Normative Framework of International Humanitarian Law: Overlaps, Gaps, and Ambiguities

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I. INTRODUCTION

The year 1998 marks the fiftieth anniversary of the Universal Declaration of Human Rights¹ and the Convention on the Prevention and

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Punishment of the Crime of Genocide, respectively adopted on the tenth and ninth of December 1948. The year 1998 marks also birth date of the Treaty on the Establishment of an International Criminal Court adopted in Rome on July 17, 1998. On this occasion, it is important to take stock of international law's progress, to assess how much its veneer has thickened, and to determine what needs to be done to make more effective its goals of prevention and control. Since most of the world's victimization occurs in violation of international law's proscriptions against war crimes, crimes against humanity, and genocide, this article will deal with the weaknesses of the normative framework of these three *jus cogens* crimes. My purpose is to eliminate, or at least substantially narrow, the legal loopholes through which the perpetrators of war crimes, crimes against humanity, and genocide are able, with impunity, to escape accountability for their international crimes and widespread violations of fundamental human rights.

International humanitarian law is that body of norms that protects certain categories of persons and property and prohibits attacks against them during the course of armed conflicts be they of an international or non-international character. These norms derive from conventional and customary international law which are respectively referred to as “the Law of Geneva” (for the conventional law of armed conflicts) and “the Law of The Hague” (for the customary law of armed conflicts). “The Law of The Hague” is not, however, exclusively customary law because it is in part treaty law and the “the Law of Geneva” is also not exclusively treaty law because it includes customary law. Thus, the traditional distinction between conventional and customary law is substantially eroded. Additionally, the treaty law that applies to weapons derives from customary as well as conventional law, and some of its specific norms have become part of customary law. In sum, in the last one hundred years, the evolution of the dual sources of international humanitarian law, namely conventional and customary law, have become so intertwined and so overlapping that they can be said to be two sides of the same coin. The nomenclature “the Law of Geneva” and “the Law of The Hague” is therefore only a useful shorthand label.

In addition to this historic dual-track evolution of the law of armed conflicts, two additional developments have expanded the general scope of the term “international humanitarian law,” namely, the proscriptions against


crimes against humanity and genocide. The first originated as an outgrowth of war crimes even though it subsequently evolved into a distinct category of international crimes; the second, though originally intended to encompass crimes against humanity, also evolved into a distinct and separate category of international crimes. The norms contained in these three major international crimes—war crimes, crimes against humanity, and genocide—have become part of jus cogens. Deriving from multiple legal sources, they overlap relative


The second aspect, determining which individual of the targeted population qualify as civilians for purposes of crimes against humanity, is not, however, quite as clear. Common Article 3, the language of which reflects "elementary considerations of humanity" which are "applicable under customary international law to any armed conflict," provides that in an armed conflict "not of an international character" Contracting States are obliged "as a minimum" to comply with the following: "Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely ...." Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims in International Armed Conflicts (Protocol I) defines civilians by the exclusion of prisoners of war and armed forces, considering a person a civilian in case of doubt. However, this definition of civilians contained in Common Article 3 is not immediately applicable to crimes against humanity because it is a part of the laws or customs of war and can only be applied by analogy. The same applies to the definition contained in Protocol I and the Commentary, Geneva Convention IV, on the treatment of civilians, both of which advocate a broad interpretation of the term "civilian." They, and particularly Common Article 3, do, however, provide guidance in answering the most difficult question: specifically, whether acts taken against an individual who cannot be considered a traditional "non-combatant" because he is actively involved in the conduct of hostilities by membership in some form of resistance group can nevertheless constitute crimes against humanity if they are committed in the furtherance or as part of an attack directed against a civilian population.

Prosecutor v. Duško Tadić, (IT-94-1-T), reprinted in 36 I.L.M. 908 at 939-940 (1997) (citations and footnotes omitted). It is unclear, in the understanding of the majority, what are the legal boundaries between the customary law of armed conflicts applicable to conflicts of a non-international character and, respectively, Common Article 3 of the 1949 Geneva Conventions. See infra Appendix III. See also Protocol II, infra note 86, infra Appendix III, reprinted in 2 II.B.11 Weston, supra note 2. See also Theodor Meron, International Criminalization of Internal Atrocities, 89 Am. J. Int'l L. 554 (1995).
to their context, content, purpose, scope, application, perpetrators, and protected interests.\(^7\)

These norms also contain certain ambiguities and gaps, the existence of which is due essentially to two factors. The first is the haphazard evolution of international criminal law.\(^8\) The second is that governments, which control the international legislative processes, are not, for a variety of reasons, though mostly for political reasons, desirous of eliminating the overlaps, closing the gaps, and removing the ambiguities\(^9\)—not a surprising fact given that two of the three categories of crimes, crimes against humanity and genocide occur with deliberate state action or policy, and that governments are not particularly inclined to criminalize the conduct of their high officials.\(^10\) War crimes can also be a product of state action or policy, but frequently are committed by individual combatants acting on their own, which probably explains why there is less reluctance to criminalize this type of individual criminal conduct.\(^11\)

\(^7\) For example, the International Criminal Tribunal for the Former Yugoslavia, in the Tadić majority opinion, erroneously applied the standards of "state responsibility" reflected in the I.C.J.'s Nicaragua v. U.S. to the determination of whether a conflict is of an international or non-international character. See Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. U.S.), 1986 I.C.J. 14, 331-47 (June 27). The majority also did not contribute to clarity when it very broadly concluded that:

International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.


\(^8\) See M. Chérif Bassiouni, INTERNATIONAL CRIMINAL LAW CONVENTIONS AND THEIR PENAL PROVISIONS 21-31 (1997), [hereinafter Bassiouni, ICL Conventions].


\(^10\) One reason will be the fact that international crimes involving state action or policy potentially reach all the way to the top of the military and civilian hierarchy. See M. Chérif Bassiouni, From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court, 10 HARV. HUM. RTS. J. 11 (1997), [hereinafter Bassiouni, From Versailles to Rwanda], describing the history of international criminal investigatory bodies and international criminal tribunals. With respect to the limits of command responsibility see INTERNATIONAL CRIMINAL LAW, supra note 5, at 21-74.

