention II (Drago Porter Convention).\textsuperscript{226} Probably the most significant result of the Conference, contained the prohibition of use of force for the recovery of contract debts. The obligation to settle disputes between states by peaceful means like arbitration, of course, is no condemnation of war itself. However, it was a first attempt towards the restriction of the right to step to war. The Drago Porter Convention may be qualified as the first international instrument that made a step towards modification of jus ad bellum to the now existing jus contra bellum.

Article 227, paragraph 1, of the Peace Treaty of Versaille provided responsibility of the German Emperor Wilhelm II "for a supreme offense against international morality and the sanctity of treaties."\textsuperscript{227} The notion "supreme offence against international morality" contained "[a]cts which provoked the world war and accompanied its inception,"\textsuperscript{228} whereas the supreme offense against the
sanctity of treaties referred to the breach of the neutrality treaties of 1839 and 1867 with regard to the invasion of Luxembourg and Belgium. Interesting is that the Commission itself draw the conclusion that "the acts which brought about the war should not be charged against their authors...." One reason therefore was that "a war of aggression may not be considered as an act directly contrary to positive law...."  

The Covenant of the League of Nations did not prohibit the resort to war, but contained a set of rules that were at least, legally binding and codified provided a limitation of the right to start wars. Worth mentioning is the three month "cooling-off period" and the dispute settlement mechanism in Article 12 paragraph 1:

The Members of the League agree that if there should arise between them any dispute likely to lead to a rupture, they will submit the matter either to arbitration or to inquiry by the Council, and they agree in no case to resort to war until three month after the award by the arbitrators or the report by the Council.

The provision probably closest to a prohibition of the jus ad bellum was Article 10 paragraph 1 sentence 1, where the Covenant explicitly established explicitly the principle of respecting the territorial integrity as an obligation for the member States. Moreover, the Council as an international organ had the right to impose on the inflicted States certain means to undertake the effort to settle the dispute by peaceful means. These achievements,
however, were devaluated by Article 15, paragraph 7, which, in case the Council failed to reach a unanimous agreement on the report, reserved the parties the right to take "actions as they shall consider necessary for the maintenance of right and justice." According to Bert V. A. Roeling, the Covenant of the League of Nations did not contain any "ban on the use of force, [but] only some restrictions before the road to war lay open."

An important turning point towards the attitude against the right to resort to war, was the Multilateral Treaty for Renunciation of War of 1928, better known under the name of the foreign ministers of the United States of America and the French Republic, who elaborated the treaty, the Kellogg-Briand-Pact. The treaty was signed by all of the later major powers of World War II, and finally counted 63 contracting States. The weak point of it was that the treaty did not supply any enforcement mechanism. In Article 1, the signatory states for the first time declared the waging of war unconditioned as contrary to the Law of Nations:

The high contracting parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another.

After the end of World War II, the United States Delegation to the London Conference expressed their intention to try individuals of the European Axis who
operated at the high-policy-making level for waging war. The Soviet Union, France and above all the Churchill Government were skeptical, or even opposed this intention; the latter one with the argumentation that "international law did not recognize a crime of aggression."\textsuperscript{238} Also France expressed their concern because according to their opinion crimes against peace were lex lata.\textsuperscript{239} Nonetheless, Article 6(a) of the Charter of the IMT defined the crime against peace as namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.\textsuperscript{240}

It is unclear whether this formulation restricts the scope ratione personea of crimes against peace. Without further doubt, only Heads of State and members of the policy-making level have the capacity to plan, prepare or initiate war. Less clear are the notions "waging," "participation" or "conspiracy."\textsuperscript{241} On grounds of the principle of proportionality, these notions should be interpreted that they do not cover the participation of every normal soldier in situations of war.\textsuperscript{242} This view is disputed\textsuperscript{243} but supported by Article 2 of the IMT according to which only the "major war criminals" shall be prosecuted. The United States Military Tribunal applied this interpretation in the German High Command Trial\textsuperscript{244} and I.G. Farben Trial.\textsuperscript{245} The wording of Article 5 of the Charter of the IMT for the Far East is substantially identical.
Article 2, paragraph 1 (a), of Control Council Law Number 10, which gave the legal basis for the trials executed by other tribunals than the IMT added the above given definition the passage "[i]nitiation of invasions of other countries and wars of aggression in violation of international laws and treaties, including...." 246

One specific legal problem of crimes against peace was the defense of the accused that this actus reus 247 did not exist prior World War II in international law. Thus, the trial would violate the principles "nullum crimen sine lege" and "nulla poene sine lege." The IMT rejected this defense and stated that the Charter contained "the expression of international law existing at the time of its creation." 248 The Tribunal primarily relied on the Kellogg-Briand of 1928. 249 This document contained the first unconditioned condemnation of war. The Pact was legally binding and contained a clear prohibition. Without success the defendants invoked "that the Pact does not specifically state that aggressive war is a crime." 250 Further reference gave the Tribunal to the Geneva Protocol for the Pacific Settlement of International Disputes of 1924. However, Germany did not sign this resolution because it was not yet member of the League of Nations. In October, Germany withdrew from the Covenant of the League of Nations. Hence, it is more than questionable that the German Reich binding conventional international law provided a crime against
peace. A different approach is to qualify aggression as violation of customary international law. Indeed, there is also the mentioned articles of the Charter of the League of Nations, the Pacific Settlement Protocol and the Pact as further proof of documents outlawing aggression. Nonetheless, one may doubt whether these sources were consistent enough to fulfill the requirements of existing customary international law after the end of World War II.

Even if one agrees that the actus reus of prohibition of aggression was existing international customary law at the end of World War II, most commentators agree that the opinion of the IMT that the Charter of the IMT expresses only existing international law fall short of proof, at least concerning the individual responsibility. One of the references the IMT gave was the Kellogg-Briand Pact. This argument is not convincing. Beside the already mentioned objections, the scope ratione personae, the Kellogg-Briand Pact only addressed the states. Furthermore, the IMT cites in support of its view other documents, which outlaw aggressive war as international crime. But none of them established any individual responsibility of human beings. Hence, individual responsibility was neither part of the existing international law nor customary international law prior to World War II.
2.2. Current Legal Situation

Saddam Hussein invaded Liesoy in August of 1990. Is he individually responsible for the commitment of a crime against peace under current valid international law? Three issues should be addressed in order to give a satisfactory answer: (1) whether a crime exist against peace as part of international law, (2) if yes, what is the definition, the actus reus and, finally, (3) does international law provide individual responsibility of the perpetrator.

Crime Against Peace as Part of International Law

A prerequisite to affirming the existence of a crime against peace is that, first, that the norm is part of binding international law. And, second, that the actus reus of this norm reflects one or more of the penal characteristics. As we saw, prior to World War II crimes against peace were neither part of conventional and probably not customary international law. For the current legal situation, thus, it is decisive if "crimes against peace" emerged as new rule of international law, either as part of conventional or customary international law.

Article 2, paragraph 4, of the Charter of the United Nations implemented the idea of the Kellogg-Briand-Pact with the extension that nowadays any form of use of force is prohibited except self-defense. Under Chapter VII, the Security Council has the competence to issue, in particular, economic and military sanctions for the restoration
of peace. Other binding instruments do not exist. However, under consideration of the universal applicability of the Charter and the prevailing nature of the Charter over other instruments of international law, Article 2, paragraph 4, and Chapter VII of the U.N. Charter are sufficient proof that aggression is a criminal conduct and, therefore, an international crime under international law. If aggression is an international crime apart of the Charter under customary international law is of minor importance, because on the one hand nearly every State is member of the United Nations. Furthermore, Article 2, paragraph 6, of the U.N. Charter ensures that non-members obey "these principles [of the Charter] so far as it may be necessary for the maintenance of international peace and security. Consequently, the notion "jus ad bellum" belongs to history. More adequate is to speak of the "jus contra bellum".

As in the Draft of 1954, in the Draft of 1991, the ILC goes even one step further in suggesting in Article 16 that the mere threat of aggression should be an international crime. This reflects that, in addition to Article 2, paragraph 4, of the Charter of the United Nations, U.N.G.A. Resolutions as well as the judgement of the ICJ in the case Nicaragua v. United States (Merits) outlaw "declarations, communications, demonstrations of force" or other acts that constitute
threats of aggression. However, several details of this Article were disputed among the members of the ILC\(^{270}\) and it is questionable that such an enlargement will become international law in the near future.

**Definition of Aggression**

Nuernberg introduced the term "war of aggression." One of the major obstacles in the attempts of the ILC to establish individual responsibility for crimes against peace was the failure of a definition of the notion "aggression." For this, and other reasons in 1954, the work of the ILC on the Draft Code was postponed.\(^{271}\) In 1974, the UNGA succeeded in adopting Resolution 3314,\(^{272}\) that defines the notion of "aggression."\(^{273}\) Article 15, paragraphs 2 to 7, of ILC Draft of 1991, largely reiterate the definitions of U.N.G.A. Resolution 3314.\(^{274}\) The definition is divided in an abstract part\(^{275}\) and an enumeration of a situation constituting aggression.\(^{276}\) The most important situations covered by the articles are invasion, bombardments, blockades and the sending of irregular troops and armed bands, "which carry out armed force against another State."\(^{277}\) Paragraphs 6 and 7 "reproduce Articles 6 and 7 of the 1974 Definition of Aggression" and state that Article 15 does in no way alter the scope of the Charter of the United Nations, especially with regard to the lawful use of force under Chapter VII\(^{278}\) and the right of self-determination. Under the light of the United Nations
Charter large parts definition of aggression are relevant for the actus reus of the crime against peace.

**Individual Responsibility for the Crime Against Peace**

Just as little individual responsibility was part of international law prior World War II, Article 2, paragraph 4, of the U.N. Charter does not contain any obligation for the individual human being, but addresses only States. Consequently, individual responsibility for crimes against peace is at present not part of conventional international law. Disputed is whether customary international law provides today responsibility of the individual for the crime against peace. A remarkable number of international documents after World War II deal with crimes against peace. Nuernberg Principle VI (a)\(^{279}\) of the ILC of 1950\(^{280}\) repeated the wording of Article 6(a) of the Charter of the IMT. Furthermore, several United Nations General Assembly Resolutions express that the desire and necessity of the community of States for individual responsibility. In Resolution 95 (I) the General Assembly affirmed the principle of individual responsibility. Resolution 2625 (XXV), that was adopted by consensus that "[a] war of aggression constitutes a crime against peace for which there is responsibility under international law."\(^{281}\) A similar formulation contains Article 5, paragraph 2, of Resolution 3314.\(^{282}\) Article 12 and 13 of new ILC Draft of 1991 continue this efforts. One objection to the existing
customary international law is that "not one of the
approximately 30 [and more] international wars that have
taken place since 1945 has resulted in a prosecution for
crimes against peace."\textsuperscript{283} If application is given to the
prerequisites of customary international law, "practice" and
"recognition as legally binding"\textsuperscript{284} then one merely can
support the assertion\textsuperscript{285} that customary international law
provides individual responsibility for "crimes against
peace."\textsuperscript{286} It remains hopeful that this will be one of the
next steps the international community is prepared to do.

3. War Crimes

In contrast to the issues of individual responsibility
and crimes against peace, conventional international law
supplies a comprehensive set of rules outlawing certain acts
committed in the conduct of hostilities against civilians
and against person hors de combat. For reasons of space in
this text, only the major sources of conventional and
customary international are mentioned and regarded:

1. Article 71 of the Lieber Code of 1863
2. Article 22, 23 The Hague Convention II of 1899 and
Convention IV of 1907.
3. Article 228 of Peace Treaty of Versaille, 28 June 1919
4. Declaration of St. James
5. Agreement for the Prosecution and Punishment of the
Major War Criminals of the European Axis. Signed at
London, on 8 August 1945
6. Article 6 (b) of the IMT Charter
7. Control Council Law No. 10, 20 December 1945
8. Affirmation of the Principles of International Law
Recognized by the Charter of the Nuernberg Tribunal
(G.A.-Res. 31) of 11 December 1946
9. Genocide-Convention, 1948
11. Principles of International Law Recognized by the Charter of the Nuernberg Tribunal (G.A.-Res.95 (I) of 1950)
15. U.N. Resolution 2712 on War Criminals, 15 December 1970
17. Article 85 paragraph 3 and 11, 85 paragraph 4 (a)-(e), 85 paragraph 3 (a)-(f) (see ILC-Draft at 273: 85 and 57 paragraph 2 (a) (iii), 85 paragraph 4 (d) and 53 of Additional Protocol I
18. Article 4 paragraph 2 and 13 paragraph 2 of 1977 Additional Protocol II
20. Article 6 of the French Report
21. Article 4 of the Italian Report
22. Article 3 of the CSCE Report

3.1. History and Legal Development

Regulations that address the committing of war crimes by members of armed forces can be traced back in history up to 500 B.C. and are found in all geographical regions. More recently, for the United States, relevant examples are Articles 47 and 71 of the Lieber Code, that outlawed acts "punishable by all penal codes" of American soldiers against civilian populations of the enemy and additional wounding or killing of soldiers "hors de combat." It is striking that the protected persons are identical to two groups also protected in the Geneva Law, the civilian population and soldiers "hors de combat." The Hague Convention II of 1899 and Convention IV of 1907 contain
regulations that prohibit certain methods of warfare like treachery, killing of those who have surrendered, abuse of flags and unnecessary destruction of private property and seizure of religious and municipal property. The qualification that prohibited conduct is one of the characteristics of a crime. Consequently, these norms constitute war crimes. In the inter-war period Article 228 of the Peace Treaty of Versaille provided that

\[\text{the German Government recognizes the right of the Allied and Associated Powers to bring before military tribunals persons accused of having committed acts in violations of the laws of war and customs of war.}\]

Yet, in a note of February 16, 1920, the Allies declined their right to exercise their extradition claim and agreed that the German Supreme Court at Leipzig should try the accused. The judgement of the perpetrators of war crimes was based on German municipal law. Therefore, this episode did not contribute to the development of war crimes under international law. The Nuernberg Trials tried to prevent the experience of Leipzig. Article 6 (b) of the Charter of the International Military Tribunal, a combination between an abstract definition and reference to the enumeration principle, defined of the actus reus of "war crimes" as

namely, violations of the laws and customs of war. Such violation shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.
The first sentence reveals that the judgement of the IMT on war crimes should be based on existing conventional and customary international and is insofar no new sources of law. The second sentence, then, gives a list of acts constituting war crimes. It is important to mention, first, that it is an open, nonconclusive enumeration, and, second, that the scope *ratione personae*, which is protected, are the PoW and the civilian population. Public and private property are also protected. However, the scope of enumerated forbidden acts was restricted very narrow. Moreover, the scope *ratione temporis* was restricted to war crimes committed during the course of World War II.

The significance of Nuernberg with regard to war crimes is to a lesser extent the scope of the described war crimes rather than "the general recognition of criminal responsibility for serious violations of the laws of war and in the duty of States to prosecute or extradite accused persons...." Furthermore it was the driving experience that led to the most important current valid instruments that address war crimes, the Genocide Convention of 1948 and the four Geneva Conventions of 1949. Before we address the different instruments one can summarize and define war crimes as all acts which constitute grave violations of the Laws of War that are applicable in the course of hostilities ("*conduite des hostilités*") against belligerent, the
citizens or property of the enemy or of a conquered nation or of a forcibly occupied neutral territory."\textsuperscript{295}

3.2. Current Legal Situation

a. Conventional Law

If we regard the current valid international instruments, two set of rules may be regarded as the paramount of existing treaty law outlawing war crimes: The four Geneva Conventions of 1949 and Additional Protocols of 1977\textsuperscript{296} and the Genocide Convention of 1948. Both the Geneva Conventions and the Genocide Convention were inspired by the atrocities in World War II and are today universally accepted.\textsuperscript{297} The overwhelming majority of states are contracting parties. In the current efforts of the Security Council to establish a tribunal for the war crimes committed in the territory of former Yugoslavia, reference is made to both of these basic instruments.


The actus reus, indirect individual responsibility is established for, can be found in Article 50 of Convention I, Article 51 of Convention II, Article 130 of Convention III and Article 147 of Convention IV. Additional Protocol I\textsuperscript{298} contains war crimes in Articles 11 and 85. Whether Additional Protocol II contains war crimes is questionable. Some commentators cite Article 4, paragraphs 2 and 13, and paragraph 2 of Additional Protocol II as being similar to the "grave breaches" of the four Geneva Conventions\textsuperscript{299}
Under the system of the Geneva law only the notion "grave breaches" is used. However, commentators unanimously agree that this term is only a synonym for war crimes. "The reason the Conference preferred the words "grave breaches" was that it felt that, though such acts were described as crimes in the penal laws of almost all countries, it was nevertheless true that the word "crimes" had a different legal meaning in different countries."\(^{300}\) This confirms that since 1977 Article 85, paragraph 5 of Additional Protocol I states explicitly that "...grave breaches of these instruments shall be regarded as war crimes."\(^{301}\)

**Field of application of the Conventions and the Additional Protocols**

One has to differentiate between the general material field of application as laid down in Article 2 common and the general protected group of persons. According to Article 2, all four Geneva Conventions are applicable in "all cases of declared war or...any other armed conflict...."\(^{302}\) This includes only armed conflicts of an international character.\(^{303}\) Article 1, paragraph 3, of Additional Protocol I provides that this Protocol is applicable under situations mentioned in Article 2, common to the four Conventions, international armed conflicts. Beside Article 3, common of the four Conventions Article 1, paragraph 2, of Additional Protocol II provides that the latter addresses victims of conflicts not covered by Article 2 common, i.e, conflicts of non-international character.\(^{304}\)
The Conventions provide protection for war victims and each one addresses to a different group of possible of them: Convention I deals with "the Amelioration of the Condition of Wounded and Sick in Armed Forces in the Field, Convention II dedicates to "the Amelioration of the Wounded, Sick and Shipwrecked Members of Armed forces at Sea. For reasons of significance and space we will restrict further considerations to Convention III that deals with the Treatment of Prisoners of War (PoW) and Convention IV that provides rules for the protection of Civilian Persons in Time of War. What all four Conventions have in common is that the protected persons are always at the power of the enemy. The conflicts in Nigeria, the Middle East and especially Vietnam in the 1960's revealed that beyond the Geneva Conventions additional regulations "would be necessary for the protection of the civilian population against the effects of hostilities". Protocol I is, in addition to the four Geneva Conventions, concerned with the protection of combatants, civilians and dedicates special protection to children.

**Actus reus of grave breaches**

**Article 130 of Convention III**

Acts that are within the described field of application grave breaches involve the following five conducts:

- willful killing, torture or inhuman treatment, including biological experiments, willfully causing great suffering or serious injury to body or health, compelling a prisoner of war to serve in the forces of
the hostile Power, or wilfully depriving a prisoner of war of its rights of fair and regular trial prescribed in this Convention.\textsuperscript{306}

The protected persons under this norm are, as already seen, the PoW. Article 4 provides a lengthy description who may fall under this notion\textsuperscript{307} A Perpetrator may be any member of the enemy armed forces.

**Article 147 of Convention IV**

Acts that provide protection to the Civilian population against the acts already mentioned in Article 130 of Convention III add two further criminal conducts

...unlawful deportation or transfer or unlawful confinement of a protected person,...taking hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.\textsuperscript{308}

Article 4, paragraphs 1 and 2, of Convention IV\textsuperscript{309} provides in essence that protected persons are all civilians, who are "not a national of the Party to the conflict or Occupying Power in whose hands he is."\textsuperscript{310}

Besides the Genocide Convention, Article 130 of Convention III and Article 147 of Convention IV presumably will be the major sources on which a Tribunal dealing with the crimes in the territory of the former Yugoslavia, if it becomes a reality, will rely for their judgements. It is still unsolved is whether the Statute of the prospective Tribunal shall made reference to the Geneva Conventions or enumerate and reiterate the forbidden conducts laid down in the Geneva Conventions.\textsuperscript{311} Article 2, paragraph 1 (b), of
the French recommendations for a Statute of the Tribunal combines Article 130 of Convention III, 147 of Convention IV and Article 3 common when it provides that the following acts shall be tried by the Tribunal:

(i) Violence to life and person, in particular murder of all kinds, and cruel treatment such as torture, mutilation or any kind of corporal punishment;

(ii) Collective punishment;

(iii) Taking hostages;

(iv) Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, forced prostitution and indecent assault;

(v) [omitted]

(vi) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;

(vii) plunder."