\(^11\) The regulation of armed conflicts benefits from the fact that regular armies are usually well disciplined and have a tight command structure that controls discipline and the observance of the laws of armed conflicts. Furthermore, regular armies have a shared interest in the observance of the laws of armed conflicts because violations by one side to a conflict can result
Crimes against humanity and genocide are essentially crimes of state, as are sometimes war crimes, because they need the substantial involvement of state organs, including the army, police, paramilitary groups, and the state's bureaucracy. These crimes generate significant victimization and must be strenuously deterred. Nevertheless, governments are reluctant to remove the ambiguities in the relevant normative provisions applicable to crimes against humanity and genocide, and to fill the existing gaps in these proscriptions. The individual criminal responsibility of soldiers and others in the lower echelons of state power is much more easily accepted by governments than that of political leaders and senior government officials and, as well, those in the governmental bureaucracy who carry out, execute, and facilitate the policies and practices of crimes against humanity, genocide, and even war crimes. Indeed, the articulation of relevant international norms effectively shields them from criminal responsibility; existing international norms of criminal responsibility relative to crimes against humanity, crimes of genocide, and even war crimes, are too ambiguous to reach effectively into this category of violators. This renders their prosecution virtually impossible.

Since World War II, there have been an estimated 250 conflicts of an international, non-international, and purely internal legal character. The estimates of the resulting casualties reach as high as 170 million. Most of in actions by the other side, even though reprisals are limited. See Frits Kalshoven, Belligerent Reprisals (1971). Conversely, however, when genocide or crimes against humanity occur, the same constraints that exist in armies arising out of the considerations stated above, are not usually present in the course of genocide and crimes against humanity.

12. Genocide and crimes against humanity, as discussed below, are however also applicable to non-state actors. The problem of non-state actors, acting by themselves or in concert with state actors nevertheless remains, as the definitions of genocide and crimes against humanity do not specifically contemplate non-state actors, particularly when there is no concert of action with state actors. By implication, however, it should be clear that genocide and crimes against humanity apply to non-state actors as well.

13. The most recent example of such governmental reluctance to remove ambiguities and fill gaps is that of the ICC Diplomatic Conference in Rome, June 15-July 17, 1998, whose statute has not removed the overlaps, gaps, and ambiguities with respect to genocide, crimes against humanity, and war crimes. See Rome Statute of the International Criminal Court, U.N. Doc. A/Conf.183/9 (1998), infra Appendix I, at art. 7, Appendix II, at art. 6, Appendix VI at art. 8 [hereinafter ICC Statute].

that victimization occurred at the hands of tyrannical regimes and by non-state actors during internal conflicts. This tragic new dimension in world victimization requires a reexamination of international humanitarian law to make it unambiguously applicable to non-state actors, and to reconcile their overlapping application, fill in their gaps, and clarify their ambiguities so as to render their enforcement sufficiently effective to prevent, deter, and punish the perpetrators of such crimes. This article discusses these questions.

II. CRIMES AGAINST HUMANITY

Crimes against humanity originated after World War I in the concept of “crimes against the laws of humanity,” a term found in the Preamble to the 1907 Hague Convention. Until a more complete code of laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and from the dictates of the public conscience.

After the war, in 1919, the Allies established a Commission to investigate war crimes which thereafter found that the killing of Armenians by the Turks around 1915 constituted “crimes against the laws of humanity.” The United States and Japan strongly objected to the concept and insisted on having their dissenting positions reflected in the Report. In 1923, after the failure of ratification of the 1919 Treaty of Sèvres, which required that the Turkish

15. BASSIOUNI, CRIMES AGAINST HUMANITY, supra note 4.


17. Id., Preamble


government turn over to the Allies those responsible for such crimes, the Treaty of Lausanne excluded such a provision and a protocol was attached, giving amnesty to the Turks who had committed the crime irrespective of whether they acted as state actors or non-state actors. By 1942, the Allies realized that they would have to revisit that crime, and in 1945 the London Charter provided, in Article 6(c), for the prosecution of those who committed “crimes against humanity”:

Crimes against humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian populations, before or during the war; or persecutions 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 where perpetrated.

But that article linked Article 6(c) crimes to “crimes against peace” (the initiation and conduct of war) as defined in Article 6(a) and to “war crimes” as defined in Article 6(b). This meant that all “crimes against humanity” committed before the initiation of the war, between 1932 and 1939, were not prosecutable. The war-connecting link was removed in a 1950 Report of the International Law Commission (ILC). The question that remained, however,


25. Agreement by the Government of the United Kingdom of Great Britain and Northern Ireland, the Government of the United States of America, the Provisional Government of the French Republic, and the Government of the Union of the Soviet Socialist Republics for the Prosecution and Punishment of the Major War Criminals of the European Axis and the Charter of the International Military Tribunal, Aug. 8, 1945, 59 Stat. 1544, 1546, 82 U.N.T.S. 279, 3 Bevans 1238, entered into force Aug. 8, 1945, [hereinafter London Charter], reprinted in 2 Weston, supra note 2, at II.E.1. See also Special Prosecution Establishing an International Military Tribunal for the Far East and Charter of the International Military for the Far East, Jan. 19, 1946, T.I.A.S. No. 1589, at 3, 4 Bevans 20 [hereinafter IMTFE], reprinted in 2 Weston, supra note 2, at II.E.2. Article 5(c) is similar to Article 6(c) of the London Charter, as is Article II(c) of Control Council No. 10, though it removes the war connecting requirement.


was the legally binding effect of such a report. On its face, a report of the ILC has no binding effect, unless it is deemed to be the embodiment of customary international law, in which case the ILC report can be seen as the progressive codification of customary international law and therefore binding as to its content. However, the practice of states remains an important element in addition to the element of opinio juris to establish customary international law, and this practice seems to be somewhat wanting because there are few states that have prosecuted persons for such crimes. Moreover, no convention on crimes against humanity has been developed since 1945, even though many other conventions on various international crimes have been adopted since that time. There is no rational explanation for this gap other than the lack of political will by governments.

The next opportunity to reaffirm the London Charter’s “crimes against humanity” arose in 1993 when the Security Council adopted the Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY). In this statute, however, the connection to an armed conflict was preserved.

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30. The states that have done so are Canada, France, and Israel.
31. See BASSIOUNI, CRIMES AGAINST HUMANITY, supra note 4.
32. BASSIOUNI, ICL CONVENTIONS, supra note 8.
34. Prosecutor v. Duško Tadić, (IT-94-1-T), reprinted in 36 I.L.M. 908 (1997). See also ICTY Statute in Appendix I, at Article 5. Concerning the war-connecting link, the Tadić decision stated:

Article 5 of the Statute, addressing crimes against humanity, grants the International Tribunal jurisdiction over the enumerated acts "when committed in armed conflict." The requirement of an armed conflict is similar to that of Article 6(c) of the Nürnberg Charter which limited the Nürnberg Tribunal's jurisdiction to crimes against humanity committed "before or during the war," although in the case of the Nürnberg Tribunal jurisdiction was further limited by requiring that crimes against humanity be committed "in execution of or in connection with" war crimes or crimes against peace. Despite this precedent, the inclusion of the requirement of an armed conflict deviates from the development of the doctrine after the Nürnberg Charter, beginning with Control Council Law No. 10, which no longer links the concept of crimes against humanity with an armed conflict. As the Secretary-General stated: "Crimes against humanity are aimed at any civilian population and are prohibited regardless of whether they are committed in an armed conflict, international or internal in character." In the Statute of the International Tribunal for Rwanda the requirement of an armed conflict is omitted, requiring only that acts be committed as part of an
with Article 5 requiring that "crimes against humanity" take place in the

attack against a civilian population. The Appeals Chamber has stated that, by incorporating the requirement of an armed conflict, "the Security Council may have defined the crime in Article 5 more narrowly than necessary under customary international law," having stated earlier that "[s]ince customary international law no longer requires any nexus between crimes against humanity and armed conflict . . . Article 5 was intended to reintroduce this nexus for the purposes of this Tribunal." Accordingly, its existence must be proved, as well as the link between the act or omission charged and the armed conflict.

The Appeals Chamber, as discussed in greater detail in Section VI.A of this Opinion and Judgment, stated that "an armed conflict exists whenever there is resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State." Consequently, this is the test which the Trial Chamber has applied and it has concluded that the evidence establishes the existence of an armed conflict.

The next issue which must be addressed is the required nexus between the act or omission and the armed conflict. The Prosecution argues that to establish the nexus for a violation of Article 5 it is sufficient to demonstrate that the crimes were committed at some point in the course or duration of an armed conflict, even if such crimes were not committed in direct relation to or as part of the conduct of hostilities, occupation, or other integral aspects of the armed conflict. In contrast the Defence argues that the act must be committed "in" armed conflict.

The Statute does not elaborate on the required link between the act and the armed conflict. Nor, for that matter, does the Appeals Chamber Decision, although it contains several statements that are relevant in this regard. First is the finding, noted above, that the Statute is more restrictive than custom in that "customary international law no longer requires any nexus between crimes against humanity and armed conflict." Accordingly, it is necessary to determine the degree of nexus which is imported by the Statute by its inclusion of the requirement of an armed conflict. This, then, is a question of statutory interpretation.

The Appeals Chamber Decision is relevant to this question of statutory interpretation. In addressing Article 3 the Appeals Chamber noted that where interpretative declarations are made by Security Council members and are not contested by other delegations "they can be regarded as providing an authoritative interpretation" of the relevant provisions of the Statute. Importantly, several permanent members of the Security Council commented that they interpret "when committed in armed conflict" in Article 5 of the Statute to mean "during a period of armed conflict." These statements were not challenged and can thus, in line with the Appeals Chamber Decision, be considered authoritative interpretations of this portion of Article 5.

The Appeals Chamber, in dismissing the Defense argument that the concept of armed conflict covers only the precise time and place of actual hostilities, said: "It is sufficient that the alleged crimes were closely related to the hostilities occurring in other parts of the territories controlled by the parties to the conflict." Thus it is not necessary that the acts occur in the heat of battle.

context of "an armed conflict" of an international or internal character. The difference between the war-connecting link of the London Charter's Article 6(c) and the ICTY's Article 5 is the addition in Article 5 of a conflict of an internal character.

In 1994, however, when the same Security Council adopted the Statute for the International Criminal Tribunal for Rwanda (ICTR), it did not include any war-connection whatsoever. Why the change? One explanation is that the ICTY's formulators sought to preserve the London Charter's requirement, though expanding it to internal conflicts, to offset arguments that Article 5 of the ICTY departed from existing customary law. Since there was no convention on crimes against humanity, that category of crimes had to be deemed as falling within customary law. But with respect to the ICTR, the Government of Rwanda was not expected to challenge the absence of such a requirement. To have included such a war-connecting requirement in the ICTR statute would have meant that prosecutions for such crimes would have been impossible because that conflict was purely internal.


36. See id. at art. 3.

37. See, e.g., Ch. 2, "Establishment of the Tribunal and Legislative History" of M. CHERIF BASSIOUNI, & PETER MANIKAS, THE LAW OF THE INTERNATIONAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 199-235 (1996). The Appeal Chamber in the Tadić case noted that "it is by now a settled Rule of customary international law that crimes against humanity do not require a connection to international armed conflict. Indeed ... customary international law may not require a connection between crimes against humanity and any conflict at all." Decision in Prosecutor v. Duško Tadić, (IT-94-1-AR72), reprinted in 35 I.L.M. 32, at 72 (1996). Further, the Tadić decision stated:

If customary international law is determinative of what type of conflict is required in order to constitute a crime against humanity, the prohibition against crimes against humanity is necessarily part of customary international law. As such, the commission of crimes against humanity violates customary international law, of which Article 5 of the Statute is, for the most part, reflective. As stated by the Appeals Chamber: "There is no question ... that the definition of crimes against humanity adopted by the Security Council in Article 5 comports with the principle of nullum crimen sine lege."

Id. at 937. The Appeal Chamber in the Nikolić case noted that a crime against humanity must be shown to have been committed in the course of an armed conflict. Nikolić Rule 61 Hearing, (IT-95-2-R61).