However, these conducts are only punishable by the Tribunal if they were massive and systematic.

A reason for this restriction was the fear of the Committee that otherwise the international jurisdiction would be submerged "in so many cases that it would be unable to function effectively." The application of the Geneva Conventions and Protocols as such is in the case of the former Yugoslavia without further problem. All parties in the conflict are bound. Problems, however, could arise from the scope temporis. On July 3, 1991, just about five weeks after the declaration of independence, the Federal Army intervened in Croatia. The Croatian declaration of succession to the Geneva Conventions was made on May 11, 1992. Hence the question arises if Croatia was bound to the Geneva Conventions between July 3, 1991 and May 11, 1992.
The same issue arises for Bosnia and Herzegovina between the outbreak of clashes between Serbian and Muslim militias on 1 April 1992, one month after the referendum on independence, and the Bosnian declaration of succession on December 31, 1992.

Croatia, Bosnia and Herzegovina could argue that between these periods they were not bound by the Geneva law. With regard to Bosnia and Herzegovina, another problem could arise from Article 2 common of the Geneva Conventions. On May 22, 1992, Bosnia and Herzegovina were admitted as member of the United Nations. From this point of time the quality as to a State is without question. It is unclear, however, if Bosnia and Herzegovina fulfilled the prerequisites of an State. The Bosnian Government had never effectively controlled the majority of the territory of Bosnia-Herzegovina.

Furthermore, indeed, muslims are the major ethnic group in Bosnia and Herzegovina, yet nearly 50 percent of the population are Serbs and Croats. In such a case, can people be considered? If these prerequisites are denied, then in the period before membership in the United Nations, only a civil war was in existence with the consequence that only Additional Protocol II was applicable. In this case the interesting, but unresolved, issue arises whether the United Nations Security Council has, under Chapter VII, the competence to enlarge the applicability of the Geneva
Conventions and Additional Protocol I to a situation of a non-international conflict. Can this be justified under the restoration of international peace and security? These issues are still unsolved.

Article 11 and 85 paragraph 3 (a)-(f), paragraph 4 (a)-(e) of Additional Protocol I

Additional Protocol I provides three sections in which grave breaches are laid down: Article 11, Article 85, paragraph 3 (a)-(f), paragraph 4 (a)-(e). The intention of these provisions is to accomplish and enlarge the protection of the groups of war victims protected by the four Conventions of 1949. Article 11, whose violation is according to Article 85, paragraph 3, a grave breach of Protocol I, has the "the foremost aim...to clarify and develop the protection of persons protected by the Convention and the Protocol against medical procedures not indicated by their state of health, and particularly against unlawful medical experiments." Moreover, physical mutilations, scientific experiments and the removal of tissue or organs for transplantation are in particular prohibited. Article 85, paragraphs 3 and 4, provides an enumeration of acts that are concerned with conduct of warfare, and, therefore belong to the Hague Law. The new quality of these norms is that not only against persons or objects in the power of the enemy war crimes can be committed and tried, but also conduct committed in the course of hostilities, i.e., on the battlefield. Article 85,
paragraph 3, for e.g., includes attacks on civilian population, on persons "hors de combat" and the use of the red cross emblem without authorization. The threshold for all enumerated acts is that they must be executed "wilfully" and cause "death or serious injury to body or health". Article 85, paragraph 4, deals with apartheid methods, delayed repatriation, destruction of clearly recognized historic monuments and transfer of its own population into occupied territory or deporting of population of the occupied territory out of the latter. All acts require intention. Protected Persons are, according to Article 85, paragraphs 2, 44, and 45, combatants (wearing uniform), PoW and children.

**Article 4 paragraph 2 and 13 paragraph 2 of Additional Protocol II**

Some authors take the view that also Article 4, paragraphs 2 and 13, belong to the category of war crimes.\(^3\)\(^1\) Both Articles prohibit certain conducts such as violence to life, acts of terrorism and spread of terrorism among the civilian population. Therefore, it belongs to international criminal law. Whether they are defined as war crimes depends on what application is given to the notion "war," i.e., the issue of whether war covers only international conflicts or includes non-international conflicts.\(^3\)\(^2\)\(^0\) The general tendency among scholars\(^3\)\(^2\)\(^1\) as well as in the ILC\(^3\)\(^2\)\(^2\) is to abolish the distinction between
international and non-international conflicts for the system of war crimes. However, this view is disputed.

(2) Protection of (Cultural) Property¹²³

The intense destruction of public, private, non-cultural and cultural property in the conflict in the territory of the former Yugoslavia, gives reason to investigate if existing rules of law prohibit these conducts. Prior to World War II, only a small amount of evidence is available for the special protection of cultural property. One of the first instruments addressing it was the Roerich Pact of 1935.³²⁴ After World War II, more attention was given to cultural valuable object. Rules dealt with later can be divided into two groups: Regulations protecting civilian property and regulations protecting cultural sites and historic monuments.

Article 85, paragraph 3 (b), and Article 57, paragraph 2 (a) (iii), of Additional Protocol I provide the obligation to damage civil objects only to the minimum degree and prohibit any further destruction. The term "minimum" however, is quite slippery. Article 147 of Geneva Convention IV outlaws the "extensive destruction and appropriation of property [if the act is] not justified by military necessity and carried out unlawfully and wantonly."³²⁵ The scope of this provision is very broad and includes any kind of property: private, public, or cultural, whether valuable or not. However, the triple restriction of
military unnecessary, unlawful and wanton execution of the
destruction takes much of its effectiveness from this
provision. Restricted to cultural private or public
property, but without the restriction of Article 147 of
Geneva Convention IV, The Hague Convention for the
Protection of Cultural Property is one of the most
comprehensive instruments for the protection of monuments
and historical and cultural works of Article 1.326 Article
1 (a) protects, among other things:

monuments of architecture, art or history, whether
religious or secular; archeological sites, groups of
buildings which, as a whole, are of historical or
artistic interest;327

In the course of the war cultural sites like the
historical town of Dubrovnik, several mosque in Bosnia and
Herzegovina suffered severe destruction. The French Report
decided to adopt under the crimes within the jurisdiction of
the prospective Tribunal crimes in the territory of former
Yugoslavia Article 147 of Convention IV.328 The advantage
of Article 147 is that it covers cultural and non-cultural
property. However, under Article 147 of the Geneva
Convention IV it would be presumably difficult to disprove
the defense that the destruction was induced by military
necessity. Therefore, it is doubtful as to whether the
French Proposal will prove to be a sufficient tool.329

Therefore, it is important that these acts are covered by
the Convention on the Protection of Cultural Property. The
parties involved in the conflict in the territory of the
former Yugoslavia are bound by the Convention. Article 4, paragraph 1, prohibits "any acts of hostility directed against such property" whereby it is without difference if the cultural site is located within or without the own territory. Paragraph 4 adds that the High Contracting Parties "shall refrain from any act directed by ways of reprisal against cultural property."

The Convention does not provide any direct individual responsibility for breaches of the obligations laid down above, however, orders alike the Geneva Conventions the obligation to implement and prosecute breaches of the obligations by means of municipal law. In contrast to the Geneva Convention, the principle of try or extradite is not adopted. The special protection of cultural sites has been a part of the Geneva Law since 1977. Article 85, paragraph 4 (d), of Additional Protocol I prohibits making objects of cultural or spiritual heritage of peoples object of attacks. However, the application of this provision contains a fivefold threshold. Protected are only historic monuments that are "clearly recognized" as such and "to which special protection has been given by special arrangement." The protected monument must be located outside the "immediate proximity of military objectives" and must not be used "in support of the military effort" of the adversary. Finally, the destruction must be extensive. In the conflict in the territory of former Yugoslavia, the
defendants would say that any destroyed historic site fulfilled all of the requirements. Indeed, the scope of Article 53 of Additional Protocol I is broader because it prohibits hostilities against any historic monuments which constitute the cultural or spiritual heritage of people. Because of the prohibition of the conduct one may qualify this provision as war crime, however, it is not part of the "grave breaches" and, therefore, no (indirect) individual responsibility exists.

b. Customary International Law

One may ask why it is at all important that war crimes are part of customary international law. Indeed, the Geneva Conventions are ratified by the majority of States. Nevertheless there are situations where these Conventions cannot be applied. As already indicated, in non-international conflict the Geneva Conventions and Protocol I are not applicable. Does customary international provide regulations that defines acts in non-international conflicts as war crimes? Furthermore, many States like the United States have not ratified Protocol I. Are they bound to the provisions of Protocol I on grounds of customary international law? Another example may be the transitional periods of Bosnia and Herzegovina and Croatia between their statehood and declarations of succession to the Geneva Law. Hence, here also the question arises whether the new States in the territory of former Yugoslavia are bound on the
prohibitions laid down in Article 2 on grounds of customary law.

In 1948, UNWCC filed in 1948 a list of war crimes that covers 32 different acts. The commission of these acts constitute "breaches of the laws and customs of war according to the UNWCC." The accepted view is that Article 3, which is common to the four Conventions, belongs to the "[w]ell-established general rules of customary law...." Moreover, there is the tendency to include the "grave breaches" of the Geneva Conventions III and IV. This is because they are partly identical with the actus reus of Article 3 common and Article 6 (b) of the IMT. The latter provision, that protects PoW and the civilian population, was undisputed at the end of World War II when there was already existing customary international law for international conflicts.

Furthermore, the actus reus of "war crimes" was confirmed in the post war period in several instruments and documents. But also to the extent that the "grave breaches" of the Conventions enlarge Article 3 common and Article 6 (b) of the Charter of the IMT (i.e. the prohibition of acts like biological experiments, compelling a protected person to serve in the force of a hostile Power and extensive destruction and appropriation of property) the "grave breaches" today probably can be regarded as customary law.
c. Article 22 of the ILC Draft of 1991

Article 22 supplies the actus reus for war crimes that should be covered by the Draft. The present article reflects a compromise between different attitudes between the members of the ILC. Paragraph 2, sentence 1, contains a general definition, whereas Article 2 enumerates the different acts covered by the Draft. Some features make it worth dealing in a larger extent with this part of the draft.

What is the new quality of this article beside the law of Geneva and customary international law that prohibit war crimes? In contrast to the Geneva Law of the four Conventions and customary international law the actus reus is restricted to exceptionally serious war crimes. This means a double threshold. Not all war crimes are covered, only the serious war crimes, and among the serious war crimes, again, only the exceptionally serious will be covered by the present Article. In the commentary, the ILC explicitly states that the mentioned Article should not cover "all war crimes in the traditional sense, nor are they all grave breaches [of the Geneva Conventions and Additional Protocol I]...." From the text of the draft it remains ambiguous if all acts mentioned under paragraph 2 (a) to (f) constitute automatically exceptionally serious war crimes. The text of the draft seems to support this interpretation. However the ILC states that the following three conditions have to be fulfilled:
(a) "...the act constituting a crime falls within any one of the six categories on paragraph 2 (a) to (f);
(b) ...the act is a violation of principles and rules of international law applicable in armed conflicts;
(c) ...the violation is exceptionally serious."\(^342\)

This passage clarifies that not all under paragraph 2 (a) to (f) mentioned acts are automatically exceptionally serious, but only those of the described acts of para 2 (a) to (f) that were committed with special excessiveness or intensity.

Already existing war crimes or grave breaches remain applicable international law. Article 22 does not replace the existing system but broadens the scope of individual responsibility for war crimes. Under this diffuse definition, it is helpful that according to the commentary the enumeration under paragraph 2 is "exhaustive"\(^343\) and not open ended. Already existing war crimes in international law that will not be covered remain untouched. Of further interest is that paragraph 2 refers for the enumerative definition on conventional or customary international law. However, it is important to keep in mind that the acts thereunder prescribed need not be part of existing war crimes under international law. Instead it is sufficient that the act is an exceptionally serious violation of "principles and rules of international law applicable in armed conflict." What the significance of this
unclear. It should be helpful for later interpretation of different acts defined thereunder.

The enumerated types of conduct under paras. (a) - (f) partly reiterate The Hague Law and the Law of Geneva, partly contain new conducts, that reflect new means of warfare in recent conflicts. Para. (a) is substantial identical with Article 3 which is common to the Geneva Conventions and Article 147 of Convention IV, but has no restrictions with regard to its scope of persons who are protected. Subparagraph (c) outlaws the unlawful use of weapons as already reflected in the existing Hague Law. The intent of the ILC under subparagraph (b) to qualify the establishment of settlers in an occupied territory is not part of existing international criminal law. The ILC reasoned the adoption of this provision with the argument "that such an act could involve the disguised intent to annex the occupied territory." It is doubtful as to whether this rule will survive the comments and recommendations of States. If this provision became part of conventional international law, the Prime Minister, the Government and military commanders of Israel could be accused of war crimes. The State of Israel has been practicing this policy for years in the Gaza Strip. Besides Article 26, subparagraph (d) prohibits conduct that causes widespread, long-term and severe damage to the natural environment. The wording is taken from Article 35, paragraph 3, and Article 55 of Additional Protocol I. The
prohibition of the conduct in these articles indicates that they are part of international criminal law. However, they may be war crimes under international law. Article 85 of Additional Protocol I does not cite both of them, and, under the system of the Geneva law only "grave breaches" are considered as war crimes that the Contracting Parties are obliged to try or prosecute. Whether this omission takes Articles 35, paragraphs 3 and 55, the quality of crimes under the laws of war, or only provides indirect individual responsibility, is not completely clear.

Under either possibility, however, one comes to the solution that neither conventional nor customary international law provides for individual responsibility for conduct like the order of the Iraqi leader Saddam Hussain in the course of the Kuwait conflict to pollute the Gulf with hundreds of thousands of tons of oil. The proof that such conduct becomes more likely to be used as a mode of warfare, however, reveals the desirability of creating an instrument that qualifies actions like this as war crimes and to provide individual responsibility for them. Property is protected by subparagraph (e) and (f). The former covers "large-scale destruction of civilian property," that has to be interpreted alike its conventional models, Article 147 of Geneva Convention IV, Article 85 paragraph 3 (b) and (c) and Article 57, paragraph 2 (a) (iii), of Additional Protocol I. For the protection of cultural property in sub-paragraph (f)
the ILC tries to approach to Article 53 of Additional Protocol I and to renounce the manifolded prerequisites laid down in Article 85, paragraph 4 (d), of the Protocol. Instead, the draft article concentrates on two elements that restrict the applicability: the wilful character and the exceptional religious, cultural or historic value of the property.

The revolutionary innovation in Article 22 is the extension of the notion "armed conflict." Under current international law the notion "armed conflict" covers only international conflicts, i.e., conflicts between two states or a war of national liberation. According to the commentary:

the words "armed conflict" cover not only international armed conflicts within the meaning of Article 1, paragraph 4, of Protocol I Additional to the Geneva Conventions but also non-international armed conflicts covered by Article 3 common to the four 1949 Geneva Conventions.

Here, the ILC considers the increasing attitude among scholar and commentators that for an effective protection of the victims of all armed conflict humanitarian law must provide individual responsibility for international as well as non-international conflicts. For the scope of the Draft the distinction between the different kind of conflicts is abandoned. It cannot be sufficiently stressed: The improvement of the situation for victims of non-international conflicts would be enormous if this text once became binding international law.
4. Crimes Against Humanity

The notion of crimes against humanity is ambiguous and not easy to define. The term was first used in early 1800 "by European Powers to condemn Turkey for certain genocidal massacres of the Christian minority and to justify humanitarian intervention by these European States.... [This] was a political solution unsupported by any norm of international law." In the context of an international legal document the notion of humanity was first used in the Conference at The Hague. Since then there are instruments and documents available. Nowadays the term of crimes against humanity is mostly replaced by the Genocide and Apartheid Convention. Furthermore, this is covered in Article 50 of Geneva Convention I and in Article 51 of Geneva Convention II. Article 130 of Geneva Convention III and Article 147 of Geneva Convention IV include the most heinous acts against humanity:

1. The Hague Convention II of 1899
2. The Hague Convention IV of 1907
3. Article 6 (c) of the IMT-Charter
4. Genocide Convention
6. Principle 6 (c) of the Nuernberg Principles
7. Article 2 paragraph 10-12 of the ILC Draft of 1954
8. Article 19 of the ILC Draft of 1991
9. Article 6 of the French Report
10. Article 4 of the Italian Report
11. Article 3 of the CSCE Report
4.1. Legal and Historical Development

The Hague Convention II of 1899 and Convention IV of 1907 announce in their preamble that in cases where the Convention is not applicable "belligerent remain under the protection and empire of... the laws of humanity...."351 During World War I the Turkish Government ordered the massacres of the Armenian minority living in Turkey, an event that was later called "the forgotten genocide."352 Great Britain and other European States condemned as crimes against humanity in that the Turkish officials were personally responsible.353 However, early attempts of the UNWCC to punish the perpetrators for crimes against "the elementary laws of humanity"354 failed because of the objection of the United States.355

Crimes against humanity as part of treaty law appears for the first time in Article 6 (c) of the Charter of the IMT. The norm was with respect to its controversy more disputed than war crimes and less disputed than crimes against the peace. Article 6 (c) provides that [c]rimes against humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or prosecution on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country were perpetrated.

The relationship between crimes against humanity, on the one hand, and crimes against peace and war crimes, on the other hand, is ambiguous. Crimes against humanity are
not independent of war crimes or crimes against peace, yet are not wholly part of either category." The IMT stressed that they were closely linked to the other both categories of crimes covered by Article 6 of the Charter of the IMT. Partly the actus reus is identical with war crimes, however, crimes against humanity should also cover acts that did not constitute war crimes either (1) because they were committed before World War II or (2) because they were committed during World War II but not in the conduct of hostilities. It was important that the formulation "civilian population" covered not only atrocities against the population of adversaries in the war, but also the German population that was subject to prosecution during the Third Reich.

4.2. Current Legal Situation

Under current international law, crimes against humanity are partly covered by the Genocide and Apartheid Conventions and furthermore by the Geneva Law. The Genocide Convention is applicable in time of peace as well as in time of war. For the act of Apartheid, two set of rules are available. The Apartheid Convention prohibits acts of Apartheid in time of peace. In the laws of war, Apartheid is covered by the Geneva law. If, and to what extent, crimes against humanity belong apart of these instruments to current customary international law is questionable.
a. Genocide

Conventional International Law

Under the affect of the "Nazi holocaust in Europe that slaughtered some 6 million Jews, 5 million Protestants, 3 million Catholics and half a million Gypsies" before and during World War II on 9 December 1948 the United Nations General Assembly adopted unanimously by Resolution 260 (III) A the Convention on the Prevention and Punishment of the crime of Genocide. It was inspired by crimes against humanity as laid down in the Charter of the IMT. Meanwhile, more than 100 States have ratified the Convention and it is today one of the few universal applicable instruments beside the Geneva Conventions. This author is aware that "the Genocide Convention does not constitute a part of the law of armed conflicts in its strict sense" because Article 1 confirms that Genocide is a crime under international law "whether committed in time of peace or in time of war...." However, this instrument gains particular importance in time of war and may, therefore, for the purpose of this investigation, be considered under the Chapter "Crimes under the Law of Wars."

Article 1 states that Genocide is an international crime, Article 5 obliges the Contracting Parties to implement the acts of Genocide into municipal law. Article
2 defines the following acts as Genocide, which the Contracting Parties are obliged to prosecute and punish:\(^{368}\):

In the present convention, genocide means any of the following acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

(a) Killing members of the group;
(b) Causing serious bodily or mental harm to members of the group;
(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
(d) Imposing measures intended to prevent births within the group;
(e) Forcibly transferring children of the group to another group.\(^{369}\)

This definition raises two major problems. First, since the drafting of the Convention there are discussions about the significance and content of the formulation "committed with the intend to destroy, in whole or in Article..."