38. See, e.g., Bassiouni, supra note 6.

39. See Bassiouni, From Versailles to Rwanda, supra note 10, at 46-49.

40. For an insight into the establishment of the ICTR, see VIRGINIA MORRIS & MICHAEL P. SCHARF, THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (2 vols. 1998).
An examination of the contents of crimes against humanity as defined in Article 6(c) of the Nuremberg Charter reveals that it covers the following acts: "murder, extermination, enslavement, imprisonment, deportation or other inhumane acts," and "persecution." The ICTY and ICTR added "rape" for specificity. However, the ICTR also added the restrictive requirement not present in the ICTY; that the acts constituting the crime must be the result of "widespread or systematic" practices. Furthermore, some of the terms used in the London Charter's Article 6(c), the ICTY's Article 5, and the ICTR's Article 3 may be deemed to lack sufficient specificity to satisfy the "principles of legality" required in the world's major legal systems. For example, "other inhumane acts" can be deemed vague, "murder" overlaps with "extermination," and "imprisonment" and "deportation" can be lawful. Of course, careful judicial interpretation can avoid such vagueness and ambiguity, but that presupposes the existence of a judicial process that can develop a clear and precise jurisprudence, and in that respect much is expected from the ICTY and ICTR.

Another issue concerning "crimes against humanity" is whether it is essentially a category of mass victimization crimes, which is predicated on the existence of state-action or state-policy, or whether it is but a catch-all category for mass crimes even when committed by non-state actors. The formulation of Article 6(c) raises that issue relative to whether "persecution" is a required policy element or simply another genre of the specific crimes listed in Article 6(c), or indeed, whether it is both a specific type of prohibited act as well as a policy element applicable to state and non-state actors alike. In this writer's judgment, "crimes against humanity" as set forth in Article 6(c) is no mere catch-all category for mass victimization, but rather a category of international crimes, distinguishable from other forms of mass victimization by the jurisdictional policy element of a "state action or policy." But when the ICTR's Article 3 was made to qualify Article 6(c)'s policy of persecution by the addition of the terms "widespread or systematic," the drafters, while doubtless seeking to tailor the definition of "crimes against humanity" to the Rwandan conflict, brought about a progressive

41. See London Charter, supra note 25, at art. 6(c).
42. See ICTY Statute art. 5(g) infra Appendix I; ICTR Statute art. 3(g) infra Appendix I.
43. See ICTR Statute infra Appendix I, at art. 3. It is interesting to note that Article 5 of the ICTY does not refer to the words "widespread or systematic" contained in Article 3 of the ICTR. Yet, in the Tadić opinion the Trial Chamber referred to the words "widespread or systematic" using the disjunctive. See generally MICHAEL P. SCHARF, BALKAN JUSTICE (1997).
44. See BASSIOUNI, CRIMES AGAINST HUMANITY, supra note 4, at Ch. 4 "The Principles of Legality."
45. See id. at Ch. 5.
46. See id. See also Roger S. Clark, Crimes Against Humanity at Nuremberg, in THE NUREMBERG TRIAL AND INTERNATIONAL LAW 177 (George Ginsburgs & Vladimir N. Kudriavtsev eds., 1990); Egon Schwelb, Crimes Against Humanity, 23 BRIT. Y.B. INT’L L. 178 (1946).
47. ICTR Statute, infra Appendix I, at art. 3 (emphasis added).
development. This is evidenced in the disjunctive "or" as opposed to the conjunctive "and." If the mass victimization can be only "widespread" and not also "systematic," then it can be the spontaneous consequence of a given conflict \(^4\) and not necessarily a reflection of "state action or policy."

The statute of the ICC adopted in Rome on July 17, 1998, follows the ICTR's precedent in that it states in its Article 7 that "for the purpose of this statute, 'crimes against humanity' means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population with knowledge of the attack..." \(^4\) At the same time, the ICC Statute's Article 7(h) makes "persecution" specifically prohibited conduct, \(^5\) and while it is one of the forms of carrying out an "attack directed against any civilian population," the persecution of a group of persons is by its very nature possible only as a consequence of state action or policy carried out by state actors or non-state actors, or the product of policy carried out by non-state actors. In fact, most of the specific crimes listed within the meaning of this definition can occur only as a result of state action or policy carried out by state actors or non-state actors: "(b) extermination; (c) enslavement; (d) deportation or forcible transfer of population; ... (j) the crime of Apartheid." \(^5\)

The other specifically listed crimes presumably can be committed by individuals without the existence of state action or policy. But clearly if such crimes are directed against a "civilian population," they are necessarily the product of state action or policy carried out by state actors or the product of policy of non-state actors. These specific crimes are:

(a) murder; ... (e) imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) torture; (g) rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; ... (i) enforced disappearance of persons; ... (k) other inhumane acts of a similar character intentionally causing great

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48. For sure the terms "widespread or systematic" as used in Article 3 of the ICTR cannot be interpreted as a characteristic of the specific crimes listed in the definition because, for example, there can be no particular crime called "widespread extermination."

49. ICC Statute, infra Appendix I, at art. 7 (emphasis added).

50. Article 7 states:

Persecution against any identifiable group or collectivity on political, social, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court. . . .

Id.

51. Id.
Thus, the element of state policy for state actors and that of policy for non-state actors is dominant throughout this latest definition of “crimes against humanity.”

The element of state action or policy is not the only distinguishing international jurisdictional characteristic of crimes against humanity; it carries with it also certain implications concerning the criminal responsibility of a state’s agents who contribute to the overall execution of the state’s plan or policy. Thus, if it is established that a state has developed a policy, or carried out a plan, or engaged in acts whose outcomes include the crimes contained in the definition of crimes against humanity, then those persons in the bureaucratic apparatus who brought about, or contributed to, that result could be charged with complicity to commit crimes against humanity. Further those who intended to carry out the policy could be charged with the commission of that crime, or at least, with complicity to commit that crime. The responsibility of state agents arises in this case irrespective of whether their conduct was lawful under national law. However, it is important to note that the policy element, whether developed or carried out by state actors or non-state actors, is the jurisdictional element that makes “crimes against humanity” a category of international crimes and that distinguishes it from other forms of mass victimization which otherwise are within national criminal jurisdiction.

Between the Nuremberg formulation of Article 6(c) in 1945 and the ICTR’s formulation of Article 3 in 1994, “crimes against humanity” have shifted from a category of crimes applicable only to situations involving state policy or action to situations involving non-state actors. This shift has been evidenced in the ICTR and ICC Statutes which provide the requirements of “widespread or systematic” and “attack against any civilian population.” The combination of the two requirements makes the crime applicable to both state and non-state actors; and also applicable in time of peace and war, without any connecting link to the initiation or conduct of war or to war crimes.