Debated is, whether the phrase "in whole or in part" refers to the commitment or to the intention. In the latter case the perpetrator must kill at least parts of a group with the intention to destroy the whole group. Suppose one prefers this interpretation than the questions arises, what is a group. If one follows the former interpretation that the intention to destroy a part of a group is sufficient. Suppose one follows this interpretation and questions arise as to whether it is sufficient to kill one member of the group for Genocide.\(^{370}\)

Bassiouni requires as a mental element the intent to destroy the group as such.\(^{371}\) This author tends to adopt
the interpretation of Ben Whitaker, rapporteur of the 1985 United Nations report on the Convention.\textsuperscript{372} First, Whitaker clarifies that the crime of Genocide does not require the elimination of a whole group; a part of it is sufficient. With regard to the issue, what a part is, Whitaker answers that "[i]n part would seem to imply a reasonable significant number, relative to the total of the group as a whole, or else a significant section of a group such as its leadership."\textsuperscript{373} He rejects the opinion of M. Cherif Bassiouni\textsuperscript{374} that the killing of a single member of a group can constitute Genocide for two reasons. The principle of gravity inherent the Convention "should not be devaluated or diluted by the inflation of cases as a result of too broad interpretation...."\textsuperscript{375} This view is supported by the language of Article 2 (a) and (e), which uses the plural. Another problem that arises from the requirement of the subjective element of "intent" is the difficulty to give evidence for this prerequisite. One solution that has been suggested was that "actions or omissions of such a degree of criminal negligence or recklessness that the defendant must reasonably be assumed to have been aware of the consequence of his conduct"\textsuperscript{376} are sufficient evidence.

The second major problem is what groups are protected. Article 2 enumerates "national, ethnical, racial or religious group". However, the Convention does not provide any definition of these terms. Disputed is, among others,
as to what extent the "national" or "ethnical" groups should include sexual minorities. One set of groups that are not listed in the Convention, but are proposed by several authors, are political groups. The original Article 2 of the Ad hoc Committee’s Draft enumerated, not only racial, national and religious, but also political groups as protected groups under the Convention. General Assembly Resolution 96 (I) of 1946 still mentioned political groups as subjects of persecution. One of the major supporters of this definition was the United States.

However, during the work of the ILC on the Convention the majority of members and States voted to exclude this group from the actus reus for political and legal reasons. First, a number of States would have denied ratification of the Genocide Convention including political groups. Besides, the extension of the actus reus to political groups would have caused considerable uncertainty when and whether this would get in conflict with the principle of Non-interference in domestic political affairs. Finally, it was criticized that "political groups were not clearly identifiable." Furthermore, whether cultural genocide should be included or whether genocide should be restricted to physical destruction was debated. Whereas the Draft of the Ad Hoc Committee of the ECOSOC contained a provision dealing with the issue, the "majority [of representatives of
States, however, considered that the protection of culture should be object to another convention."\(^{380}\)

Despite the existence of the Convention, several mass killings occurred without any punishment of the perpetrators. Recent examples are the prosecution of Kurds and Shiits in Iraq (and Turkey).\(^{381}\) Despite the defeat of Saddam Hussain he remained able to kill thousands of Shiits and Kurds. The world public was horrified, but neither Saddam Hussain, the superior military commander who gave the orders nor the subordinate soldiers were held responsible for it. It was necessary to wait until the occurrence of the mass killings in the course of the Serbian policy the ethnic cleansing in Bosnia-Herzegovina in order to place genocide on the agenda of an International Tribunal. The Reports of France, Italy and the CSCE unanimously propose including the crime of Genocide.\(^{382}\)

**Customary International Law**

Declarations of succession of the new States in the territory of the former Yugoslavia, like for the Geneva law, do not exist with regard to the Genocide Convention. Moreover, there are countries like Angola that are not parties to the Convention. Hence, the question arises whether the principles laid down in the Genocide Convention are applicable in Angola on grounds of customary international law. Since World War II a number of documents reiterated that prohibition of Genocide.\(^{383}\) According to
the holding of the advisory opinion of the ICJ of May 28, 1951, "[t]he principles underlying the Convention are principles which are recognized by civilian nations as binding on States, even without any conventional obligation." Hence, genocide is part of customary international law and both parties in the conflict, the UNITA as well as the Governments of Angola are bound to obey the rules laid down in the Genocide Convention. This view was also taken by the ILC and the French Jurists in their report. With regard to the scope of Genocide Article 19 of the ILC Draft, neither report enlarges the notion to cultural genocide. In the literature, authors take the view that "the destruction of a national linguistic, religious, cultural or other identity of a particular group" [should be] protected by the crime of Genocide. However, this view could not find a majority in the ILC. The formal argument they put forward was that the Draft should be restricted to the most "heinous crimes." Moreover at the current level States do not support any enlargement in this direction.

bb. Apartheid and other forms of inhuman treatment

Conventional Law

The Geneva law refers in several provisions to apartheid and other acts that the Charter of Nuernberg drew under crimes against humanity. Article 147 of Convention IV provides that "inhuman treatment, including biological experiments, wilfully causing great suffering or serious
injury to body or health, unlawful deportation or transfer" are grave breaches of the Convention. Because of the events in the territory of the former Yugoslavia special consideration deserves the prohibition of deportations. Article 49, paragraph 2, clarifies that every deportation is prohibited unless "the security of the population or imperative military reasons so demand." In particular, the notion of imperative military reasons gives reason for concern about the effectiveness of this provision. It will depend on the court to interpret this defense in an reasonable manner.

One of the weaknesses of Article 147 is that the applicability of this provision is restricted to acts that take place in partial or totally occupied territory. Consequently, atrocities on the own population and on civilian in nonoccupied territories fall not within the scope of Geneva Convention IV.

Article 85 of Additional Protocol I enlarges the prohibition of deportations. Paragraph 4 (a) outlaws the transfer of population of the occupying power into the territory as well as the deportation of the population in the occupied territory outside or within the occupied territory insofar as Article 49 of Geneva Convention IV does not provide an exception. Sub-paragraph (b) furthermore ensures that the repatriation of PoW should be executed without "unjustifiable delay." Finally "practices of
apartheid and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination" are prohibited.  

This set of rules surely covers the policy of ethnic cleansing in Bosnia and Herzegovina. Surprisingly, the Report of the French Jurists does not contain any of these provision. According to their view, the policy of ethnic cleansing should be covered by the Genocide Convention. This author hesitates to confirm this view because none of the conduct laid down in Article 2 of the Genocide Convention covers the mere act of deportation of civilian population as such. The Italian report and the report of the CSCE followed a different path. They propose to include in addition to the crimes of Genocide also crimes against humanity. Under this crime they include also "deportation and forcibly transferring populations." This approach, to me, seems to be more adequate to ensure that the tribunal will be able to prosecute the policy of ethnic cleansing in former Yugoslavia in its whole extent.  

What happens when the Geneva Conventions are not applicable. As we saw this may occur under various situations. Either parties to the conflict are not bound like in the transitional period in the dissolution of the former Yugoslavia or the Geneva Conventions and Additional Protocol I are not applicable because the fighting does not constitute an international conflict in the sense of Article
2 common to all four Conventions. Article 3 common does help partly as far as a conduct may be qualified as "outrages upon personal dignity, in particular humiliating and degrading treatment." Protocol II also provides some protection against inhuman treatment. However, none of these provision refers explicitly to deportation and other forms of transfer of the population in the occupied territory. Most commentators take the view that at least the content of article 6 (c) of the Charter of the IMT is since World War II part of customary international law. If this opinion is followed, then acts like deportation and enslavement are punishable. Whether the articles of the Geneva Conventions and Additional Protocol I can be regarded as customary international law remains questionable.
CHAPTER III
ENFORCEMENT AND INTERNATIONAL CRIMINAL COURT

Instruments that order the prosecution and punishment of the perpetrators are effective deterrents, in addition to provisions that outlaw certain acts. However, it is a weakness of international law in general that it does not address the issues of enforcement of the law. This failure is even more valid for the section of international criminal law. The reason for this is the tendency of States to consider every loss of competence as intrusion into their Sovereignty. Whereas in political affairs the Security Council has the competence as police-organ, there is no juridical equivalent. Nevertheless, some provisions deserve closer consideration:

1. Art. 49 of Geneva Convention I, art. 50 of Convention II, art. 129 of Convention III and art. 146 of Convention IV
2. Art. 28 of Cultural Property Convention of 1954
3. Art. 6 of Genocide Convention
4. Draft International Criminal Code (Bassiouni)
5. ILA Queensland Resolution on International Criminal Law
6. 9th. Report of Special Rapporteur to the ILC
7. French Report
8. Italian Report
9. CSCE Report

The provisions dealing with prosecution and punishment, i.e., enforcement of the laws of war producing individual
responsibility for crimes against the laws of war are rather spare in international law. There are two ways of enforcement, either by international organs or by national organs.\textsuperscript{399} This manuscript will address only the provisions that belong in the broader sense to the laws of war or include at least the jurisdiction over violations of the laws of war.\textsuperscript{400}

1. National Law Approach

The failure of an international criminal court for the enforcement, i.e., prosecution and punishment of the perpetrators of the laws of war was left to the individual states. This national approach raises many problems, among which are issues of jurisdiction. In traditional customary international law, jurisdiction required certain links. Most common were the following four: The crime occurred in the territory of the state, the crime has impact on the state, the perpetrator is a national of the state, and, the victim is national of the state. However, in recent times the principle of universal jurisdiction has won growing significance. The Geneva Convention and Additional Protocol are, in this context, the most famous examples. Article 49, Paragraph 2 of Convention I, Article 50, paragraph 2 of Convention II, Article 129, paragraph of Convention III and Article 146, paragraph 2 of Convention IV provide in sentence 1 that:

\begin{quote}
Each High Contracting Party shall be under the obligation to search for persons alleged to have
committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality before its own courts.\textsuperscript{401}

Similar provisions contain Article 28 of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict. Article 5 of the Genocide Convention gives an optional solution and provides that the perpetrators have to be prosecuted either by national or an international penal tribunal.

It has been mentioned already\textsuperscript{402} that these provisions constitute an obligation for the High Contracting State. This obligation, however, is not absolute because States have the option of "try or extradite", i.e., the possibility of handing over the perpetrator to another High Contracting Party. This customary rule of international criminal law is incorporated in sentence 2 of the relevant articles of the Geneva Conventions.\textsuperscript{403} It is important to mention that the Geneva Conventions give the right to prosecute war criminal without discrimination.\textsuperscript{404} Hence, not only the victim State is empowered and obligated to try war criminals of the aggressor, but also the aggressor state has the right and the obligation to try war criminals of the victim State.

The result of this national law approach, with regard to the implementation of the Geneva law, has been until now rather disappointing. Only few High Contracting Parties have changed - or at least adequately ensured a sufficient concordance of the actus reus of the municipal law and the
grave breaches - their domestic legislation on the subject. But the enforcement is not more satisfying. Since 1945 numerous civil wars and other wars took place. In the conflicts in Algeria, Korea, the Congo, Biafra, Indonesia, and East Pakistan "no systematic effort to investigate the charges or bring the accused to trial" took place. This list of Telford Taylor, who was Associate trial Counsel at the IMT of Nuernberg, may be continued with examples like Afghanistan or the Gulf War between Iraq and Iran. The reason is obvious: No country wants to try their "good boys" for "certain irregularities" during the combat. Probably the most famous exception was the trial on the My Lai (accurately Son My) killings in March 1968, during the Vietnam War, by courts of the United States against members of the U.S. forces. However, of the perpetrators only a few were tried and only Lieutenant William Calley was convicted. Like the Leipzig trial after World War I "the criminal consequences of My Lai were 'almost farcical.'"

2. International Courts, Tribunals and International Criminal Court

One has to distinguish between international courts and international arbitration tribunals that have the competence to interpret international treaties, to settle disputes between States or that may even adjudicate civil claims for restoration of property, from international criminal courts that have the competence to apply international or municipal penal law and to convict individuals or a State on grounds
of criminal law. Whereas, there are increasing examples for the former,\textsuperscript{410} examples of international criminal tribunals are few in history. This paper addresses criminal tribunals.

Two basic issues arise in connection with the establishment of an international criminal court (ICC). Should there be a permanent criminal court or is it sufficient, if in cases of excessive war crimes, \textit{ad hoc} tribunals are established? History provides only the latter case. The disadvantages and dangers of \textit{ad hoc} tribunals will be shown under the materials for the IMT.\textsuperscript{411} A permanent ICC could be established either as a new judicial institution independent from the ICJ or as a chamber of the existing ICJ after the revision of its Statute.\textsuperscript{412} However, there are a lot of problems and issues that are still not resolved. One question, for example, is the relationship of an international criminal court and the Security Council in the case of sanctions and in the case of aggression.

\textbf{2.1. History and Legal Development}\textsuperscript{413}

Prior to World War I there is proof for cases where war crimes of enemy soldiers led to a trial of the perpetrators. The legal basis of jurisdiction "derived from the customary right of a belligerent to try enemy soldiers for war crimes."\textsuperscript{414} These tribunals were not of an international character as they consisted of members of the nation of the
perpetrated soldiers. Probably one of the first lawyers who intended and inspired the idea of an establishment of an international organ for the repression of crimes against the law of nations (droit des gens) was M. Moynier in 1872. More than two decades later, in 1895, he elaborated his ideas at the session of the Institute for International Law. According to Stefan Glaser,\footnote{415} the first step towards the realization of the ideas of M. Moynier was the creation of an International Prize Court to judge "[t]he validity of the capture of merchant ship or its cargo."\footnote{416} In 1920, when the Permanent Court of International Justice was created, the Belgian delegate and president of the committee that was entrusted to draft the statute of the PCIJ, Baron Descamps, started an initiative to establish a High Court of Justice that would have jurisdiction over crimes against the law of nations. This proposal, however, was dismissed as premature.\footnote{417}

After World War I the Allied established a Commission to elaborate the necessary provision to punish the German authors of the War. The Commission on Responsibility of the authors of the War drew the conclusion that "[t]he acts which brought the war should not be...made subject of proceedings before a tribunal."\footnote{418} Robert Lansing and James Brown Scott, representative of the United States, both expressed that only municipal tribunals of the Head of State have the authority to try the latter.\footnote{419} Nevertheless, the
commission concluded Article 227, paragraph 2,\textsuperscript{420} that foresaw the establishment of an international military tribunal to try the former German Emperor Wilhelm II. Article 229, paragraph 1,\textsuperscript{421} ordered that the German war criminals should be tried before the military tribunal of the power which the victim was a national. In this case, prosecution and punishment would be done by a municipal court. An international tribunal for the trial was planned only in the case of Article 229, paragraph 2:

> Persons guilty of criminal acts against the nationals of more than one of the Allied and Associated Powers will be brought before military tribunals composed of members of the military tribunals of the Powers concerned...\textsuperscript{422}

Neither provision was ever enforced. Wilhelm II found asylum in the Netherlands and German war criminals were tried on grounds of municipal German law and because of German public pressure the Allied agreed to the proposal of the German government to try other German war criminals before the German Supreme Court in Leipzig. However, the result of the trials was what Jacques-Bernard Herzog called "la parodie de justice de Leipzig."\textsuperscript{423} In June 1922, the Court proceeded without the victor States and disregarded fundamental rules of procedure as "[i]n the vast majority of cases there was no public hearing."\textsuperscript{424} The result of the trials was "that out of a total of 901 cases.... 888 accused were acquitted or summarily dismissed, and only 13 ended in a conviction;"\textsuperscript{425}
The IMTs for Nuernberg and Tokyo\textsuperscript{426} are the only examples in history where an international organ tried individuals for crimes under the law of war.\textsuperscript{427} In addition to two International Military Tribunals there were a number of trials and hearings before the national courts and commissions of the United States, Great Britain, Australia, France and other States.\textsuperscript{428} The United States military commissions and tribunals alone tried 950 cases with a total of 3,095 defendants. Never before had such a large number of war criminals been convicted.\textsuperscript{429} One of the reasons for the creation of international tribunals were the experiences with the Leipzig Trials.

The Nuernberg Tribunal was established \textit{ad hoc} on the basis of the London Agreement and the Charter for the IMT. A special proclamation of the Supreme Commander for the Allied Powers established the Tokyo Military Tribunal in January of 1946.\textsuperscript{430} They were international, insofar as they were formed from members of four different States. Furthermore, the London Agreement, which was based on Article 2 of the London Agreement, and was an integral part with the Charter of the IMT, was signed by 19 other States. However, the members of the Tribunal were nationals of only the Allied States. The victor States, tried only war crimes of members of the defeated powers. The international character would have been more valuable if members of neutral states or those of the defendants' nationalities had
been integrated in these judicial bodies. So, suspicion about the impartiality of the courts arose.\(^{431}\) Looking back, it seems that an international tribunal for the trial of war criminals is only possible if there is an unconditional surrender of one of the parties which are engaged in war.

### 2.2. Early Efforts after Nuernberg

As we saw, the number of cases in which perpetrators of the laws of war have been tried by international tribunals is rather small. Except for the IMT of Nuernberg and Tokyo in recent history, there are no other examples. Telford Taylor called the trials "an episode in a century-old sequence of human thought and endeavor."\(^{432}\) The reasons for this are manifold: the trial of war criminals by organs other than the ones of the perpetrators' nationality is a highly delicate matter in the public opinion of the perpetrators' country.\(^{433}\) Even more, States fear the establishment of an permanent international criminal court (PIIC) that would be an intrusion into their sovereignty as States. Apart from this, no head of state feels very comfortable with the idea of an international organ that could try him for crimes.

Nevertheless, the criticism of the Nuernberg and Tokyo Trials sharpened the awareness for the necessity of an PICC, and scholars of most countries\(^{434}\) and institutions\(^{435}\) elaborated drafts for such a court. There is one argument
that endorsed the interest on an international criminal judicial organ: Only "the establishment of an international criminal court could... provide the required objectivity and impartiality in applying a criminal code, and without those factors there could be no valid and lasting international order."  

One of the first efforts after World War II can be found in the Genocide Convention. Article 6 provides that

> Persons charged with Genocide or any other acts enumerated in Article 3 shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.

This wording is rather unique and reflects the dispute within the ILC as to whether there should be created an international criminal court as "rule-supervisory organ" for the Genocide Convention. The strongest supporter of this idea during the drafting of the convention was the representative of the United States. The underpinning was that history showed that States are not always willing to try their nationals on charges of Genocide. The opponents, especially the Soviet Union, relied on aspects of State Sovereignty. After one vote in favor of deleting Article 6 and another vote where the members decided to reconsider the content of the clause, the majority of States decided to reinsert the provision pertaining to the possibility of an prospective International Criminal Court. On a draft
resolution of the ILC to continue its work for the creation of such an organ, the General Assembly approved this and invited the International Law Commission to study the desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide or other crimes over which jurisdiction will be conferred upon that organ by international conventions. \(^{440}\)

Two possibilities were considered for the establishment of an international criminal court. It could be either a new institution or a chamber of the ICJ. Therefore, in the same document the General Assembly requested the ILC "... to pay attention to the possibility of establishing a Criminal Chamber of the International Court of Justice. Rapporteur Ricardo Alfaro\(^{441}\) answered the desirability as well as the possibility of the creation of an international criminal court "unhesitatingly in the affirmative."\(^ {442}\) His successor, Emil Sandstrom, had an opposite opinion as to the issue of the desirability as well as the possibility to create an international criminal court.\(^{443}\) Furthermore, he came to the conclusion that the General Assembly envisioned the international criminal court as a principal organ of the United Nations, analogous to the ICJ, and that such a court could be created only by amending the Charter of the United Nations via Article 108 of the U.N. Charter.\(^ {444}\)

Nevertheless, the majority of the members of the ILC affirmed both the desirability as well as the possibility of establishing an international criminal court. The members preferred the option of a new independent judicial institution and rejected the idea of a Criminal Chamber of the
ICJ. When the Sixth Committee discussed the report of the ILC the response of the representatives of States was divided. This situation was solved by shifting the work to another body. Recognizing that the Draft Code on Crimes against Peace and Security of Mankind needed a procedural counterpart, and continuing the efforts in connection with Article 6 of the Genocide Convention in 1951, on recommendation of the Sixth Committee, the General Assembly appointed a 17-member committee to elaborate a statute for an international criminal court. In 1953, this Committee in International Criminal Jurisdiction concluded a draft statute for an international criminal court. However, like the Draft Code of 1954, further considerations were postponed until the definition of the notion "aggression" could be defined.

2.3. Recent Efforts

In its 36th (1981-1982) session the General Assembly invited the ILC to resume its work on the Draft Code of Crimes against Peace and Security of Mankind. In 1983, the ILC asked the Assembly whether their considerations should include the establishment of an international criminal court. The General Assembly answered the question in 1989 in the affirmative and directed the ILC to report at the next session about the problems pertaining to an international criminal court. In 1990 the General
Assembly renewed the legal basis for the work of the ILC when it invited the Commission to consider further and analyses the issues raised in its report on the question of an international criminal jurisdiction, including the possibility of establishing an international criminal court or other international criminal trial mechanism.

a. Jurisdiction

The Report of the Special Rapporteur

Special Rapporteur, Mr. DouDou Thiam, concentrated his ninth report on (a) the court’s jurisdiction and (b) the requirements for submission of cases to the court. The report of the special rapporteur included one draft article that covers the jurisdiction of the court. This article revised the draft statute of the Committee on International Jurisdiction of 1953. The Special Rapporteur stressed that the report should be a mere "test of opinion" and "basis for discussion," and the debate would be a useful guide to him at a later stage. Thiam tried to find a compromise between political feasibility of an international criminal court and creating an effective instrument. In order to avoid a drawback like in the 1950s, it was important to find a solution that would get sufficient backing of the States and that would have a chance to be ratified by a considerable number of members of the United Nations.

One major obstacle was the conflict between international criminal jurisdiction and principle of State
sovereignty. In order to draft a prudent and feasible provision, Thiam added several restrictions of the court's jurisdiction in paragraph 1 and 2 of the draft article. First, paragraph 1 clarifies that the jurisdiction of the court refers only to individuals and not to States. Paragraph 1 foresees in square brackets that the jurisdiction should not cover all crimes of the draft code, but only those listed in an annex to the statute. This annex should restrict the court's competence "to crimes forming the subject of international conventions, on which general agreement therefore existed, such as genocide, apartheid, certain war crimes and certain acts of terrorism...." Paragraph 1 further provided that the principle of universality as laid down in the Geneva Conventions would not be applied. Instead, Thiam proposed a system of "conferment of jurisdiction." States that have jurisdiction on grounds of the principle of territoriality will lose this jurisdiction only if they confer their jurisdiction upon the international criminal court. Paragraph 2 provides, in an ambiguous relationship to paragraph 1, that in addition to paragraph 1 there are four other groups of States that have to confer jurisdiction to the court if their (1) national legislation gives them jurisdiction (2) on grounds of the principles of active and passive personality and real protection.
Reaction on the Report

The reaction on the report was rather divided. Three major problems were discussed among the members on jurisdiction: (1) The nature or extent of jurisdiction, (2) the jurisdiction ratione materiae and (3) Conferment of jurisdiction. Only arguments of interest will be addressed in this manuscript.\textsuperscript{459}

Whether the court should have exclusive or only concurrent jurisdiction was debated. Some members endorsed the idea that the court should have only jurisdiction "where national courts declared that they were not competent."\textsuperscript{460} However, this would create conflicts of jurisdiction so other members enhanced the idea of exclusive jurisdiction of the court. However, the latter idea is unrealistic and unlikely to get sufficient support of States. A preferable third way would give the court "jurisdiction to review (either on appeal or on cassation) decisions handed down by national courts."\textsuperscript{461} The undeniable advantage of this solution is that impartiality and objectivity would be ensured and the intrusion in State sovereignty would be kept on a minimum extent.

Another proposal worth considering is to determine the jurisdiction according to the nature of the crime. Within this proposal, States had rather different ideas. One realistic and reasonable solution would be to reserve exclusive jurisdiction "in particular for crimes under
international conventions which stipulated that the perpetrators were to be tried by an international tribunal, such as the crime of genocide."\textsuperscript{462} This well balanced approach might get sufficient support of the members because it also reflects the concern of State Sovereignty.

This latter proposal is linked with the issue of what jurisdiction \textit{ratione materiae} the prospective court should have. A group of members supported the pragmatic idea of the Special Rapporteur to limit the jurisdiction to "a very small category of crimes of extreme gravity..."\textsuperscript{463} that are already defined in international instruments like genocide. However, there were also proposals in the opposite direction, i.e., to extend the jurisdiction to international crimes in general. It is doubtful that the latter proposal is realistic or will find any considerable encouragement of the States. The principle of State sovereignty is still too strong for a considerable number of States to accept that broad jurisdiction.

A third major point of criticism and reservations was the conferring of jurisdiction as laid down in paragraph 1 and especially paragraph 2 of the draft article. Indeed, the approach of the Special Rapporteur to find a feasible compromise that would be able to get sufficient support of States has to be appreciated. However, one can doubt if a system like paragraph 2 works effectively. In a considerable amount of cases, conferring of jurisdiction of too
many States would be necessary. A second argument devalues paragraph 2 of the draft article. The overwhelming majority of crimes under ILC Draft of 1991 were crimes directed against States. The notion of crimes under international law implies, however, that the wrongful act is of such a gravity that "the question of jurisdiction [is] of concern not only to individual States but to the international community as a whole." The proposal of the Rapporteur would not only go behind the universality principle as laid down in the Genocide Convention and in the Geneva law, but also "drop the concept of a crime under international law." Therefore, it is unlikely that the draft article will be the prototype of a prospective article in the Statute of an international criminal court.

b. Requirements of Submission of Cases before the Court in the case of crimes against peace

Beside jurisdiction of an international criminal court, the Special Rapporteur paid special attention to the institution of criminal proceedings. The possible relationship between the Security Council and an International Criminal Court in cases of crimes against the peace (aggression) is of special interest. The starting point is that the Security Council as a political organ has the competence to prevent a breach of peace and, in the case of aggression, to restore peace and international security. For this purpose, Article 39 of the Charter gives the Security Council the competence to determine "the existence
of any threat to the peace, breach of the peace, or act of aggression. Conversely, a prospective Court has the judicial task and competence to try individuals for breaches of the peace or threats of aggression. The overlapping point is that in order to convict the perpetrators, the court has to decide as a preliminary question whether there exists a breach of peace. Hence, the issue arises that if the proceeding of the court is subject to a prior consent of the Security Council, does a breach of peace exists. Thiam responded to this issue for crimes against peace in the affirmative. The discussion revealed different opinions of the members. One fear of several members was that because of the veto right of the permanent members of the Security Council, there might be situations where the Security Council denies the existence of a breach of peace. One has to consider that the affirmation of a breach of peace, indeed, would not legally force the Security Council to take action under Chapter VII. However, the political pressure in fact might lead to a moral obligation. Yet, such a no-vote would invoke "a double standard" and result in a dependence of the court as a judicial organ on political circumstances. Therefore, the critics of the draft article spoke in favor of a strict separation of the political and legal level, i.e., that no prior consent should be necessary. This proposal seems to be at least reasonable in the case where the Security Council did not deal with the
matter. Here, "the international criminal court [sh]ould have full freedom to determine the existence of an act of aggression or a threat of aggression, where appropriate." In cases where the Security Council already addressed the concerned act of aggression, a deviation and different appreciation of the court should be possible from a negative or from a positive decision of the Security Council. Otherwise, either the Security Council or the Court would lose some creditability. Therefore, preference would be given to a formulation such as:

with regard to crimes of aggression and threats of aggression the International Criminal Court must not deviate from decisions of the Security Council that concern with the existence of a threat to the peace, breach of the peace, or act of aggression relevant to the case before the International Criminal Court.

2.4. U.N.S.C. Resolution 808

The consciousness for the necessity of a permanent international criminal court exists and is constantly growing. After the Iraq invasion in Kuwait, Secretary of State James Baker announced deliberations of the United States that "time is probably ripe to look seriously at the idea of creating an international criminal court." Now, more than four decades after the Nuernberg and Tokyo trials, it seems that the words of Telford Taylor may prove to be wrong. The continuing atrocities in the territory of the former Yugoslavia fostered the preparedness of the community to try the perpetrators by an international tribunal. In
Resolution 808 of February 22, 1993, the Security Council decided as follows:

that an international tribunal shall be established for the prosecution of persons for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991;474

This decision is unique and raises several problems. Moreover, it shows that after the end of the cold war the Council is working more effectively than ever.475 First, one may ask if it is at all possible to create a judicial body by means other than an international treaty. Indeed, the Charter of the IMT and the Peace Treaty of Versailles were international agreements. However, the Tokyo International Military Tribunal was created by special proclamation of General McArthur and proves that there are other possibilities than treaty law. Therefore, from this point of view, the creation of an International Tribunal by an international organ seems to be possible. The United Nations has the competence with regard to the scope ratione materiae to deal with humanitarian and human rights aspects. The Charter addresses the protection of human being in several articles.476 Therefore, the Security Council as the main political organ has within the framework of the Charter the competence to take measures to protect the individual. The most effective form of protection is the prosecution of the perpetrators.
The basic question then, is whether the Security Council as a political organ has the competence to create an ad hoc judicial organ.

According to Article 39 of the Charter of the United Nations, the legal basis for the establishment of the tribunal is that the measure "maintain[s] or restore[s] international peace and security." For reasons addressed above, the international aspect in the conflict in the territory of the former Yugoslavia is relatively easy to affirm. The Council reiterated in several preceding resolutions that the conflict in the territory of the former Yugoslavia constitutes a threat to peace. The fact that since May 22, 1992, Slovenia, Croatia and Bosnia and Herzegovina have been members of the United Nations and the involvement of Serbia (Serbia and Montenegro) and the Yugoslav People's Army (JNV) in the fighting in the territory of Bosnia and Herzegovina further strengthens the international character of the conflict.

The French Report to the Security Council speaks of "... the former Yugoslavia and the States that have replaced it...." But even if one regards the conflict as a civil war, the international threat to peace can be affirmed by the fact that the fighting caused waves of refugees that "have some potentially serious, observable effects on neighboring countries, particularly Bulgaria and Hungary."
Within Chapter VII of the Charter of the United Nations, the Security Council has a threefold option of legal basis for his action. The use of armed force according to Article 42 of the Charter is not relevant in this case. It is possible to argue that Article 41 includes measures like the establishment of an ad hoc judicial organ. Indeed, Article 41 refers primarily to economic sanctions. However, sentence 2 of Article 41 says that the non-military measures only "include" different kinds of economic sanctions. The list, therefore, is not conclusive and gives the Security Council a wide digression to take the steps it regards necessary. Beyond these two provisions, it is recognized today that the Security Council may also take measures without special reference to Article 41 or Article 42, but on the basis of the general competence Chapter VII gives to the Council. Whether the establishment of an ad hoc war crimes tribunal belongs to the possible measures that the "fathers" of the Charter had in mind when they created Chapter VII remains questionable. The legislative history does not give an answer to this question and, hence, at least does not exclude this possibility.

The French Report distinguishes between the establishment of an permanent universal criminal court and the creation of an ad hoc tribunal. With regard to the former, the Committee "would be very reluctant" to affirm a competence of the Security Council under Chapter
VII. Interpreting the Charter "dynamically and teleologically, the Committee believes, however, that the Security Council could, if necessary, establish such an ad hoc tribunal by virtue of the powers conferred on it by Chapter VII of the Charter...." The French Report sees the legal basis of the establishment of the prospective tribunal in Article 41. It states that "the criterion for a contemporary interpretation of Article 41 is the commensurability to the object that is sought." Under this interpretation, the French jurists conclude that the establishment of an ad hoc tribunal can be justified if it is the appropriate measure at the right time "that seems likely to attain or facilitate the objective of restoring international peace and security." Another interesting aspect that the French Report addresses is the issue of whether the tribunal looses its legitimacy at the moment the hostilities cease. Arguably, restoration of peace is fulfilled at this moment. With the argument that Chapter VII also serves the "maintenance" of peace, and this aim is achieved by the trials of the tribunal, they answer the question in the affirmative way.

In the last paragraph of Resolution 808, the Security Council asked the Secretary General to submit a report within 60 days. It remains to be seen what proposals and consideration the Secretary General will submit to the
Security Council for the "... effective and expeditious implementation of the decision of the Security Council...."
CHAPTER IV
DISTINCTION BETWEEN WAR AND OTHER HOSTILITIES

Today international law supplies various instruments and documents that contain individual responsibility for war crimes. The question that remains is in which conflicts are these sources applicable. The answer largely depends on the legal content of the notion "war," i.e., under what situation of conflict crimes are war crimes. This issue arises first and foremost in the context of the Geneva Conventions and Additional Protocol of 1977. They are applicable because they are the most important current conventional instruments in the laws of war and explicitly define the prerequisites the conflict has to fulfill.

The legal content of the notion "war" is disputed and options of commentators are various. Here, we focus and restrict the inquiry on the purpose of this work: Which situations are covered by the provisions that create individual responsibility and define war crimes, and what is the consequence if these sources are not applicable to certain types of conflict? One situation of conflict is given particular consideration because of their actuality: the relationship between United Nations operation and the laws of war.
1. The Notion of "Armed Conflicts" 

Treaties of the 19th and early 20th century only referred to the situation of war. For example, the Additional Articles relating to the Condition of the Wounded in War of 20 October 20, 1868 or the Laws of Hague In this instrument the notion "war" signifies an armed "formally recognized situation involving two or more States and entailing a whole of specific legal consequences provided by international law of war...." This definition of war contains two decisive elements. First, the state of war preliminates a declaration of war or at least recognition of the existence of a state of war between two parties. This element may be called a subjective element since it depends of the personal view of the involved parties. Second, parties of the war must be states. With the foundation of the League of Nations the "achievement of peace..., principally 'obligations not to resort to war'" became an international considered goal laid down in the Covenant of the League of Nations. Henceforth, states preferred to start war without declaration or at least recognition. In these situations of "non-war" the Hague and Geneva Law was not applicable, a consequence of the Sovereignty of States.

However, States realized the necessity to establish a set of rules for the protection of civil population, wounded, and prisoners of war that should be applicable regardless the willingness of State to recognize the
situation of war. Under the impression of two World Wars, Article 2, paragraph 1, of the four Geneva Conventions of 1949 mentions explicitly the applicability of the rules regardless of the recognizing of the situation of war,\textsuperscript{496} and clarifies further that the notion of "armed conflict" is "purely factual."\textsuperscript{497} The undeniable advantage of choosing this notion is that it has a more objective nature. This means that "the occurrence of the facto hostilities [between two countries overstepping a certain threshold] is sufficient...."\textsuperscript{498} for the application of the Geneva Conventions. According to some commentators\textsuperscript{499} the notion of "armed conflict" should express that certain fields of the laws of war are not only applicable in conflicts between states (i.e., international conflicts), but also in other non-international conflicts (i.e., where only one state is involved).

The Geneva Convention, however, does not provide any definition of the notion of armed conflict. Consequently, the question of the relationship between the terms of "war" and "armed conflict" arises. Are they identical, includes the notion of armed conflict as a larger concept war or vice versa. From the development and history, it seems to be more likely that first and foremost the subjective criteria of recognition or declaration of war should be deleted. The wording of Article 2, paragraph 1, however, speaks of "...war...or other armed conflict...." Accordingly, in the Geneva Law war is one form of armed conflict, and,
therefore, the latter has the larger scale. Most commentators follow this view.500

The second prerequisite, the statehood, refers to the issue, what kind of conflict exists and what kind of law is applicable if there is only one state involved, in so called non-international conflicts. International practice of the United Nations broadened the notion of international conflicts.

2. Types of War

Commentators follow different approaches to categorize the different types of war. Ingrid Detter de Lupis distinguishes between geographical wars, programmatic wars and methodological war501 Another distinction which should be added even though the meaning and content is very debated is international and non-international wars or conflicts. As we will see later, the distinction is decisive for the rules of law applicable and especially for patterns of implementation, i.e, indirect individual responsibility.

2.1. International conflicts

If we follow the given geographical category for differentiation, we first may distinguish between interstate war, non-interstate wars and wars and other types of war. Originally the definition of war implied that at least two states were involved. In the case of interstate war, doubtless, the armed conflict has international character. A current example was the invasion of Kuwait by Iraqi armed forces.502 The question with regard to the conflict in the
former Yugoslavia is more difficult. The issue with regard to Bosnia-Herzegovina is even more difficult. In international law, statehood requires four prerequisites: Territory, a people, government, which has effective internal control over the state’s territory, and no dependance from another state. The recognition by other states may be an indicator, but is no prerequisite of statehood itself. The hostilities between Serbia and Croatia may be qualified as war between two states because Croatia had declared its independence before the outbreak of the fighting and possessed a defined territory, people and a Government. The fact that certain parts of the territory were involved in fighting with the Serbian dominated JNA is no hindrance, as far as a effective control over most of the territory exists. This a question of degree. The Croatian Government under President Franjo Tudjman exercised a sufficient and an effective control over the territory.

The issue is more difficult with respect to Bosnia-Herzegovina. Serbian armed forces and militia control, at least currently, more than the half of Bosnian territory and the Bosnian Government never had effective control over the territory. Therefore, one may be tempted not to qualify the situation as interstate war.

At this point the question arises if other criteria may qualify a conflict as an international conflict. Today, the overwhelming majority of scholars agree that a conflict may get international character with the involvement of the
United Nations. The Security Council very early regarded the situation in the territory of the former Yugoslavia as a threat to international peace and security and confirmed this in numerous consequent resolutions that address the conflict in the former Yugoslavia.\textsuperscript{503} Hence, current international law provides the somewhat curious situation that a civil war may exist that is transformed with the involvement of actions of the United Nations under Chapter VII into an international armed conflict.

Three more examples of actions under Chapter VII should also reveal the broadening of the notion "international," that is of primary importance for the applicability of the war crimes concept. Only the threat of international peace and security comes within the scope of Chapter VII and consequently gives the Security Council the competence to authorize States to use force. However, with the end of the Cold War this notion seems to change its definition. In Resolution 688 of April 5, 1991 the Security Council decided to qualify the repression of the Iraqi civilian population, especially the Shiite and Kurds, as a threat to international peace and security. Later only a possible Chinese veto in the Security Council "stopped the Council from adopting the resolution under Chapter 7, thus giving countries the right to use force to help the Curds and Shiite".\textsuperscript{504} Here, one may submit the international character from the fact that the prosecuted Curds in the north fled into Iranian and turkish territory and the Shiite
in the south, also tried to get shelter in Iran. Less clear was the "Operation Hope" in Somalia by American and French troops. The decision of the Security Council that United States troops could use force if they needed to "establish a secure environment for humanitarian relief operations is highly disputable. The qualification of "the threat of human tragedy" as "a threat to international peace and security" is a very wide, if not a novel interpretation of the notion "international conflict". This reveals that the principle of non-intervention may loose its importance in the future - at least for humanitarian operations - of its importance. The legal concept of "international" is in a transitional phase.

2.2. Non-International Conflicts

Non-international conflicts is a field to which international law gave only insufficient consideration. Until the middle of this century, there is nearly no proof of conventional or customary international law that addresses in particular the situations of non-international conflicts. Like issues of international jurisdiction internal affairs belonged in former times to the exclusive domain of internal affairs. One of the first conventional law that supplied minimum standards in all kinds of armed conflicts were the Geneva Conventions of 1949. Only a few sources of international law are available:

1. Article 85 of Lieber Code of 1863
3. Common Article 3 of Geneva Conventions of 1949
9. Additional Protocol I for "Wars of National Liberation"
10. Additional Protocol II

a. Definition and Distinction

In the literature, different approaches are undertaken to define the notion of non-international conflicts.506

The initial rule is simple. All conflicts that do not fall under the category of international conflicts, which were discussed earlier, are non-international conflicts, i.e., conflicts that are not between two States or conflicts within the territory of one State with the involvement of another State507 or the United Nations.