Other than these two formulations, “crimes against humanity” never have been the subject of a specialized international convention, thus leaving some doubt as to some of the specific contents of that category of

52. Id.

53. For example, genocide requires a specific “intent to eliminate in whole or in part,” while war crimes, no matter how widespread or systematic or both, do not require any element of state action or policy in connection with the commission of these crimes.

54. This was the case with Touvier and Popon cases in France. See generally sources cited infra notes 137, 138, and 139. See also SORJ CHALANDON & PASCALE NIVELLE, CRIMES CONTRA L'HUMANITÉ: BARBIE, TOUVIER, BOUSQUET, PAPON (1996).
international crimes and as to their applicability to non-state actors. This is evident in the eleven international instruments that have been elaborated between 1907 and 1998 and that define, in different though similar ways, "crimes against humanity." Thus, "crimes against humanity" remain part of customary law, with a mixed baggage of certainty as to some of its elements, and uncertainty as to others and to their applicability to non-state actors.

A textual comparison of these formulations, which are contained in Appendix I, evidences the slight differences between them. It also evidences the overlap that exists between genocide and war crimes relative to the protected targets and prohibited conduct.

III. GENOCIDE

In defining protected groups the Convention on the Prevention and Punishment of the Crime of Genocide, specifies only three, namely: national, ethnic, and religious groups. This enumeration excludes political and social groups, an omission that was no accident. The Convention was elaborated in 1948, and at that time the USSR was not desirous of having political and social groups included in those being given protection because Stalin and his regime already had begun their purges which targeted these very groups. As a consequence of this omission, the killing of an estimated one million persons in Cambodia by the Khmer Rouge between 1975 and 1985, almost 40 percent of the population, can be argued to have not constituted genocide because the perpetrators and victims were of the same ethnic group and because the targeted victim group was a political group which is not covered by the convention.

This gap in the Genocide Convention is well known, but at no time since 1948 was there any effort to fill it. In fact, three opportunities were never

55. See generally M. Cherif Bassiouni, "Crimes Against Humanity": The Need for a Specialized Convention, 31 Colum. J. Transnat'l L. 457 (1994). See also Bassiouni, Crimes Against Humanity, supra note 4, at Ch. 7.


seized. The Statutes of the ICTY\textsuperscript{59} in 1993 and the ICTR\textsuperscript{60} in 1994 were adopted with the same formulation as Article II of the Genocide Convention. Later, in connection with the elaboration of the Statute of the International Criminal Court, the Preparatory Committee failed to support any changes to Article II of the Genocide Convention.\textsuperscript{61}

As stated, the Genocide Convention protects three groups, national, ethnic, and religious.\textsuperscript{62} It also specifies that there must be a specific "intent to destroy [the protected group] in whole or in part."\textsuperscript{63} This requirement makes it appear that the criminal responsibility befalls essentially those who plan, initiate, or carry out the policy that is specifically intended to produce the result of destroying the protected group "in whole or in part," and leaves open the questions of the responsibility of those in the lower echelons of the execution of such a policy and the legal standards required to prove it.\textsuperscript{64} The requirement of specific intent in the criminal laws of most legal systems is more difficult to prove than that of general intent. General intent can be proven inferentially by the legal standard of what the ordinary reasonable person would have known under existing circumstances.\textsuperscript{65} This difficulty is especially true of lower echelons of executors where typically there exists no "paper trail." But to prove specific intent by higher echelons may also be arduous if there is no paper trail. The reason is that the Genocide Convention was drafted with the Nazi experience in mind; the Germans, who were meticulous in everything, left behind a detailed paper trail.\textsuperscript{66} But this situation never has been repeated. In the Yugoslav\textsuperscript{67} and Rwandan\textsuperscript{68} conflicts, for example, a paper trail, if it exists, has yet to be found, and it may never be

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59. See ICTY Statute, infra Appendix II, at art. 4.
60. See ICTR Statute, infra Appendix II, at art. 2.
61. See ICC Statute, infra Appendix II, at art. 6.
62. See Genocide Convention, infra Appendix II, at art. II.
63. Id.
64. See \textit{generally} Bassiouni, \textit{Crimes Against Humanity}, supra note 4, at Ch. 8 "Elements of Criminal Responsibility."
65. That standard exists in the criminal laws in those legal systems influenced by the Romanist-Civilist Germanic legal traditions, as well as those legal systems influenced by the Common Law tradition.
made public by those who have the information. The same is true of other conflicts such as Cambodia. There are, moreover, conflicts where a paper trail exists but has not been made public.

In addition to the issue of specific genocidal intent, which is fraught with evidentiary difficulties, there is the question of whether the protected group can be identified differently. For example, can it be based on gender, or limited to a group in a given area? The Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), which investigated violations of international humanitarian law in the former Yugoslavia, concluded that these two questions can be answered in the positive. In the French trial of Papon who was convicted on April 2, 1998 of complicity for "crimes against humanity" as defined in French criminal law, the central issue, where "genocide" was frequently referred to though the charge was only "crimes against humanity," was how to prove complicity in these types of crimes by agents of the state. When a person charged is a bureaucrat operating in a large bureaucracy, it is so far unclear how individual criminal responsibility can be established for such a person where no specific criminal act is accomplished, but whose administrative function aids in the ultimate

69. It is also believed that in the Yugoslav conflict the U.S. has satellite and other air-reconnaissance pictures and probably recorded air-waves and telephone communications that would establish certain facts constituting any one of the three major crimes mentioned, but for political reasons has elected not to make them available to the ICTY Prosecutor.

70. See sources cited supra note 58, particularly ABRAMS & RATNER.


conduct. These questions remain unanswered by the norms applicable both to “genocide” and to “crimes against humanity.”

Lastly, a question arises as to “genocide,” and that is the nature and size of the “group” targeted for elimination “in whole or in part.” Is it the entire group as it exists in the world, or a smaller portion of that group which is identified and targeted by the perpetrators? Could it be, for example, that portion of the group that inhabits a certain area, or a given town, or a segment of that group such as the intellectuals or the women in that group? That was the issue that faced the Commission of Experts in determining whether “ethnic cleansing” could be deemed a form of genocide. Similarly, the issue arose with respect to the policy of systematic rape of the women of a certain identifiable group.

The Genocide Convention leaves these questions unanswered, but it would be valid to consider the Genocide Convention as susceptible of progressive interpretation in light of the new techniques that nefarious planners devise to achieve their evil goals. The Genocide Convention justifies an evolving interpretation that fulfills its goals and purposes.

Since 1948, “genocide,” as defined in the Genocide Convention, has been embodied in three international instruments, to wit, the statutes of the ICTY, ICTR, and the Statute of the International Criminal Court, and the incorporation of Article II of the Genocide Convention into these three instruments has been without change. Accordingly, none of the problems evident since 1948 have been addressed to date.

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76. See Final Report, supra note 72.
77. Id.
78. Id. See also M. Cherif Bassiouni, Investigating Serious Violations of International Humanitarian Law in the Former Yugoslavia (DePaul University, Occasional paper); Meron, supra note 6. See also the indictment of Karadžić and Mladić, in which the judge referred to “ethnic cleansing” as a form of genocide, (IT-95-18-I).
80. See Genocide Convention, infra Appendix II, at art. II.
81. See ICTY Statute, infra Appendix II, at art. 4.
82. See ICTR Statute, infra Appendix II, at art. 2.
83. ICC Statute, infra Appendix II, at art. 2.
84. See Appendix II.
The regulation of armed conflicts has two sources: (1) conventional law, also referred to as the "Law of Geneva," consisting of the four Geneva conventions of 1949 plus two additional protocols of 1977 relating to "conflicts of an international character" and to "conflicts of a non-international character"; and (2) customary law, also referred to as the "Law of The Hague," which refers to the customary practices of states.

As stated above, however, the "Law of The Hague" is not exclusively customary law because it is in part treaty law and the "Law of Geneva" is also not exclusively treaty law because it incorporates customary law. Thus, the traditional distinction between conventional and customary law is substantially eroded. Additionally, the treaty law that applies to weapons derives from both customary and conventional law, and that body of treaty law, as well as some of its specific norms, has become part of customary law. Customary law, however, is binding only on the states that share in the custom and that express their will to be bound by it unless it becomes a general custom that is binding on all states. Consequently, states that do not follow the custom, unless it is a general custom, are not bound by it as a legal obligation. Nevertheless, a custom can rise to such a level of general


acceptance that it may become binding even on those states that do not share in the custom or that may express their will not to be bound by it. This applies to those general customs that rise to a higher level of acceptance and which reflect a universal sense of opprobrium, namely *jus cogens* or a peremptory norm of international law. Among the international crimes that fall within this category are: aggression, genocide, "crimes against humanity," war crimes, slavery and slave-related practices, torture, and piracy. In time, other international crimes may rise to that level and be deemed *jus cogens* crimes.

In 1899 and then again in 1907, the customary law of armed conflicts was "codified" in the Hague Convention Respecting the Laws and Customs of War on Land. But that codification was applicable only to states and only when a conflict was between states—in other words, a "conflict of an international character," as that term was developed subsequently in the 1949 Geneva conventions. Contrary to general belief, the 1907 Hague Convention did not establish the principle of individual criminal responsibility for the enunciated violations, but only the principle of compensation, which was incumbent upon the violating state. It was only in time, starting with the aftermath of World War I, but more particularly in the aftermath of World War II, that the principles of individual criminal responsibility, and of command responsibility under international law, were made part of customary law.

In addition to this original customary law of armed conflicts, a number of international instruments have been executed. Most of these cover the use or prohibition of use of certain weapons in time of war, the prohibition of certain weapons at all times, and the prohibition of emplacement of weapons in certain places at any time; as well as the protection from destruction and

88. See Bassiouni, *supra* note 6, and the authorities cited therein.

89. At present there are 25 categories of international crimes. They are: (1) aggression; (2) genocide; (3) crimes against humanity; (4) war crimes; (5) crimes against United Nations and associated personnel; (6) unlawful possession or use or emplacement of weapons; (7) theft of nuclear materials; (8) mercenarism; (9) apartheid; (10) slavery and slave-related practices; (11) torture and other forms of cruel, inhuman, or degrading treatment; (12) unlawful human experimentation; (13) piracy; (14) aircraft hijacking and unlawful acts against international air safety; (15) unlawful acts against the safety of maritime navigation and the safety of platforms on the high seas; (16) threat and use of force against internationally protected persons; (17) taking of civilian hostages; (18) unlawful use of the mail; (19) unlawful traffic in drugs and related drug offenses; (20) destruction and/or theft of national treasures; (21) unlawful acts against certain internationally protected elements of the environment; (22) international traffic in obscene materials; (23) falsification and counterfeiting; (24) unlawful interference with submarine cables; and, (25) bribery of foreign public officials. These crimes are reflected in 323 international instruments elaborated between 1815-1997. See Bassiouni, *ICL CONVENTIONS, supra* note 8.


91. See Bassiouni, *From Versailles to Rwanda, supra* note 10.

92. There are 35 treaties on the control of weapons. See Bassiouni, *ICL CONVENTIONS, supra* note 8.
pillage of cultural property in the time of war. There is a divergence of views among governments and experts as to which of these treaties rise to


the level of a general custom and which do not. Nevertheless, a general custom has evolved from the cumulative effect of these treaties that weapons that "cause unnecessary pain and suffering" are prohibited even though what these weapons are is still the subject of debate.94

The "Law of Geneva" (four Geneva conventions of 1949 and portions of protocols I and II which embody customary law) are also deemed to have risen to the level of a general custom.95 They are therefore binding on all states irrespective of whether a given state has or has not ratified one of them.96 But it should be noted that some states maintain that not all of Protocols I and II codify customary international law and therefore some of their provisions are still deemed to be part of conventional law which is applicable only to States Parties. As a result, there is an overlap in the binding legal effect of these conventions since they are first binding on their signatories, then also binding on the same signatories and on all other states because they are part of customary law. But some governments, like the United States, argue that only portions of protocols I and II, which the United States has not yet ratified, have risen to the level of a general custom. Selecting what is and what is not part of custom is not only a challenging legal exercise, but one that is fraught with political considerations.97

As earlier noted, the "Law of Geneva" is divided into two categories: (1) "conflicts of an international character" where violations (war crimes) are referred to as "grave breaches"98—well defined, but applicable only to armed