Article 1, paragraph 1, of Additional Protocol II, Article 3 of the Geneva Conventions, and Article 1 of Protocol I supply a negative definition. Article 3 common only uses the notion of "armed conflict not of an international character...." without further definition. This provision has to be read in the context of Article 2, paragraph 1 common that provides that

....[t]he Convention shall apply to all cases of declared war or any other armed conflict which may arise between two or more of the High Contracting Parties....
Indeed, the Conventions do not explicitly say that only States may be Contracting Parties. However, from the documents on the Conference that drafted the Geneva Conventions, it becomes clear that only situations of armed (or non-armed\textsuperscript{608}) conflict between two States should be covered by the Conventions.\textsuperscript{509} Consequently, we can distinguish between conflicts of two or more States and other conflicts.

This narrow interpretation of international armed conflicts was broadened by Article 1, paragraph 4 of Additional Protocol I that provided that the rules of the Geneva Conventions as a whole are applicable to wars of national liberation.\textsuperscript{510} Furthermore, it has been seen that the United Nations practice under Chapter VII enlarged the notion of international armed conflict. Article 1 of Additional Protocol II that describes the material field of application introduces a new category of non-international armed conflicts. It restricts the application in noninternational conflicts as laid down in Article 3 common with a fourfold threshold, that leads to a "de facto statehood"\textsuperscript{511}: (1) parties to the conflict can only be armed forces of High Contracting Party confronts armed dissident forces or other organized armed groups which are under (2) responsible command. Furthermore, the insurgents (3) must control of part of the territory that enables them (4) to undertake sustained and concerted nature of military operations and to implement the Protocol. Article 1,
paragraph 2 of Protocol II furthermore supplies a borderline between armed conflict and internal disturbance/internal tension. Most commentators agree that this "bottom line" is also valid for common Article 3. Hence the legal system of the Geneva Conventions can be drawn as follows:

(1) international conflicts: Geneva Conventions/Additional Protocol I
(2) War of National Liberation: Geneva Conventions/Additional Protocol I
(3) non-international conflicts: Article 3 common
(4) non-international conflicts that fulfill fourfold threshold: Additional Protocol II and Article 3 common.
(5) internal disturbances and tensions: no applicability of Geneva law.


Civil War

It is difficult to find a clear definition of civil war. However, according to the Geneva law, it is a struggle by armed force of a certain intensity between the government in power and a organized group of citizens of the state. Recent examples are Somalia, Liberia, Kampuchea, El Salvador.

A legal consequence of the existence of a civil war is that the Geneva Law regards the conflict as being of a non-international nature. Hence, the Geneva Conventions are, except for Article 3 common, not applicable. Under the prerequisites discussed above also Additional Protocol II also may give protection to the combatants.
**War of National Liberation**

In addition to the geographical classification of types of wars, a distinction is also possible by teleological criteria that asks to the purpose of the war. For purposes of this paper, only the "war of national liberation" will be addressed. According to Article 1, paragraph 4, of Additional Protocol I, a war of liberation is an armed conflict in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations.

This wording was the result of the efforts of the United Nations to legitimate the struggle of the prescribed colonial peoples and to give "material and moral support to national liberation movements in colonial territories." The right of self-determination embraces, according to Article 1, paragraph 1, of the International Covenants on Human Rights, the right of all people to "freely determine their political status and freely pursue their economic, social and cultural development." The general recognized examples are the PLO, ANC and SWAPO.

This is the only kind of conflict in which the Geneva system does not maintain the distinction between international and noninternational. The separating legal criterion of liberation wars from other civil wars is the
distinctive applicable set of law. As cited above, Article 1, paragraph 4, of Additional Protocol I, provides in the beginning sentence that the described conflicts are included in the notion "armed conflicts" as laid down in Article 1, paragraph 3, of Additional Protocol I and Article 2 common of the four Geneva Conventions. Whether one says that, consequently, war of liberation is an international conflict (with the argument that there is an international concern for this kind of struggle) or, as other commentators, that for this kind of geographically regarded internal conflict the Geneva Law for international law is applicable, has not to be decided.522

It is significant that the whole set of rules of the Geneva Convention and Additional Protocol I for conflicts between two States can be made applicable. Like all international instruments and as laid down in Article 2 common, the rules become applicable if both are contracting parties of the Treaty. As the liberation movement will not be a High-Contracting Party of the Protocol or Conventions, Article 96, paragraph 4, provides that the authority of the liberation movement "may undertake to apply the Conventions and this Protocol in relation to that conflict by means of unilateral declaration." This declaration has the immediate effect that the Government and the liberation movement have "the same rights and obligations as those which have been assumed by a High Contracting Party to Conventions and this Protocol." Consequently the system of "grave breaches" and
the "implementation system" is applicable, i.e., victims of liberation wars enjoy the same protection, and the Government and the authority of the liberation movement have the obligation to try (or extradite) perpetrators, and soldiers have the indirect obligations and responsibilities emerging from the Geneva Law as in international conflicts. Hence, in a war of national liberation after the unilateral declaration of the liberation movement, authority between the latter and the Government of the High Contracting Party, indirect individual responsibility for war crimes according to the Geneva system exists.

**Internationalized War, "Mixed" Armed Conflicts**

Mixed Conflicts are "conflicts containing elements of both noninternational and international conflicts." Here, one has to distinguish between intervention by or on behalf of the United Nations or intervention by a State. In the mixed international-noninternational conflicts, two fields of law are applicable. The judgment of the I.C.J. in the Nicaragua v. United States of America reflects the leading opinion among commentators:

The conflict between the contra forces and those of the Government of Nicaragua is an armed conflict which is "not of an international character." The acts of the contra towards the Nicaraguan Government are therefore governed by the law applicable to conflicts of that character; whereas the actions of the United States in and against Nicaragua fall under the legal rules relating to international conflicts.
Whether this principle is also applicable in situations where the United Nations are involved will be discussed later.

c. Legal Consequence for Non-International War

Chapter II revealed that the actus reus of common Article 3 and of the relevant article of Additional Protocol II cover the most heinous grave breaches of the Geneva Conventions. Consequently the actus reus of some of the most important war crimes is available. Article 3, which was "inspired to prevent a recurrence of the Spanish civil war", reflects "elementary considerations of humanity." The difference is that Article 3, common to the Geneva Convention and Protocol II, does not supply any implementation obligation. However, the ICRC or other impartial humanitarian institutions can offer their services "but the parties have no formal [legal] obligation to accept them." There is no conventional obligation of the Contracting Parties to try or extradite pulpits. Hence, the system of indirect individual responsibility is not secured.

Article 3 of the Conventions

Charles Lysaght discusses the enforcement mechanism applicable to Common Article 3, as far as the Conventions are concerned. This opinion, however, is not representative. As most commentators Jean S. Picet takes the view that "it is no longer the Convention as a whole which will be applicable, but only the provisions of Article 3 itself." Another interesting question concerns who is
bound by Article 3 common. According to this provision, any party to a non-international armed conflict has to apply the provisions laid down in Article 3, i.e., not only the government forces of the signatory party, but also the insurgents, although they never signed the Convention should be bound. The legal basis for imposing obligations, as laid down in Common Article 3, on subjects that never signed the very instrument is questionable. Lysaght argues that "when a government ratifies a convention it does so on behalf of all its nationals, including those who may revolt against it."535

3. Criticism and conclusions536

Many commentators have rejected the current distinction as described. The protection for civilian, PoW and injured people involved in fighting is absolutely inadequate in noninternational situations.537 The applicability of the four Geneva Conventions is too narrow in ratione personea and ratione materiae. The set of rules applicable to noninternational conflicts with Article 3 and Additional Protocol II are not satisfactory. Many commentators and institutions of high authority speak in favor of an application of the laws of war to all kind of armed conflicts that overstep a certain level538 This follows in particular from the goal of humanitarian law: The protection of the individual in any kind of armed conflict. Some commentators cite the ICJ in Nicaragua v. United States of America.539 They maintain that the Court expressed in
favor of the applicability of rules of the Geneva
Conventions other than Article 3 to noninternational
conflicts because the court stated that

[the United States is [on grounds of Article 1 of the
Geneva Conventions] under an obligation not to
encourage persons or groups engaged in the conflict in
Nicaragua to act in violation of the provisions of
Article 3 common to the four 1949 Geneva Convention...

However, this conclusion does not seem to be correct.
The author fails to say that the ICJ came to this conclusion
after two others had mentioned the same presumptions: The
actions of the United States against Nicaragua have to be
regarded under the rules of international law. Furthermore,
Article 3 is applicable as a minimum standard of
humanitarian law in armed conflicts of international armed
conflicts as well. Considering this, it seems obvious that
the ICJ did not want to apply Article 1 to noninternational
conflicts, but the outset was an international conflict in
which, of course, Article 1 and, in addition, Article 3 are
applicable.

A modest approach would be to lower the threshold for
the applicability of Protocol II to the same level as
Article 3 common of the Geneva Conventions demands, i.e.,
the only threshold for the applicability should be a certain
intensity of the armed conflict as laid down in Article 1
paragraph 3 of Protocol II. But this solution does not
provide any applicability of the implementation system of
the Geneva Conventions.
But also (at least indirect) individual responsibility on grounds of international law is in particular in non-international conflicts desirable and necessary. An efficient protection of human rights and imposition of humanitarian law in situations of war consist of two elements: The creation of norms that protect the individual by condemning the conduct and a set of rules that guarantees the efficient prosecution and punishment of the perpetrators. The conduct of insurgents were subject to "rules regarding violations of the laws of war, such as concerning war crimes and those encompassing the basic Nuremberg principles." Moreover, in particular in the situation of civil wars and insurrection against a established regime, the perpetrators belonging to the established system normally do not need to be afraid of prosecution unless the insurgents reach power. Therefore responsibility under municipal law is not very effective under these circumstances. Hence, on both sides of the insurgents and the established government, a direct individual responsibility on grounds of international law is necessary to gain a certain degree of deterrence. It has been proven that indirect individual responsibility for the commitment of grave breaches exist until now only for international conflicts.

Theoretically there are two possibilities to enlarge the applicability of the implementation system of the Geneva Conventions: Either to extend the application of the rules
in question as far as possible to all combatants and situation of armed conflicts (with maintenance of the distinction international - noninternational); or, to abolish the distinction between international and noninternational armed conflicts. The latter was a result of the ILC in draft Article 22, paragraph 2, that provides individual responsibility for exceptionally serious war crimes. According to this paragraph "for the purpose of this Code, an exceptionally serious war crime is an exceptionally serious violation of principles and rules of international law applicable in armed conflict...."\(^{541}\) In the commentary, the IJC declares that this expression also covers "non-international armed conflicts covered by Article 3 of the four conventions."\(^{542}\) It remains to be seen whether States are willing to accept the given proposals. Practice proves that states are more than reluctant to accept the applicability of international law in non-international conflicts.
CHAPTER V AND CONCLUSION
THE APPLICATION OF THE LAWS OF WAR TO UNITED NATIONS FORCES

In August of 1990, Iraq invaded Kuwait and declared it as a province of Iraq. The Security Council condemned the action as a breach of peace, called on Iraq to withdraw the troops and empowered the members of the U.N. to take non-military and military sanctions to enforce the request.543 On January 16, 1991, Allied forces under the command of the United States accomplished the Security Council Resolution and forced Iraq by use of military force to withdraw from the occupied Kuwait territory. In December of 1992, the Security Council decided to start a humanitarian relief operation in Somalia.544 In Kampuchea, the United Nations installed as a peace-keeping force a "Transitional Authority" to secure the peace treaty of Paris.545

The proliferation of United Nations operations in areas of conflict all over the world raises the question of whether the soldiers of the U.N. or national soldiers under U.N. authorization may commit war crimes, and with the consequences that there may exist also some individual responsibility. Are the United Nations forces bound to the Geneva Conventions III and IV? Can use of armed force under Security Council authorization be declared as "war" or
"armed conflict"? Are the laws of war applicable towards the United Nations forces? From this outset in particular two questions arise. Are U.N. soldiers protected by the humanitarian laws of war, in particular as PoW under Geneva Convention III. If this question is affirmed, with the consequence that against the members of the U.N. troops war crimes may be committed? The second problem is, if the United Nations may try and prosecute perpetrators analogous to the implementations system of the Geneva Conventions. Also in this Chapter only few international instruments and documents are available. Some important documents are worth closer consideration:

1. Proceedings of the American Society of International Law, 24-26 April 1952
2. Resolution of the Institute of International Law of 1963
3. Declaration of the Secretary General of 1956
4. Letter of the Secretary General to the ICRC of 1962
5. Resolution of the "Conseil des Delegates du Congres de la Croix Rouge Internationale" of 1964
6. Regulations of the Secretary General for UNEF, ONUC and UNIFICYP
7. Agreements between the United Nations and the Particants of UNIFICYP
1. Peacekeeping-Operations and Enforcement-Action under Chapter VII

Basically, one has to distinguish between U.N. troops as peace-keeping forces and U.N. forces enforcing Security Council decisions under Chapter VII.


In addition, the U.N. may intervene in a conflict on grounds of Chapter VII of the Charter on a formal and binding Security Council decision to enforce the restoration or maintenance of peace and international security. A precondition is that the Security Council states according to Article 39, that there exists a situation endangering international peace and security. Then, economic or military actions may be taken. The peace-keeping or enforcement action itself may either be lead by forces under national command on behalf of a U.N.-Resolution or under the command of the United Nations. In the latter case, the
forces may consist either of national contingents or set up through individual recruitment.\textsuperscript{551} Most military actions of the U.N. were executed either by states on behalf of the U.N.\textsuperscript{552} or were under United Nations command but consisted of national contingents\textsuperscript{553} because the organization does not possess sufficient military staff.

As it has been seen, the recent actions of the Security Council under Chapter VII like the humanitarian relief operation in Somalia, prove that the organization interprets the notion of "threat or breach for the international peace and security" in an extensive way. Furthermore the borderline between a peace-keeping operation and enforcement actions becomes more and more diffuse. Peace-keeping forces are only permitted to apply military force in cases of self-defense. Conversely, the soldiers of the relief action in Somalia were empowered to use force to secure the humanitarian operation. However, in the conflict in the territory of the former Yugoslavia the Security Council backed a resolution on Chapter VII that authorized the United Nations peace-keeping forces "to use force to insure that aid shipments reach those in need in Bosnia and Herzegovina."\textsuperscript{554}

2. Applicable Humanitarian Laws of War in United Nations Operations\textsuperscript{555}

In Resolution 678 of November 29, 1990, the Security Council authorized with 12 votes to 2 (Cuba and Yemen) and an abstention (China)
...under Chapter VII of the Charter...Member States co-operation with the Government of Kuwait, unless Iraq on or before 15 January 1991 fully implements, as set forth in paragraph 1 above [omitted], the above mentioned resolutions, to use all necessary means to uphold and implement resolution 660 (1990) and all subsequent relevant decisions and to restore international peace and security in the area;

This was the legal basis for operation "desert storm" that liberated Kuwait from the occupation by the Iraq forces. What existed between the United Nations and Iraq war? The situation is different as the United Nations does not only act as one State who defends its sovereignty, but the organization acts on behalf the whole community to restore or maintain international peace and security. Questionable is whether this has an impact on the application of the laws of war in relation to the aggressor and the United Nations forces. As seen, the majority of scholars interprets the notion war in the sense of "international armed conflict." Under the objective criteria of armed conflict fall all hostilities that overstep a certain intensity. Hence, from this point of view the laws of war remain applicable.

However, the United Nations is not a High Contracting Party of the Geneva Conventions or Additional Protocols. Hence, these instrument do not automatically bind the United Nations and soldiers acting for the Organization. Besides, the Geneva Conventions and Additional Protocols ignore the possibility of an involvement of the United Nations in an armed conflict. There is no existing convention addressing
to the conduct of United Nations forces "...[n]or has the United Nations enacted any special or detailed regulations of its forces." The question is, therefore, (1) if the aggressor State has to apply the Geneva Law to the forces of the United Nations and (2) if the United Nations forces are bound by the principles laid down in the Geneva Laws, either by analogous application, customary international law or declaration of the Secretary General.

2.1. Obligation of the Aggressor to Comply with the Geneva Conventions and Additional Protocols.

The Geneva Conventions and Additional Protocols are applicable in all situations of an international armed conflict. If the aggressor is a High Contracting Party, and this is very likely, then Article 2, paragraph 2, sentence 1 provides that the aggressor is only bound by the Convention in relation to the Non-Contracting Party "if the latter accepts and applies the provisions thereof." However, beyond this, most of the actus reus of the grave breaches are customary international law that binds the aggressor. Consequently, individuals belonging to the aggressor who commits war crimes against members of the forces of the United Nations remain individually responsible to the extent discussed earlier.


This issue was raised for the first time with the United Nations operation in Korea, where the "large-scale
hostilities by United Nations forces [led] inevitable [to]
certain breaches of the laws of war...." One of the
first international documents that addresses the involvent
of the United Nations is Resolution I of the
Intergovernmental Conference on the Protection of Cultural
Property in the Event of Armed Conflict.\footnote{563}

In 1956, during the UNEF operation, the issue arose as
to whether the United Nations forces are bound to
international humanitarian law. It was disputed after World
War II whether the United Nations could deviate from the
laws of war. This idea goes back to a doctrine that
proposed that on the grounds of the development in
international law towards illegality of aggression the
victim State should have the right to deviate from certain
laws of war.\footnote{564} The application of the principle of
discrimination towards United Nations forces was fostered by
several authors as well as the Institute of International
Law in a Resolution in September, 1963. However, both
references of law pointed out that this principle should not
be applicable to the humanitarian rules of warfare, i.e., to
the grave breaches of the Geneva Conventions and Additional
Protocols.\footnote{565} The Institute of International Law continued
its work\footnote{566} on the question what rules of armed conflict
should be applicable in hostilities in which the United
Nations forces are engaged and issued two Resolutions that
are the first overall approach to codify in detail the issue
of application of the laws of war on United Nations forces. Today the relevant documents on this issue. This consent led in 1971 to the adoption of Article 2 of the Zagreb Resolution that provides that

The Humanitarian rules of the law of armed conflict apply to the United Nations as of right and they must be complied with in every circumstances by United Nations Forces which are engaged in hostilities.

The rules to in the preceding paragraph include, in particular:

(a) the rules pertaining to the conduct of hostilities in general and especially those prohibiting the use or some uses of certain weapons, those concerning means of injury the other party, and those relating to the distinction between military and non-military objectives;

(b) the rules contained in the Geneva Conventions of 12 August 1949;

(c) the rules which aim at protecting civilian persons and property.

This provision covers almost all of the existing international law that provides individual responsibility for war crimes. (a) refers to the law of the Hague, which is nowadays partly embodied in Article 85, paragraphs III and IV of Additional Protocol I. The Geneva Conventions are explicitly mentioned in (b). (c) refers to Article 85, paragraph 3 (b) and Article 57, paragraph 2 (a) (iii) of Additional Protocol I, and Article 147 of Geneva Convention IV.
This view is also shared by the United Nations. The ICRC contributed considerably to this development. Already in 1956, during the UNEF operation the ICRC asked for a declaration of the Secretary General concerning the application of humanitarian law for the UNEF forces. From this time on a dialogue between the Secretary General and the ICRC emerged that confirms the content of Article 2 of the Zagreb Resolution. On November 8, 1962, the Secretary wrote to the ICRC that the UNO insisted on its armed forces in the field apply the principles of the Geneva Convention of 1949 as scrupulously as possible. Furthermore the ICRC issued resolutions that call on the United Nations to give a declaration that confirms the applicability of the Geneva Conventions. Indeed, until now such a declaration is missing. However, a step on this road are the directions of the Secretary General to the United Nations forces in the operations of UNEF, ONUC and UNFICYP. Hence, in these operations the applicability of the humanitarian law and in particular the Geneva Conventions and Additional Protocols was ensured. Article 3 A, paragraph 1, of the Zagreb Resolution tries to codify this practice. This applies at least as long as the United Forces are established by individual recruitment. If the United Nations force is composed of national contingents, Article 3 B, paragraph 1, of the Zagreb Resolution proposes that either the United Nations should
issue regulations directly to the soldiers or conclude agreement with the States that supply the contingent in which the compliance with humanitarian law is secured.\textsuperscript{573} Besides, even if it is denied that national contingents are bound by the position taken by the United Nations and if no agreements between the United Nations and the States contributing the contingents exist, the members of the national contingents remain bound and responsible to the same extent that their State is bound to either conventional or customary international humanitarian law. The same goes if a United Nations action is under the command of one State.