94. For example, the U.S. takes the position that incendiary and laser weapons and land mines are not included in that category.
96. See Geneva Conventions of 12 August 1949 and Additional Protocols of June 1997: ratifications, accessions and successions (Oct. 5, 1998), <http:lvww.icrc.org/unicc/icrnews>. See also BASSIOUNI, ICL CONVENTIONS, supra note 8, at, respectively, pp. 416-17, 426-27, 434-35, 440-41, 457-60 and 486-87. This position is bolstered by the number of ratifications for these conventions. They are:

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<tr>
<th>Convention/Protocol</th>
<th>Ratifications</th>
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<tr>
<td>First Geneva Convention of 1949:</td>
<td>188</td>
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<tr>
<td>Second Geneva Convention of 1949:</td>
<td>188</td>
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<td>Third Geneva Convention of 1949:</td>
<td>188</td>
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<td>Fourth Geneva Convention of 1949:</td>
<td>188</td>
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<td>Protocol I of 1977:</td>
<td>152</td>
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<tr>
<td>Protocol II of 1977:</td>
<td>144</td>
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See supra note 85 for the full citation to the first four Geneva Conventions. See supra, note 86 for the citations to Protocol I and Protocol II.

97. This was obvious in the 1997 Preparatory Committee for an International Criminal Court at its second and third sessions.
98. See Geneva Conventions in Appendix III, at arts. 50 and 51 of the First and Second Convention, reprinted in 2 Weston, supra note 2, at II.B.11-12 and arts. 130 and 147 of the Third and Fourth Conventions, respectively, reprinted in 2 Weston, supra note 2, at II.B.13-14; 1977 Protocol I, supra note 86, infra Appendix III.
conflicts taking place between states; and (2) “conflicts of a non-international character” where violations are not referred to as “grave breaches”—involving a foreign element, according to some, but applicable mainly to armed conflicts between a state and a belligerent or insurgent group within that state. There are, therefore, two regimes applicable to war crimes within the “Law of Geneva”: the “grave breaches” regime of the four Geneva conventions of 1949 and Protocol I, in addition to the “violations” regime of common Article 3 of the four Geneva conventions of 1949 and Protocol II. Within the first “grave breaches” regime, war crimes are not limited to “grave breaches” but extend to other transgressions of norms contained in these codifications which also incorporate customary law. Within the second “violations” regime there is lingering reluctance to consider all the transgressions of norms contained in Protocol II as war crimes. In that regime, “violations” of common Article 3 are deemed war crimes and require no foreign element to make common Article 3 applicable; but, Protocol II, which applies to this regime, precludes the application of common Article 3 to conflicts between dissident groups within a given state. Thus, the two regimes of the “Law of Geneva” exclude most of those conflicts that may be deemed purely internal conflicts, including tyrannical regime victimization, even though these types of conflicts have since caused most of the world’s wartime victimization since World War II.

As noted, conflicts of a “non-international character” are regulated in the 1949 Geneva conventions by a single article, common to all four conventions—common Article 3. Protocol II expands upon common Article 3 relative to what that article deems to be “violations” and not “grave breaches.” But, common Article 3 and Protocol II are limited in scope and do not have the specificity or detail contained in the articles defining “grave breaches.” The “grave breaches” contained in common Articles 50, 51, 130, and 147 of the 1949 Geneva conventions embrace nine categories of war crimes:

1. wilful killing (I-IV conventions);
2. torture or inhuman treatment, including biological experiments (I-IV conventions);
3. wilfully causing great suffering or serious injury to body or health (I-IV conventions);
4. extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly (I, II, and IV conventions);
5. compelling a prisoner of war or a protected person to serve in the forces of the hostile Power (III and IV conventions);

99. See Common Article 3 infra Appendix III.

100. See Protocol II, supra note 86, infra Appendix III.
6. wilfully depriving a prisoner of war or a protected person of the rights of fair and regular trial prescribed in the Convention (III and IV conventions);

7. unlawful deportation or transfer of a protected person (IV convention);

8. unlawful confinement of a protected person (IV convention); and

9. taking of hostages (IV convention).

To be considered a “grave breach,” each of the categories listed above must be committed against persons or property protected by the relevant conventions.

Common Article 3 of the four Geneva conventions does not categorically establish that “violations” of that provision are war crimes, but scholars have interpreted common Article 3 violations as constituting war crimes.\textsuperscript{101} Article 4(2) of Protocol II, expanding on Article 3 of the four Geneva conventions, provides:

Without prejudice to the generality of the foregoing, the following acts against the persons referred to in paragraph 1 are and shall remain prohibited at any time and in any place whatsoever:

(a) violence to the life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;

(b) collective punishments;

(c) taking of hostages;

(d) acts of terrorism;

(e) outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;

(f) slavery and the slave trade in all their forms;

(g) pillage; and

(h) threats to commit any of the foregoing acts.

Cognate provisions\textsuperscript{102} further provide that certain fundamental protections be observed: (1) humane treatment for detained persons, such as protection from violence, torture, and collective punishment; (2) protection from intentional attack, hostage-taking, and acts of terrorism of persons who take no part in

\textsuperscript{101} See generally LEVIE, supra note 3; Meron, supra note 6.

\textsuperscript{102} See Conventions cited supra note 85, at arts. 5 and 6.
(3) special protection for children to provide for their safety and education and to preclude their participation in hostilities; (4) fundamental due process for person against whom sentences are to be passed or penalties executed; (5) protection and appropriate care for the sick and wounded, and medical units which assist them; and (6) protection of the civilian population from military attack, acts of terror, deliberate starvation, and attacks against installations containing dangerous forces. However, Article 4(2) of Protocol II is narrow in scope: (1) it applies only to internal conflicts in which dissident armed groups are under responsible command and exercise control over such a part of the national territory as to carry out sustained and concerted military operations; (2) it has the effect of excluding many internal conflicts in which dissident armed groups occupy no significant territory but conduct sporadic guerrilla operations over a wide area; (3) it does not guarantee all the protections of the Conventions for international armed conflicts, e.g., prisoner-of-war treatment for captured combatants; and (4) it does not contain provisions to punish offenders—non-international conflicts are not covered by the definition of "grave breaches" contained in the 1949 Geneva Conventions and its Protocol I.