As a result it can be stated that there is a strong view within the United Nations and among scholars that the involvement of United Nations forces does not change any applicability of humanitarian law. If this result is achieved on grounds of customary international law, or an analogous application of conventional international law remains unclear. In particular, the content of the grave breaches in the Geneva Conventions remain applicable.\textsuperscript{574}

3. Enforcement and Criminal Jurisdiction\textsuperscript{575}

If one submits that the humanitarian rules of war and in particular the Geneva system of grave breaches remain applicable in conflicts where United Nations forces are involved, the logical consequence is to ask who should have the criminal jurisdiction to prosecute and punish the
perpetrators. Besides the jurisdiction of States here, the issue arises if the United Nations has at all the legal competence and capacity for criminal jurisdiction. Furthermore, one has to distinguish for whom the United Nations should have criminal jurisdiction: nationals of the aggressor, members of forces that were set up through individual recruitment, and members of national contingents. Finally, it remains the case of whether a State or a number of States act under the command of one State on behalf of the United Nations.

**Criminal Jurisdiction over members of United Nations Forces**

The Geneva Conventions provide for the principle of universal jurisdiction, i.e., every State is entitled and obliged to try (or extradite) soldiers who commit grave breaches. Consequently, it is out of the question that, in particular, the State whose national committed a grave breach of the Geneva Conventions has jurisdiction to try its national. This is valid in situations where States act on behalf of a United Nations authorization or the enforcement action is under United Nations command but consists of national contingents.

Disputed among commentators is whether the United Nations "itself could assume criminal and disciplinary jurisdiction over the members of the Force."\(^{576}\) The question arose in the aftermath of the Congo conflict.\(^{577}\) Seyersted answers this issue in the affirmative way,\(^{578}\)
however, without omitting that most commentators reject this approach. In particular, the implementation-system of the Geneva Conventions should be applicable to the United Nations. As already seen, the fathers of the Geneva Conventions had only States as Contracting Parties in mind. However, a teleological and dynamic interpretation should be able to overcome this failure. The Geneva Convention gives the Parties the choice to try or extradite. Consequently, as long as the United Nations does not possess a criminal court, it could hand over the perpetrator to another contracting party which has made out a prima facie case. However, this approach

will remain theoretical, as long as [United Nations forces] are composed, not of personel recruited individually, but of national contingents, and as long as the States providing these contingents...wish to retain the criminal power for themselves.

The recent United Nations forces in Yugoslavia, Kuwait and Somalia, yet, reveal that the tendency is just the opposite: More and more operation under Chapter VII are pure operations of States under the authorization of the United Nations. In this cases the contingent State of the culprit has to give his consent that the United Nations have jurisdiction over him. Nothing indicates that the States supplying the national contingents are willing to do so.

In peace-keeping operations, jurisdiction for military members is mostly restricted by agreements between the United Nations and the host country. These agreements
contain in particular provisions that establish immunity for the members of peace-keeping operations and confer exclusive jurisdiction upon the State that supplies the military members of the United Nations forces. At the 45th session of the General Assembly the Secretary General presented a "Model status-of-forces agreement for peace-keeping operations". This document should serve as model for further peace-keeping agreements. Under the chapter "jurisdiction" paragraph 46, sentence 1, provides that

[all members of the United Nations peace-keeping operations ....shall be immune from legal process in respect of words spoken or written and all acts performed by them in their official capacity.]

Paragraph 47 in particular addresses the criminal conduct of the members of the United Nations peace-keeping operation. The provision distinguishes between civilian component and military members of the operation. Whereas criminal proceedings in the host country against civilian component depends upon ad hoc concluded agreements between the Special representative/Commander of the peace-keeping operation and the Government of the host country

[military members of the military component of the United Nations peace-keeping operation shall be subject to the exclusive jurisdiction of their respective participating States in respect of any criminal offenses which may be committed by them in [host country/territory.]

To secure the prosecution of the offenders, paragraph 48 provides that the Governments of the participating States
exercise jurisdiction over their nationals who commit crimes in the territory of the host territory.
ENDNOTES

1. Compare U.S. News & World Report, November 9, 1992 at 66 and subsequence; Le Monde de Dimanche 27, 1992 at p. ...


7. U.S. News & World Report, November 9, 1992, at 73 and seq.

8. SZ, January 8, 1993, at 8; N.Y. Times, January 21, 93, at A3; SZ, February 6, 1993, at 11


20. Therefore, in contrast to an essay, problems are discussed in short. The references to other authors should help the interested reader to find more materials. Another consequence is that the reader has to deal with lots of provisions. This may be sometimes tiring, however, is prerequisite to comply with the intention of this work.

21. 137 Mil.L.Rev. at and seq.


27. hereinafter called ILC.


31. One example - without citation of the author - may be the generalization that the principles of Nuremberg constitute nowadays customary international law. But what does this mean? The individual responsibility for crimes against peace, against humanity and war crimes, or the existence of the mere actus reus itself or, perhaps, both? As we will see, e.g. the answer with regard to the existence of the actus reus of 'crime against peace' is different from the existence of individual responsibility for it.


33. Whereas according to the theory of State sovereignty the individual cannot be subject of international law, most other theoretical school of thoughts foresee the possibility of the individual as subject of international law: The natural law theory of Grotius as well as the humanitarian ideology of Lauterpacht as well as the sociological school in France recognize the position of the individual in international law. The different qualification of the relationship between international and municipal by the monistic and dualistic theory are furthermore important to answer the question what influence international law can have on the individual.

For further information see, e.g. Lyal S. Sunga, Individual Responsibility in International Law for Serious Human Rights Violations [hereinafter Individual Responsibility], at 149 and seq., in particular FN33; Karl J. Partsch, Individuals in International Law, in Encyclopedia of Public International Law [hereinafter Encyclopedia] (ed. Bernard and al.) at 316; Alfred Verdross and Bruno Simma, Universelles Voelkerrecht at @ 423 and seq.


36. Simma/Verdross, Universelles Voelkerrecht, supra note ..., at @ 423. For a broader investigation of the relationship between international law and individual duties compare Drost, Humanicide, at 223-297.

38. Two examples may be mentioned: Art. 29 of the Universal Declaration of Human Rights provides that "[e]verybody has duties to the community in which alone the free and full development of his personality is possible." G.A.-Res. 217 (III 1948)

Sentence 5 of the Preamble of the International Covenant on Civil Rights and Political Duties and the International Covenant on Economic, Social and Cultural Rights reads as follows: "Realizing that the individual having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant." 999 U.N.T.S. 172 and 993 U.N.T.S. 3.

39. Other for our purpose relevant current valid instruments like the Genocide Convention, Convention on Protection on Cultural Property follow this approach.

40. Pursuant to Tomuschat, Grundpflichten, supra note ... at 289 and seq., these cases constitute no direct responsibility of the individual under international law. To my mind this view is debatable because the responsibility of the individual is created on grounds of international law, only punishment and prosecution are laid down in municipal law. More carefully expresses Simma when he says that (translated by the author) "a true obligation of individuals under international law only exists if the individual can be directly called to account on grounds of international law." Simma/Verdross, Universelles Voelkerrecht, supra note... at @ 430 and seq., in particular @ 439.

To my mind, both Tomuschat and Simma does not distinguish between responsibility, punishment and prosecution. Responsibility, however, is constituted by the definition of the obligation and not by prosecution and punishment. The latter both are only a issue of the enforcement and effectiveness of law, but do not affect the law quality itself.

41. The distinction between documents and instruments is made to underline that only the latter category has legally binding nature.

42. For the purpose of this work all provisions are cited in arabic letters independent from the original source.


44. Art. 47: Crimes punishable by all penal codes, such as arson, murder, maiming, assaults, highway robbery, theft, burglary, fraud, forgery, and rape, if committed by an
American soldier in a hostile country against its inhabitants, are not only punishable as at home, but in all cases in which death is not inflicted, the severer punishment shall be preferred.

Art. 59 para. 1: A prisoner of war remains answerable for his crimes committed against he captor’s army or people, committed before he was captured, and for which he has not been punished by his own authorities.

Art. 71: Whoever intentionally inflicts additional wounds on an enemy already wholly disabled, or kills such an enemy, or who orders or encourages soldiers to do so, shall suffer death, if duly convicted, whether he belongs to the Army of the United States, or is an enemy captured after having committed his misdeed.

45. Frits Kalshoven, Constraints on Waging War [hereinafter Waging War] (1987), at 67 and seq. For the history of the Conventions compare Chapter II.1.3.

46. Kalshoven, Waging War, supra note..., at 68.

47. Reprinted in Schindler/Toman, Armed Conflicts, supra note..., at 88. Underlining added by author.

48. Kalshoven, Waging War, supra note..., at 68.


See also Chapter I.2.1.a.

50. Kalshoven, Waging War, supra note..., at 68.


52. 13 AJIL 151, 251, Supplement (1919).


58. Sunga, supra note... at 25

59. UNWCC, supra note..., at 25.


64. 82 U.N.T.S 279, 288

65. Compare second preambular paragraph of the London Agreement: "...German officers and men and members of the Nazi Party who have been responsible for or have taken a consenting part in atrocities and crimes will be sent back to the countries in which their abominable deeds were done in order that they may be judged and punishment according to the laws of these liberated countries...," 82 U.N.T.S. 279, 280 (1951). Underlining added by author.

66. see below.... Furthermore compare United Nations Doc. S/25266 of 10 February 1993 at ...

67. For the Tokyo Trials see Bert V.A. Roeling, *Tokyo Trials*, in *Encyclopedia*, supra note..., at 242-245. The author was one of the eleven judges of the IMT for the Far East. See also UNWCC, supra note..., at 257 and seq.


69. For the issue of immunity on grounds of the Act of State Doctrine compare Chapter I.3.1.
70. In this context, however, it should be noted that the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, adopted by Resolution 2391 (XXIII) of the United Nations General Assembly on 26 November 1968, prevents that "German War Criminals of World War II, who had not yet been apprehended, might escape prosecution because of the expiration of the periods of limitation applicable to their crimes." Schindler/Toman, Armed Conflicts, supra note, at 925. The Convention is published in 754 U.N.T.S. 73-129 (1970).


72. Article 1 provides that "THE CONTRACTING PARTIES confirm that Genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and punish."

73. The related Apartheid Convention was excluded from consideration because it does not belong to the laws of war in the narrow sense. Reprinted in 13 I.L.M. 50 and seq. (1974).

74. For citation compare FN.....


77. 75 U.N.T.S. 287, 387.

78. See Chapter II.3.2.a. (1).

79. See Sunga, Individual Responsibility, supra note ..., at 51, who also deals with the Geneva Conventions under the Chapter 'individual responsibility'.

80. Properly speaking this belongs to issues related to customary international law.
81. See Chapter II.3.2.a (1)
82. Chapter I.2.2.b.

83. Another way to achieve the same goal is presented in the French Document, supra note...: Direct international responsibility may also be established by Security Council resolution under Chapter VII, that reiterates the relevant provisions of the Genocide Convention and Geneva Law.


85. Schindler/Toman, Armed Conflicts, at 756.

86. War crimes, crimes against humanity and crimes against peace.


88. For war crimes this view may be affirmed on grounds of the existing Geneva and The Hague law. Compare Chapter I.1. and III.1.

89. Introductory note to the Nuernberg Principles in Schindler/Toman, Armed Conflicts, supra note..., at 923.

90. The expression 'document' in this context is used to express the non-binding character in contrast to 'instrument'.


95. One main obstacle was the crime against peace and the missing definition of the term aggression. Compare for further information Leo Gross, Draft Code of Offenses


97. The 1991 Draft includes beside the crimes against peace and exceptionally serious war crimes also, e.g., genocide, apartheid, mass violations of human rights, torture and mercenary. The Draft including considerations is reprinted in U.N. Document A/46/10 at 198-278 and subsequent.

For the work of the ILC on the Draft see the reports of Stephen C. McCaffrey of the 34th through 43rd session of the ILC. In chronological order: 77 AJIL 323, 78 AJIL 457, 79 AJIL 755, 80 AJIL 185, 81 AJIL 698, 82 AJIL 144, 83 AJIL 153, 83 AJIL 937, 84 AJIL 930 and 85 AJIL 703.


98. Another argument that was invoked to maintain direct individual responsibility in general was that the trials and judgements of Nuernberg and Tokyo constitute a precedent with binding force for adjudicating tribunals later in similar cases. However, already in 1947 Kelson showed convincing the substantive and formal defects of this argument. Kelson, Will the Judgement in the Nuremburq Trial Constitute a Precedent in International Law?, 1 Int’l L.Q. 2 at p. 153-171. On this issue furthermore compare Sunga, supra note... at p. 33. However, this standpoint is disputed. The Commission of French Jurist, e.g., several times invokes Nuernberg as precedent in the reasoning of the proposals for an ad hoc international tribunal for the territory of the former Yugoslavia, compare French report, supra note..., U.N. Doc. S/25266 at 25 para. 95 and 26 para. 96.


101. The actus reus for that prosecution by the tribunal is foreseen is restricted to genocide and war crimes as laid down in the enumeration of grave breaches in the Geneva Convention. See French Report, supra note..., U.N. Doc. S/25266, at 20.

102. Id. at 8.

103. Simma/Verdross, Universelles Voelkerrecht, supra note..., at @ 571.

104. Compare Chapter I.2.1. FN...

105. Sunga, Individual Responsibility, supra note..., at 19. Author added underlining.

106. Id. at 19.


108. See Chapter II.3.2.a. (1).


110. This issue is given consideration in Chapter II for reasons of interrelationship of the problems arising for the actus reus and the individual responsibility.

111. See Chapter III.2.4. for the establishment of an ad hoc Tribunal in relation to events in the territory for the former Yugoslavia.


115. Compare Chapter III.2.4. for the competence of the Security Council.

116. Levie, Armed Conflicts, supra note..., at 880.
117. Bert. V.A. Roeling, Crimes Against Peace, in Encyclopedia, supra note..., at 133. For political reasons, however, Napoleon was only sent in exile on the island of Elba.

118. 13 AJIL 151, 250, Supplement (1919). Interesting in this context is that the Japanese as well as the United States representative at the Commission on Responsibility of Authors of the War spoke against an individual responsibility for the former Emperor. See Chapter III.2.1. Compare also Herzog, Nuremberg, supra note..., at 13-16 and UNWCC, supra note..., at 46-52.

119. 82 UNTS 279, 288.


121. Art. 4 reads as follows: "Persons committing genocide or any of the other acts enumerated in Article III shall be punishment, whether they are constitutionally responsible rulers, public officials or private individuals." Genocide Convention, supra note.... Reprinted in 78 U.N.T.S. 277,....


Article 3 of the ILC Draft of 1954: The fact that a person acted as Head of State or as responsible government official does not relief him of responsibility for committing any of the offenses defined in this Code." Reprinted in Y.B. ILC 1954, vol. II, at 149, 152.


Article 5 para. 1 of the 'Italian Report': "The official status of the author of any of the crimes referred to in article 4, and particularly the fact of having acted in the capacity of head of State or member of the Government, does not exclude criminal liability." Italian Report, supra note..., U.N. Doc. S/25300, at 3.
125. E.g. Levie, Armed Conflicts, supra note... at 881.
126. Kalshoven, Waging War, supra note..., at 67.
127. 82 U.N.T.S. 279, 288.
128. So argues e.g......
129. So e.g. French Report, supra note..., at 24 para. 86.
130. Compare IMT in.... Art. 71 of the Lieber Instructions is an earlier instrument that addresses to orders of superiors. Reprinted in Schindler/Toman, Armed Conflicts, supra note..., at 13.
133. YB ILC 1988, vol. II (part II), at 69.
134. Roeling, Aspects of Criminal Responsibility, supra note..., at 216.
137. A summary of the case gives John A. Appleman, Military Tribunals, supra note..., at 165-176.
139. E. Roeling, Aspects of Criminal Responsibility, supra note ___ at 214, et seq.
140. The text is reprinted in Chapter II.3.2.a (1).
141. Art. 3 of the Genocide Convention, supra note..., reads as follows: "The following acts shall be punishable:
(a) Genocide
(b) Conspiracy to commit Genocide
(c) Direct and public incitement to commit Genocide
(d) Attempt to commit Genocide
(e) Complicity in Genocide

142. French Report, supra note..., at 63. I have to admit that I do not support the qualification as separate crime and prefer myself to list it as a further mode of conduct. The French proposal also refers to the crimes laid down in article VI of the report. Furthermore it is laid down in the context with other modes of conduct in article VII. The qualitative difference is that there is no specific link (and therefore no burden of proof) to the actual committed crime.


145. Art. 86 para. 2 reads as follows: "The fact that a breach of the Convention or of this Protocol; was committed by a subordinate does not absolve his superiors from penal disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach." 16 ILM 1391, 1428, 1429 (1977).

146. See Chapter I.3.2.b.(1) and I.3.2.a.

147. Compare Art. 15 through 26 of the ILC Code of 1991, supra note..., and the commentaries. Art. 7 para. 1 (b) of the French Report reads as follows: "The crimes referred to in article VI shall be deemed to have been committed by an individual who... [g]ave orders for the commission of one or more of the said crimes;" U.N. Doc. S/25266 at 63.

148. Principle 7 reads as follows: "Complicity in the commission of a crime against peace, a war crime, or a crime against humanity as set forth in Principle VI is a crime under international law." Y.B. ILC 1950, vol. II, at 377.
149. Article 2 para 13 (iii) reads as follows: "Complicity in the commission of any of the offenses defined in the proceeding paragraphs of this article." Y.B. ILC 1950, vol II, at 152.

150. Art. 3 para. 2 reads as follows: Any individual who aids, abets or provides the means for the commission of a crime against the peace and security of mankind or conspires in or directly incites the commission of such a crime is responsible therefor and is liable to punishment." U.N. Doc. A/46/10, at 198, 251.


152. See e.g. ___.

153. Principle 6 (a) (ii) of the Nuernberg Principles: "Participation in a common plan or conspiracy for the accomplishment of any of the acts mentioned under (i)." ILC 1950, vol. II, at 374, 376.


155. Id. at 198, 253.

156. Some commentators argue.....; others....


   Art. 3 para. 3 of the ILC Draft of 1991: "Any individual who commits an act constituting an attempt to commit a crime against the peace and security of mankind [as set out in arts. ...] is responsible therefor and is liable to punishment. Attempt means any commencement of execution of a crime that failed or was halted only because of circumstances independent of the perpetrator's intention." U.N. Doc. A/46/10, at 198, 251.

158. ibid. at 254


160. Art. 2 reads as follows: "The characterization of an act or omission as a crime against the peace and security of mankind is independent of internal law. The fact that an act or omission is or is not punishable under internal law does
not affect this characterization." U.N. Doc. A/46/10, at 238.

161. U.N. Doc. A/46/10 at 242. Art. 86 para. 2 of Additional Protocol I was the model for Art. 12 of the Draft. This reflects the substantial identical wording. For the commentary to Art. 12 see YB ILC 1988, vol. II (part II), at 70.

162. Compare Chapter I.3.2.(a) FN.....


165. Compare Yoram Dinstein, The Defense of Superior Orders in International Law, at 156-164 (1965); See also Sunga, Individual Responsibility, supra note..., at 59, 60.


167. Compare art. 46 of Geneva Convention I, art. 47 of Geneva Convention II. See also Bristol, The Laws of War and Belligerent Reprisal Against Enemy Civilian Populations, 21 A.F.L.Rev. 397-431 (1979) and Sunga, Individual Responsibility, supra note..., at 60 and seq.

168. Sunga, Individual Responsibility, supra note..., at 55.

169. This issue arose in particular with the crime against peace. With regard to the intended judgement of former Emperor Wilhelm II for breach of the peace (see below...) the representative of the United States in the Commission on Responsibility of Authors of the War stated that there should not be a "punishment created after the commission of the act." Reprinted in 14 AJIL 95, 136. The same criticism was announced after World War II for the creation of individual responsibility for crimes against peace. See Chapter II.2.1.

171. Already in this early case the defence of superior orders was rejected. For the trial compare Sunga, Individual Responsibility, supra note..., at 18, 19 and Levy, Armed Conflicts, supra note..., at 904.

172. See 16 AJIL 708 (1922).

173. A similar provision contains the special proclamation that created the IMT for the Far East. Compare Levy, Armed Conflicts, supra note..., at 904.


175. Sunga, Individual Responsibility, supra note..., at 57.


177. Principle 4: "The fact that a person acted pursuant to order of his government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him." Y.B. ILC 1950, vol. II, at 374, 375.

178. Art. 11 of the ILC Draft of 1991 reads as follows: "The fact that an individual charged with a crime against peace and security of mankind acted pursuant to an order of a Government or a superior does not relieve him of criminal responsibility if, in the circumstances at the time, it was possible for him not to comply with the order." U.N. Doc. A/46/10, at 198, 242.

179. Most commentator approve the existence of customary international law. See e.g. Sunga, Individual Responsibility, supra note..., at 56.


182. Levy, Armed Conflicts, supra note..., at 904.

183. Art. 7 para. 3 of the French Report, supra note..., is substantially identical with Art. 13 of the Draft. Compare U.N. Doc. S/25266, at 64. Therefore it is here not reprinted. The wording of Art. 5 of the Italian Report, supra note..., is slightly different: "The fact that the author of one of the crimes referred to in article 4 may have acted on the orders of a Government or of a
Hierarchical superior does not exclude criminal liability if, given the circumstances at the time of the offence, the offender had the possibility to disregard such orders." U.N. Doc. S/25300, at 3.


185. For the monistic and dualistic theories compare Verdross/Simma, Universelles Voelkerrecht, supra note..., at @ 71-74.


187. Principle 2 reads as follows: "The fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law." Reprinted in YB ILC 1950, vol. II, at 374, 375.


189. Article 10 para. 2 of the ILC Draft of 1991 reads as follows: "Nothing in this article shall preclude the trial and punishment of anyone for any act which, at the time when it was committed, was criminal in accordance with international law or domestic law applicable in conformity with international law." For the text and commentary see YB ILC 1988, vol. II (part II), at 69, 70.


191. Compare Chapter I.


193. Beyond this, according to the Geneva Conventions, a state is not only entitled but obliged to extradite or prosecute the offender.

194. The fact that actors in international law are, first and foremost States includes also the consequence that States (1) have obligations and (2) are responsible for certain conducts. Most commentators also agree that certain breaches of international law constitute e.g. because of their intensity a (3) criminal action. They are a crime against every nation and may be called, therefore,
international crime. The ILC is working for decades on Draft Code for State Responsibility. Article 19, that addresses to international crimes and international delicts, defines international crimes as

"[a]n internationally wrongful act which results from the breach by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole, constitutes an international crime."

But this seems to be one of the few points of consensus. Highly disputed is what consequences follow from a breach of international law, i.e. (4) what kind of responsibility exists: penal or only civil sanctions (reparation) and connected with this issue (5) what enforcement should be applied. Compare Bassiouni, International Criminal Law, supra note..., at 19 and 146 and seq. See further Drost, Humanicide, supra note...; For the work of the ILC on the Draft Code compare Shabtai Rosenne, The International Law Commission's Draft Articles on State Responsibility and Marina Spinedi & Bruno Simma (ed.), United Nations Codification of State Responsibility. A critical analysis of article 19 can be found in Weiler, Casses & Spinedi (ed.) International Crimes of States.

195. For a survey compare Bassiouni, International Crimes, supra note..., at 1-27.

196. Instructive Sunga, Individual Responsibility, supra note... at 17 and seq.

197. Sometimes, like in the Genocide Convention, a crime refers to both situations.


199. Levie, Armed Conflicts, supra note...., at lv.

200. Id. at lv.

201. Yoram Dinstein, International Criminal Law [hereinafter Criminal Law], 5 IYoHR 55, 68.

202. Alike Bassiouni, International Criminal Law, supra note... at 147 point 1.1.


204. Levie, Armed Conflicts, supra note..., at lv. A different categorization can be found in Ingrid Detter de Lupis, The Law of War, at 56-67 (1987). Also Yoram Dinstein
draws a different classification: (1) Peace-time offenses and war-time offenses, (2) private and official offenses, (3) offenses connected and offenses not connected with human rights violations. Dinstein, Criminal Law, supra note... at 75.

205. The categorization of 'crimes against humanity' under 'protection of fundamental human rights' is problematic because the application of crimes against humanity originally was restricted to situations that have certain links with war. In contrast according to article 1 Genocide is applicable in situations of war as well as situations of peace. Therefore, it should be added that "[b]oth, [crimes against humanity and Genocide] are in some respect also within the scope of war crimes." Levie, Armed Conflicts, supra note..., at liv.

206. For reasons of completeness three other instruments should be mentioned:

Declaration Respecting Maritime Law, signed at Paris, 16 April 1856. Reprinted in Schindler/Toman, Armed Conflicts, supra note..., at 787.

Convention For the Amelioration of the Condition of the Wounded in Armies in the Field, signed at Geneva, 22 August 1846. Id. at 279.

Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, signed at St. Petersburg, 29 November/11 December 1868. Id. at 101.

207. The Peace Conference of The Hague of 1899 intended, beside the goal reflecting its name, to conclude instruments for the "limitation [of] the progressive development of existing armaments". Schindler/Toman, Armed Conflicts, supra note..., at 49. Three conventions were concluded: Convention I for the Peaceful Adjustment of International Differences, Convention II Regarding the Laws and Customs of War on Land and Convention III for the Adaption to Maritime Warfare. The Second International Peace Conference at The Hague of 1907 concluded ten conventions, that partly revised the existing three conventions and enlarged the rules on behavior in times of war. The rules are partly adopted and revised in the Additional Protocols of 1977 to the Geneva Conventions of 1949. The Conventions of 1899 and 1907 are reprinted id. at No. 7, 38 (Conventions of 1899), 6, 8, 41, 63-68, 85 and 86 Conventions of 1907). For the History of the Conferences and Conventions see furthermore Joerg M. Moessner, Hague Peace Conferences of 1899 and 1907, in Encyclopedia, supra note..., at 204 and seq.

208. For the History of the Conventions compare Jean S. Picet, Commentary to Geneva Convention III, Introduction.

209. See Chapter I.1.
210. See Chapter IV.1.2.b.(1)

211. "The very basis of humanitarian law is that some means, irrespective of the legitimacy of course, must not be used even in situations of war." Burgos, Humanitarian Law, supra note..., at 22.

212. Combatants, Civilians and PoW.

213. Compare Lupis, War, supra note... at 130; See also Michel Veuthey, Guerilla et Droit Humanitaire [hereinafter Guerilla], at 4-6 (1983).

214. A list of all international humanitarian law instruments can be found in Veuthey, Guerilla, supra note..., at 3 FN 12.

215. Id. at 5 FN 19.

216. Id. at 5 FN19

217. Id. at 5, 6; See also Lupis, War, supra note..., at 128 and Levie, Armed Conflicts, supra note, at lv.

218. E.g. article 1 Genocide Convention. Alike Sunga, Individual Responsibility, supra note..., at 15-17.

219. Lupis, War, supra note..., at 129.

220. Lupis divides the laws of war into two groups: (1) Jus ad bellum and jus in bello and (2) The law of The Hague and the law of Geneva. Lupis, War, supra note... at 126-129. This view, however, does not consider the fact that to a large extent it is precisely The Hague law and the Geneva law that are a major part of the existing jus in bello.


222. Lupis, War, supra note..., at xx.

223. U.N. Charter, art. 2 para. 4.

224. Bert V.A. Roeling, Crimes Against Peace, in Encyclopedia, supra note..., at 133.
225. For the history of the Peace Conferences of The Hague and the Conventions compare Chapter II.1.3.


227. 13 AJIL 151, 250, Supplement (1919).

228. Commission on Responsibility of Authors of the War, 14 AJIL 95, 118, Supplement (1920).

229. Id. at 120.

230. Id. at 120.


233. Article 10 para. 1 sent. 1 reads as follows: "The members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League." 13 AJIL 128, 131, Supplement (1919).

234. 13 AJIL 128, 134, Supplement (1919).

235. Roeling, Crimes Against Peace, supra note..., in Encyclopedia, at 133, 134.

236. Published in 22 AJIL 109, Supplement (1928). For further information compare Cynthia D. Wallace, Kellogg-Briand Pact, in Encyclopedia, supra note..., at 236-239.

237. 22 AJIL 109, 115, Supplement (1928).

238. Roeling, Crimes Against Peace, supra note...., in Encyclopedia at 133.


240. 82 U.N.T.S. 279, 288 (1945).

242. This opinion supports also the fact that the subordinate soldier in most cases has not the political knowledge to decide whether he participates in an act of aggression or self-defenses. Government controlled medias like ... in rest-Yugoslavia are a striking example to influence the public opinion about the initiation, course and background of a conflict.


244. For briefing of the case see Appleman, Military Tribunals, supra note..., at 229-236.

245. Id. at 177-189.

246. Levie, Armed Conflicts, supra note.. at 908.

247. Apart from individual responsibility for it.


250. Sunga, Individual Responsibility, supra note..., at 37.

251. In a declaration dealing with aggression adopted by the Assembly of the League of Nations on September 24, 1927, the members of the League "declared... that war [is] an international crime." YB ILC 1950, vol. II, at 376 para. 112. Germany subscribed this declaration. For further examples compare id. and John P. Kenny, A Philosophical Study of the International Military Tribunal [hereinafter Philosophical Study], at 5-9.

252. Alike Sunga, Individual Responsibility, supra note... at 36 and seq.; Affirmative also Kenny, Philosophical Study, supra note..., at 8-9.

253. Compare Sunga, Individual Responsibility, supra note..., at 36 and seq.


255. For the legal value of the reference of the United States Military Tribunal to Ex part Quirin compare Sunga,
Individual Responsibility, supra note... at 38 with further references.

256. See Chapter II.2.1.

257. U.N. Charter, art. 51.

258. U.N. Charter, art. 39 and 41.

259. U.N. Charter, art. 39 and 42.

260. U.N. Charter, article 103.

261. Prohibition of a certain conduct is one of the criteria laid down above at Chapter II.1.1. for the qualification of the act as crime under international law.

262. A different issue is individual responsibility therefor. However, some commentators speak in favor of existing customary international law. Compare Sunga, Individual Responsibility, supra note..., at 21 and Roeling, Crimes Against Peace, in Encyclopedia, supra note...., at 136.

263. Different to evaluate is the issue of individual responsibility.

264. One of the few non-members is Switzerland.

265. Compare Veuthey, Guerilla, supra note...., at 6.

266. Art. 16 of the ILC Draft of 1991 reads as follows: "1. An individual who as leader or organizer commits or orders the commission of a threat of aggression shall, on conviction thereof, be sentenced. 2. Threat of aggression consists of declarations, communications, demonstrations of force or any other measures which would give good reason to the Government of a State to believe that aggression is being seriously contemplated against that State." U.N. Doc. A/46/10 at 198, 245.


269. Id. para. 2

270. GAOR, 44th Session, Supplement No. 10 (A/44/10) at 180-182.


272. Resolution 3314 (XXIX) on the Definition of Aggression of December 14, 1974. GAOR 29th Session, Supp.21

273. See in particular article 1 and 3 of the Resolution.

274. For more information see Commentary to article 15 in YB ILC 1988, vol. II (part II), at 71, 72.

275. Art. 1 of Resolution 3314 and article 15 para. 2 and 3 of the ILC Draft of 1991.

276. Art. 3 of Resolution 3314 and article 15 para. 4 of the ILC Draft of 1991.

277. Compare art. 15 para. 4 (a), (b), (c) and (g) of the ILC Draft of 1991. U.N. Doc. A/46/10 at 198, 244.

278. U.N. Charter, art. 39-42 and 51 in particular.

279. Reprinted in Chapter II.2.1.


281. Friendly Relations Declaration, supra note....


283. Roeling, Crimes Against Peace, supra note..., at 136.

284. Art. 38 (b) of the Statute of the ICJ reads as follows: "The Court, whose function is to decide in accordance with international law, shall apply... international custom as evidence of a general practice accepted as law."

285. See Roeling, Crimes Against Peace, supra note... at 135, 136.

286. Similar Sunga, Individual Responsibility, supra note... at 41 when he writes: "Whether the definition of crimes against peace includes individual responsibility is as yet unclear."
In favor this view speaks furthermore that despite article 15 and 16 of the Draft of the ILC neither the French, nor the Italian or CSCE Report included a prosecution of crimes against peace.

287. Compare Sunga, Individual Responsibility, supra note... at 17 and seq. Compare id. at FN4 in particular for further details.


289. Lieber Instructions, article 47, supra note... Reprinted in Schindler/Toman, Armed Conflicts, supra note...., at 3.


291. 13 AJIL 151, 250, Supplement (1919).

292. The Tokyo International Military Tribunal applied a similar regulation laid down in their Charter. For the history of the Trials compare Chapter I.2.1.

293. 82 U.N.T.S. 279, 288.


296. The Geneva Law contains also crimes against humanity. See Chapter II.4.2.b.


301. 16 ILM 1391, 1428 (1977)

302. Article 2 and 3 are common all four Conventions. Citations therefore are only given to one of the

303. For the problems arising from this formulation see Chapter IV.1.

304. Most commentators take the view that article 3 common is also applicable in situations of international armed conflict. Compare French Report, supra note..., at 21 para. 67.

305. Schindler/Toman, Armed Conflicts, supra note..., at 605. Compare id. for a short introduction to Additional Protocol I.

306. 75 U.N.T.S. 135, 238.

307. For reasons of space this article is not reprinted here. See 75 U.N.T.S. 135, 138.

308. 75 U.N.T.S. 287, 388.

309. 75 U.N.T.S. 287, 290.

310. Jean S. Picet, Commentary to Convention IV, at 46.

311. For the deliberations of the French Committee of Jurists on this issue compare para. 60-62 of the French Report, supra note..., at S/25266 at 19 para. 60-62.


313. S/25266 at 25 para. 91.

314. Yugoslavia ratified the Conventions on 21 April 1950. Serbia and Montenegro regard itself as successor of the former Yugoslavia. For the newly independent States in the territory of the former Yugoslavia compare declarations of succession above Chapter I.2.c.


318. Article 11 para. 2 (a)-(c).

320. This issue is addressed in Chapter IV.

321. For references compare Chapter IV.1.2.b.(4)


325. 75 U.N.T.S. 287, 388.


328. Compare article 6 para. 1 (b) (vi). Reprinted in Chapter II.3.2.a.(1)

329. The French argument, however, is presumably that "the competence of the Tribunal may be limited to the most heinous crimes. French report, supra note...., U.N. Doc. S/25266 at 21 para. 67.


331. Id.

332. Compare Additional Protocol I, article 53 sub-para. (b).

333. See Chapter II.1.1.

334. UNWCC, supra note..., at 34, 35.

335. French Document, supra note.... at 19 para. 59 (c).


338. U.N. Doc. A/46/10 at 198, 269. Article 22 of the ILC Draft reads as follows:

Exceptionally serious war crimes

1. [omitted] compare Chapter I above....

2. For the purpose of this Code, an exceptionally serious war crime is an exceptionally serious violation of principles and rules of international law applicable in armed conflict consisting of any of the following acts:

(a) acts of inhumanity, cruelty or barbarity directed against the life, dignity or physical or mental integrity of persons [, in particular wilful killing, torture, mutilation, biological experiments, taking hostages, compelling a protected person to serve in the forces of a hostile Power, unjust delay in the repatriation of prisoners of war after the cessation of active hostilities, deportation of transfer of the civilian population and collective punishment];

(b) establishment of settlers in unoccupied territory and changes to the demographic composition of an occupied territory;

(c) use of unlawful weapons;

(d) employing methods or means of warfare which are intended or may be expected to cause widespread, long-term and severe damage to the natural environment;

(e) large-scale destruction of civilian property;

(f) wilful attacks on property of exceptional religious, historical or cultural value.

339. For the commentary on the article, compare id. at 198, 269-274.

340. A very cynical expression when one deliberates what war crimes are not serious!


342. id. at 270

343. Id. at 198, 269.

344. Hereinafter only article 147 of Convention IV is cited. This provision includes the actus reus of article 130 of Convention III. See Chapter II.3.2.a.(1).
345. For a list of relevant instruments and documents that should be included under this term see commentary of the ILC. Reprinted in U.N. Doc. A/46/10 at 198, 272 para. (8).

346. Id. at 271.

347. Article 2 common of the four Geneva Conventions and article 1 of Additional Protocol I.


349. International Instruments and Documents: .......


351. Schindler/Toman, Armed Conflicts, supra note..., at 70.

352. Leo Kupfer, Genocide [hereinafter Genocide], at 105. Compare id. for the genocide against Armenians at 101-120.

353. Compare Sunga, Individual Responsibility, supra note...., at 42 and Bassiouni, Crimes against Humanity, in 1 International Criminal Law 51-71 (Bassiouni e. 1986).

354. UNWCC, supra note..., at 36.

355. For a survey compare Sunga, Individual Responsibility, supra note..., at 42, 43.

356. Id. at 47.

357. E.g. the deportation of Jews, Gypsies, Catholics and Protestants under the Hitler regime.

358. Compare for further information, e.g. Sunga, Individual Responsibility, supra note... at 44-46.

359. G.A. Resolution 3068 (XXVIII) on 6 December 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid (1973). Article 1 (stimmt das) explicitly mentions that Apartheid is crime against humanity. Article 3 provides individual responsibility for the perpetrators. The prosecution and punishment follows the Geneva system, i.e. by implementation into the municipal legal system, article 4 (b). Reprinted in 13 ILM 50 and seq.

360. For the history of this term compare U.N. Doc. E/CN.4/Sub.2/1985/6 at 6 para. 19. The interested reader may find a useful bibliography in Kupfer, Genocide, supra note..., at 221-236.
361. Id. at 7 para. 22. For further information on the German genocide against Jews compare Kupfer, Genocide, supra note..., at 120-137.

362. 78 U.N.T.S. 277

363. Art. 6 (c) of the IMT Charter. Reprinted in Chapter II.4.1.


365. Schindler/Toman, Armed Conflicts, supra note..., at 231.


367. Similar Schindler/Toman, Armed Conflicts, supra note..., at 231.

368. Compare article 3 of the Convention. reprinted in Chapter I.3.1.b.(1)

369. 78 U.N.T.S. 277, 278.

370. For different opinion, see Lawrence J. LeBlanc, The United States And the Genocide Convention, at 35 and seq. (1991).


373. Id. at 16 para. 29.


376. Id. at 19 para. 39.

377. Id. at 16 para. 30.

378. Compare id. at 18 FN25 for commentators supporting the adoption of political groups in the catalogue. Bassiouni, however, excluded political groups in his draft article 4 that refers to Genocide. Compare Bassiouni, International Criminal Law, supra note..., at 73.


382. The actus reus of article 6 para. 1(a) of the French report is identical with article of the Genocide Convention. Yugoslavia ratified the Convention on 29 August 1950.


385. Another, more difficult issue is whether insurgents are bound on conventional international law, that the Government, but not the insurgents signed. See Chapter IV.


389. This part is identical with article 130 of Convention III.

390. 75 U.N.T.S. 278, 313.

391. Article 2 common to the four Geneva Conventions.

392. 75 U.N.T.S. 287, 313.

393. Additional Protocol I, Article 85 para. 4 (c). Reprinted in 16 ILM 1391, 1428.


395. Article 4 (c) of the Italian Report, supra note.... Reprinted in U.N. Doc. S/25300 at 3. Article 4 (c) reads as follows:

Crimes against Humanity consisting of systematic or repeated violations of human rights, such as wilful murder and deliberate mutilation, rape, reducing or keeping
persons in a state of slavery, servitude or forced labor, or persecuting or heavily discriminating against them on social, political, racial, religious or cultural grounds; or deporting or forcible transferring population; The CSCE report, supra note..., makes a reference to crimes against humanity in S/25307 at pp. 110, 11 para. 6.

396. Article 3 para. (1) (c).

397. Compare article 4 para. 2. Reprinted in 16 ILM 1442, 1444.

398. Sunga, Individual Responsibility, supra note..., at 47.

399. Compare Chapter I.1.

400. Therefore article 5 of the Apartheid Convention, that is drafted similar to art. 6 of the Genocide Convention (compare below), as well as art. 22 of the Torture Convention, that foresaw the possibility to establish a Torture Committee, are not investigated.


402. Compare Chapter I.1. and I.2.2.a.

403. Art. 146 para. 2 sentence 2 reads as follows: "It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case." 75 U.N.T.S. 287, 386.


405. The Netherlands, Switzerland and Sweden belong to the few countries that implemented the grave breaches in the municipal law. Others, like the Federal Republic of Germany argue that their existing penal law is sufficient to ensure the compliance with the obligations under the Geneva law. Therefore, an implementation would not be necessary.

406. Telford Taylor, Foreword to Levie, Armed Conflicts, supra note..., at xxiii.

407. For the facts and a legal appreciation compare e.g. Telford Taylor, Nuremberg and Vietnam: an American Tragedy [hereinafter An American Tragedy], at 123-154. From the legal point of view it is interesting that Taylor "focus[ed]
on the anomalous nature of international law on guerilla warfare.... [T]he refusal of the Vietcong to wear uniforms.... is a violation of the Geneva Conventions. The trust of this argument is that the Vietcong themselves are responsible for the massacre at My Lai. Jay W. Baird, From Nuremberg to My Lai [hereinafter My Lai], at 257 (1972).

408. Other examples are the Treaty of Vereening. Bassiouni, International Crimes, supra note..., at 858.

409. Telford Taylor in Levie, Armed Conflicts, supra note..., at xxiv.

410. Already at The Hague Peace Conference of 1907 the Parties agreed on a declaration on obligatory arbitration as mean of peaceful settlement of disputes. The effort to establish an permanent international court failed, however, at least a Draft Convention for the creation of a Court of Arbitral Justice was concluded. This was the first step to the creation of the PCIJ in 1922. The successor of the PCIJ became after World War II the ICJ. According to article 36 of the Statute of the ICJ the Court has, among others, the competence to interpret treaties and solve any questions of international law. Furthermore, according to Chapter IV of the Statute of the ICJ the Court may give advisory opinions.

411. E.g. retroactive application of international law.

412. This idea is not new. Before World War II V.V. Pella "put forward a draft statute for the establishment of a criminal chamber within the Permanent Court of International Justice." U.N. Doc. A/46/10 at 234 para. 163.


414. Sunga, Individual Responsibility, supra note..., at 117.

415. Glaser, Droit International Penal, supra note..., at 146.

416. Art. 1 of Convention (XII) Relative to the Creation of an International Prize Court, signed at The Hague, 18 October 1907. Reprinted in Schindler/Toman, Armed Conflicts, supra note...., at 825 and seq.

417. Glaser, Droit International Penal, supra note..., at 147.

418. Commission on the Responsibility of Authors of the War, 14 AJIL 95, 120.
419. Id. at 136 and Herzog, *Nuremberg*, supra note..., at 13, 14.


421. See Chapter I.2.1.

422. 13 *AJIL* 151, 251 Supplement (1919).


424. UNWCC, supra note..., at 48.

425. UNWCC, supra note..., at 48. For further information on the trials compare id. at 46-52 and Herzog, *Nuremberg*, supra note..., at 17-20.

426. For the International Military Tribunal for the Far East compare e.g. Appleman, *Military Tribunals*, supra note..., at 237-267.

427. Art. 1 of the Charter of the IMT, which was according to Art. 2 of the London Agreement an integral part of the latter provided that "...there shall be established an International Military Tribunal... for the just and prompt trial and punishment of the major war criminals of the European Axis." 82 *U.N.T.S.* 279, 284.

428. Art. 6 of the London Agreement provided that "[n]othing in this Agreement shall prejudice the jurisdiction or the powers of any national or occupation court established or to be established in any Allied territory or in Germany for the trial of war criminals." 82 *U.N.T.S.* 279, 286, 288.

429. For a survey over the cases compare Appleman, *Military Tribunals*, supra note..., at 267-300.

430. See Minear Victors' Justice: *The Tokyo War Crimes Trials* (1971);


433. Compare Leipzig Trials after World War I.

Court and Draft Statute for an International Criminal Court.


438. LeBlanc, Genocide, supra note..., at 151. Note furthermore art. 9, a compromissory clause that foresees another rule supervisory organ was art. 9:

"Disputes between the Contracting Parties relating to the interpretation, application, or fulfillment of the present Convention, including those relating to the responsibility of a State for genocide...... shall be submitted to the International Court of Justice at the request of any of the parties to the dispute." This provision gives the ICJ jurisdiction for the resolution of disputes and the responsibility of States for Genocide. The latter cases was highly disputed at the drafting and the discussions within the sixth committee. Nevertheless the majority of States voted to include this provision in the convention and only a minority of States made reservations on this article. the Wording is not fully clear whether it covers only civil or also penal responsibility of States. Many parties like the United States gave an interpretation that this jurisdiction only pertains civil responsibility. For the history and problems of art. 9 compare LeBlanc, supra note..., at 201-234.

439. Conversely, early Senate hearings in 1950 revealed a strong opposition on art. 6. Compare LeBlanc, Genocide, supra note..., at 165 and seq.


441. President of Panama and later Judge at the ICJ.


443. Id. at 8-23.


452. The draft provision, printed in A/46/10 at 198, 214, 215, for the jurisdiction of the court reads as follows:

1. The Court shall try individuals accused of the crimes defined in the code of crimes against the peace and security of mankind [accused of crimes defined in the annex to the present statute] in respect of which the State or States in which the crime is alleged to have committed has or have conferred jurisdiction upon it.

2. Conferment of jurisdiction by the State or States of which the perpetrator is a national, or by the victim State or the State against which the crime was directed, or by the State whose nationals have been the victims of the crime shall be required only if such States also have jurisdiction, under their domestic legislation, over such individuals.

3. The Court shall have cognizance of any challenge to its jurisdiction.

4. Provided that jurisdiction is conferred upon it by the States concerned, the Court shall also have cognizance of any disputes concerning judicial competence that may arise between such States, as well as of application for review of sentences handed down in respect of the same crime by the courts of different States.
5. The Court may be seized by one or several States with the interpretation of a provision of international criminal law."


454. Id. at 228 para. 145.

455. This clarifies also that the criminal court does not refer to the draft articles on State responsibility.


457. Compare Chapter I.1. and Chapter I.2.2.a.


460. Id. at 198, 218 para. 114.

461. Id. at 198, 219 para. 116.

462. Id. at 198, 220 para. 117.

463. Id. at 198, 220 para. 118.

464. Id. at 198, 222 para. 126. This definition is generally accepted under international lawyers. Compare e.g. Verdross/Simma, *Universelles Voelkerrecht*, supra note..., at @ 1263.


466. For other aspects concerning jurisdiction compare id at 198, 223-227 para. 117-140.


468. The possible draft provision, reprinted in U.N. Doc. A/46/10 at 198, 228, reads as follows:

1. Criminal proceedings in respect of crimes against peace an security of mankind shall be instituted by States.

2. However, in the case of the crimes of aggression or the threat of aggression, criminal proceedings shall be subject to prior determination by the Security Council of the existence of such crimes.
469. Art. 39 provides that the Security Council "may" take actions.


471. Id. at 198, 231 para. 155.


475. Some critics even fear that the Council is too effective working and overstepping the intention of the drafters of the Charter. Beside Yugoslavia the action of the United Nations in Somalia under Chapter VII gives an illustrative example. Compare Chapter V.

476. Compare U.N. Charter, art. 1 para. 3, art. 13 para 1(b), art. 55 (c) and art. 62 para. 2. See also French report, supra note ...., U.N. Doc. S/25266, at 11 para. 30.

477. The Security Council expressed that it is "[c]onvinced that in the particular circumstances of the former Yugoslavia the establishment of an international tribunal would enable this aim to be achieved and contribute to the restoration and maintenance of peace." U.N.S.C. Res. 808.

478. Compare e.g. Res. 764, 771 and 780 (all of 1992). For the efforts of Zimbabwe and Yemen to justify the involvement of the Security Council under Chapter VII in an civil war, see id. at 686. The whole situation raises the old problems of the legal situation in a war of secession.


481. The French Report, supra note ...., backs the same argument with the remark that the list also includes the severance of diplomatic relations. U.N. Doc. S/25266, at 13 FN15.

482. Id. at 11 para. 33.
483. Id. at 11 para. 34.

484. The Italian Report, supra note..., and the CSCE Report do not consider this problem.


486. Id. at 13 para. 39.

487. For further arguments compare id. at 13 para. 40.

488. Compare Chapter I and II.

489. see I.2.b. (6) at 16-18 and II.1b

490. Reprinted in Schindler/Toman, Armed Conflicts, supra note..., at 285 and seq.

491. Compare e.g. the Convention with respect to the Laws and Customs of War on Land of 29 July 1899 (The Hague Convention II) and Convention Respecting the Laws and Customs of War on Land of 18 October 1907 (The Hague Convention IV). Reprinted in Schindler/Toman, Armed Conflicts, supra note..., at 63 and seq.


494. In 1935 Italy invaded Abyssinia without any declaration of war.

495. Kalshoven, Arms, supra note..., at 185, 289.

496. Indeed, the text of art. 2 para. 1 only refers to the recognition of one party. However, commentators agree that the provision has to interpreted that the recognition of neither party is necessary. Compare Jean S. Picet, Commentary to Geneva Convention III at 23; Lupis, War, supra note..., at 12 FN 70.

497. Kalshoven, Arms, supra note..., at 185, 290.


500. Lupis, War, supra note...., at 13, 14.

501. Lupis, War, supra note...., at 33-50.

502. The fact that there was no considerable resistance by the Kuwait armed forces is for the qualification of no importance. Compare art. 2 para. 2 common of the Geneva Conventions. Reprinted in 75 U.N.T.S. 287, 288.


508. Compare art. 2 para. 2 common of the Geneva Conventions.

509. Originally there were intentions to apply the Geneva Conventions to all armed conflicts without differentiation of international and non-international armed conflict. However, resistance of States led to the minimum provision of art. 3 common.

510. For more information compare Chapter IV.1.2.b.(2)

511. Solf, Commentator to Gasser, Case Studies, supra note...., at 929.

512. Sylvie Junod, International Humanitarian and Human Rights Law in Non-International Armed Conflicts, 33 AMULR 29, 34.

513. Compare Additional Protocol II, art. 1 para. 2.

514. Compare Additional Protocol II, article 1 para. 2

515. Compare Kirgis, International Organizations, supra note...., at.....

517. Compare Id.

518. Compare ASIL, Humanitarian Law, supra note...

519. Compare Chapter II.3.2.a.(1)

520. Lupis, war, supra note..., at 43.

521. Sandoz, Commentary on the Additional Protocols, supra note..., at 43 para. 76.

522. For the former interpretation speaks the wording of Art. 1 para 4 that liberation wars are "included" in the notion "armed conflict". However the reference to art. 2 common speaks against this, as art. 2 common does not speak of 'international conflicts', but conflicts "between two...of the High Contracting Parties", i.e States.

523. so called by Burgos, Humanitarian Law, supra note... at 1.

524. Theodor Meran, Humanitarian Law, in ISL, supra note..., at 83.

525. Examples are Mozambique, Lebanon, Vietnam, Kampuchea, Afghanistan. See Gasser, Case Studies, supra note..., at 911 and seq.


527. Art. 130 of Geneva Convention III, e.g., prohibit namely willful killings, torture, inhuman treatment and no due process as grave breaches. Partly reprinted in Chapter II.3.2.a.(1). Common Art.3 lit. (a) to (d) covers these acts.

528. Compare Chapter II.3.2.a.(1)

529. Waldemar A. Solf, Commentator to Gasser, Case Studies, supra note..., at 928, 929.

530. Corfu Channel Merits, I.C.J. Reports 1949, at 22.
531. Furthermore both the application of art. 3 common as well as Protocol II requires the recognition of the Parties of the existence of such a situation. The practice of Parties to do so is very reluctant.


537. Compare e.g. Veuthey, *Guerilla*, supra note..., at 8.

538. ASIL, *Humanitarian Law*, supra note..., at 87 and seq.; Compare furthermore Chapter II.3.2.c.


547. Most commentators, however, agree that decisions concerning peace-keeping can be taken under Chapter VI as well as under Chapter VII of the U.N. Charter.


Two problems arise if the General Assembly wants to take action. Disputed was the relationship towards action of the Security Council on the same issue, and second, if the General Assembly has at all the competence to establish peace-keeping operations.

According to art. 12 of the United Nations Charter as far as the Security Council is concerned with a situation or conflict it has the exclusive competence to address to the conflict. However, the practice of the Assembly was not always in line with art. 12. Most commentators agree that, in short, as far as the Security Council is not willing or able to take decisions (veto!) the General Assembly may address to a situation or conflict. This procedure is laid down in the Uniting for Peace Resolution. Reprinted in Seyersted, *United Nations Forces*, supra note ...., at 42, 43.

The overall competence of the General Assembly to take this kind of decisions was and is questionable. The decision to set up peacekeeping forces is part of the internal rules of the United Nations despite of their mainly external effects. Nevertheless in the Advisory Opinion of 'Certain Expenses of the United Nations' [citation] the ICJ held that "these types of decisions were not ultra vires acts of the organization as long as they were appropriate for the fulfillment of one of the stated purposes of the organization." Henry G. Schermers, *International Organizations. Resolutions*, in Encyclopedia, supra note ..., at 159, 160.


550. U.N. Charter, article 43.

551. Examples for individual recruitment are rare: The Headquarters Guard Force and Headquarters Security Service; Moreover the United Nations Field Service that has been in employed in Palestine, Kashmir and Korea. Under this category belong also military observers.
552. Examples are Korea, operation dessert storm or the Somalia relief operation. For more information on these operations compare Kirgis, supra note.... at.... For Korea compare D.W. Bowett, United Nations Forces, supra note..., at 29-60.

553. E.g. the operation in West New Guinea, UNEF, ONUC and UNFICYP. For detailed information and a legal appreciation on UNEF and ONUC compare D.W. Bowett, United Nations Forces, supra note..., at 90-254.


555. This work focuses only on the for our investigation relevant part of laws of war, the Geneva Conventions and Additional Protocols. For a more information on the general applicability of the laws of war compare e.g. compare Bowett, United Nations Forces, supra note...; See also Seyersted, United Nations Forces, supra note....

556. Compare Chapter IV.1.2.a.

557. For the discussion if the organization could and should accede the Geneva Conventions and Protocols, compare Seyersted, United Nations Forces, supra note..., at 314-398.

558. Seyersted, United Nations Forces, supra note..., at 197.

559. Compare above art. 2 para. 1 common to the Geneva Conventions. Reprinted in Chapter IV.1.

560. For ratification compare Schindler/Toman, Armed Conflicts, supra note..., at 557-562.

561. Compare Chapter II.3.2.b.

562. Bowett, United Nations Forces, supra note...., at 55. See id. for a legal valuation of the Korea operation.


564. For more information compare Seyersted, United Nations Forces, supra note... at 221-227.
565. Compare Seyersted, United Nations Forces, supra note..., at 224: "... all humanitarian rules protecting individuals, whether military personnel or civilians, must remain in force equally for both parties."

Like the Institute of International Law stated that the principle of discrimination was subject to the reservation that "... obligations whose purpose is to restrain the horrors of war and which are imposed on belligerent for humanitarian reasons by Conventions in force, by the general principles of law and by the rules of customary law, are always in force for the parties in all categories of armed conflict and apply equally to actions undertaken by the United Nations." 50 Annuaire de l’institut de droit international, Session d’Bruxelles 1963, I, at 115 and 116.


567. Compare Resolution, adopted by the Institute of International Law at its session at Zagreb, 3 September 1971 on the Conditions of Application of Humanitarian Rules of Armed Conflict to Hostilities in Which United Nations Forces may be engaged. Reprinted in Schindler/Toman, Armed Conflicts, supra note..., at 903 and seq. See furthermore Resolution adopted by the Institute of International Law at its session at Wiesbaden, 13 August 1975, on the Conditions of Application of Rules, Other than Humanitarian Rules, of Armed Conflict to Hostilities in Which United Nations Forces May Be Engaged. Id. at 907.

568. Compare above Chapter II.3.2.

569. "...Je tiens aussi a conformer que l’ONU entend que ses forces armées en compagnie appliquent aussi scrupuleusement que possible les principes de ces Conventions [de Geneve]." International Review of the Red Cross, at 28 (1962). Cited in Michael Bothe, Bericht ueber Entwicklungen und Tendenzen des Kriegsrecht seit den Nachkriegskodifikationen [hereinafter Entwiclungen], 35 ZaoRV 575, 583 (1975).

570. Reprinted in id. at 583.

571. Compare U.N. Doc. ST/SGB/UNEF/1; ST/SGB/ONUC/1 and ST/SGB/UNFICYP/1. Article 44 of the UNEF regulations, e.g. provided that "[t]he Force shall observe the principles and spirit of the general international Conventions applicable in the conduct of military personnel." Roberts & Guelff, Documents, supra note..., at 372.
572. Art. 3 A para. 1 reads as follows: "If the United Nations are set up through individual recruitment, the United Nations shall issue regulations defining the rights and duties of the members of such forces." Schindler/Toman, Armed Conflicts, supra note..., at 904.

573. Art. 3 B para. 1 of the Zagreb Resolution reads as follows: "If the United Nations Forces are composed of national contingents with regard to which the United Nations has not issued any regulations such as those mentioned in the proceeding paragraph, effective compliance with the humanitarian rules of armed conflict must be secured through agreements concluded between the Organization and the several States which contribute contingents." Id. at 904.

574. More carefully expresses Bothe, Entwicklungen, supra note..., at 585. According to his opinion there exists only a consent that the humanitarian rules of the law of war as such are applicable. Which provisions in concreto are applicable, however, remains unclear.

575. Compare art. 3 of the Zagreb Resolution; furthermore U.N. Doc. A/45/594; See also Bowett, United Nations Forces, supra note..., at 361-381.

576. Clark and Sohn, World Peace through World Law at 311, cited in Seyersted, supra note... at 365. For opinions of commentators against this proposal compare id. at 366 FN 173.

577. In 1964 the Military Advisor of the Secretary General Gen. Maj. Rikhye described the Congo experience as follows: "At present...men are tried for offenses committed on UN service under national codes in their national courts. Since these courts cannot meet in the field this is often a cumbersome and ineffective process." Furthermore "...there have been few cases, including major crimes, in which the government concerned were not disposed to make the necessary investigations and to take suitable disciplinary action against the culprits." Seyersted, United Nations Forces, at 365.

578. For his argumentation and the scope of criminal jurisdiction the United Nations should have, compare Seyersted, United Nations Forces, supra note... at 368-372.

579. G.I.A.D. Draper, cited in id. at 374.

580. Art. 129 of Convention III and art. 146 of Convention IV.

581. Seyersted, United Nations Forces, supra note..., at 373.

582. Seyersted, United Nations Forces, supra note..., at 372.
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<tr>
<th>Abbreviation</th>
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<tr>
<td>ASIL</td>
<td>American Society of International Law</td>
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<tr>
<td>ECOSOC</td>
<td>Economic and Social Council</td>
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<tr>
<td>FLMN</td>
<td>Salvadorian Farabundo Marti National Liberation Front</td>
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<tr>
<td>G.A.</td>
<td>General Assembly</td>
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<td>ICRC</td>
<td>International Committee of the Red Cross</td>
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<td>ILA</td>
<td>International Law Association</td>
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<td>ILM</td>
<td>International Legal Materials</td>
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<td>IMT</td>
<td>International Military Tribunal</td>
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<td>IYoHR</td>
<td>Israel Yearbook on Human Rights</td>
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<td>JNA</td>
<td>Yugoslav People’s Army</td>
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<td>N.Y. Times</td>
<td>New York Times</td>
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<td>PKK</td>
<td>Kurdish Worker’s Party</td>
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<td>Prisoner of War</td>
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<td>U.N.</td>
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<td>United Nations General Assembly</td>
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<td>UNWCC</td>
<td>United Nations War Crimes Commission</td>
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<td>Y.B. ILC</td>
<td>Yearbook of the International Law Commission</td>
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