The essential differences between the explicit obligations arising from the two normative regimes deemed "grave breaches" and "violations" arise with respect to the duties and rights associated with their enforcement. For "grave breaches" the duties are: (1) to investigate; (2) to prosecute; (3) to extradite; and (4) to assist through judicial cooperation of investigations; and the rights include (1) the right for any state to rely on universal jurisdiction to investigate, prosecute and punish; and the rights include; (2) the non-applicability in national or international processes of statutes of limitations;103 (3) the non-applicability of the defense of "obedience to superior orders,"104; and (4) the non-applicability of immunities including that of Head of State.105 The same duties and rights are not explicit relative to "violations"


of common Article 3, and thus a normative gap exists with respect to the enforcement consequences that arise out of transgressions of these two regimes.\textsuperscript{106} There is, however, a notable trend among legal experts to consider such formalism as historically \textit{dépassé} and to consider the same enforcement consequences applicable to both legal regimes.

The formal distinctions discussed above, and the gaps that exist in their scope, application, protection, and enforcement are no longer tenable. The "writings of the most distinguished publicists"\textsuperscript{107} agree that there should be no distinctions between "grave breaches" and "violations" of common Article 3 and Protocol II; they agree that both contain equally enforceable prohibitions carrying the same enforcement consequences.\textsuperscript{108} They do so at least in part because the overwhelming majority of post-World War II conflicts have been of a "non-international character,"\textsuperscript{109} and because these conflicts have produced an overwhelming number of victims. As noted above, there have been, since World War II, some 250 conflicts and internal tyrannical regime victimizations that have produced an estimated 170 million casualties.\textsuperscript{110} Thus, to maintain a distinction between these two legal regimes and their enforcement consequences ignores the purpose of these regimes, which is to protect innocent victims from harm.

For purposes of war crimes, however, the distinction between types of conflicts and the legal regimes applicable to them does not apply with respect to crimes against humanity and genocide. These two categories of crimes are deemed applicable in time of peace as well as in time of war. The most significant problems arising out of overlaps and gaps in the law of armed conflict are the legal standards applicable in distinguishing between conflicts of an international and non-international character, and in ascertaining the relevant parts of conventional and customary law of armed conflicts applicable to these contexts, considering that the two sets of norms mirror one another.\textsuperscript{111} Another layer of confusion originates in doctrines of

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{106} Principle III. The defense was also removed in the statutes for the ICTY and the ICTR. \textit{See ICTY Statute infra} Appendix I, at art. 7; ICTR Statute \textit{infra} Appendix I, at art. 6.
\item\textsuperscript{107} \textit{Compare} Common Article 3 \textit{infra} Appendix III, with "grave breaches" of the Third and Fourth Conventions, respectively Articles 130 and 147 in Appendix III.
\item\textsuperscript{108} One of the sources of international law as stated in Article 38 of the Statute of the International Court of Justice. \textit{See Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1055, U.N.T.S. No. 993, art. 38.}
\item\textsuperscript{109} \textit{See generally Meron, supra} note 6.
\item\textsuperscript{110} \textit{See Bassiouni, supra} note 14. \textit{See also, e.g.,} sources cited \textit{supra} note 14.
\end{enumerate}
\end{footnotesize}
international law from which improvident extrapolations are made into the law of armed conflicts; legal interpretation and analysis of these two overlapping areas are thus frequently more confusing than they are elucidating.

The foregoing observations were evidenced in two related judgments by the ICTY. The first was in connection with the Tadić jurisdictional appeal case. Commenting on that judgment Professor Meron notes:

The appeals chamber’s expansive interpretation that “laws or customs of war” in Article 3 of the Tribunal’s Statute reach noninternational armed conflicts largely avoided the worst possible consequences. However, the chamber refused to use Article 3 of its Statute (laws and customs of war) as a conduit to bring in as customary law conduct comprising grave breaches of the Geneva Conventions (grave breaches are the subject of Article 2 of the Statute; these can be regarded as customary law whose content parallels the pertinent provisions of these Conventions). The grave breaches are the principal crimes under the Conventions. Thus deprived of the core of international criminal law in cases deemed to be noninternational, the Tribunal can only raise the level of actionable violations to crimes against humanity and perhaps, in the future, genocide. Not only does this handicap the Tribunal's ability to carry out its mandate, but some commentators also criticize the resort to such heavy artillery against evil, but relatively minor, actors. Disregarding considerations of judicial economy, the appeals chamber has therefore enabled the creation of a crazy quilt of norms that would be applicable in the same conflict, depending on whether it is characterized as international or noninternational. No less, the potential for unequal and inconsistent treatment of the accused is great. Fortunately, until Tadić..., the decisions of the trial chambers on indictments pursuant to Article 61 of the Tribunal's Rules of Procedure and Evidence found that the situations involved international armed conflicts and that the grave reaches

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provisions were therefore applicable, avoiding potential chaos.\textsuperscript{113}

Meron then further notes that the decision was not inevitable, as the proposition that the fighting was part of an international armed conflict—a proposition advanced by the Commission of Experts, the U.S. Government, and many scholars—was a position known to the majority of the appeals chamber though one they chose not to adopt. Further, Meron notes, Judge Georges Abi-Saab proposed terming the fighting as part of non-international armed conflicts, but including "grave breaches" within the applicable customary law.\textsuperscript{114}

The fact remains, however, that the ICTY eschewed this reasoning. Worse, the subsequent \textit{Tadić} judgment on the merits erroneously applied another international law standard to the issue presented.\textsuperscript{115} In that decision, the \textit{Tadić} majority erroneously applied the international law standard of state responsibility to determine whether a conflict is or is not of an international character. In so doing, the Tribunal relied on the opinion of the International Court of Justice in \textit{Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. U.S.)}.\textsuperscript{116} The Court, however, failed to appreciate that the agency relationship needed to establish state responsibility, essentially for the purposes of civil damages, is distinguishable from the legal standard required to establish whether a given conflict is of an international or non-international character. Meron, aptly commenting on this confusion, writes:\textsuperscript{117}

\begin{footnotesize}
\begin{enumerate}
\item[113.] Meron, \textit{supra} note 7, at 238.
\item[114.] Id.
\item[115.] Prosecutor v. Duško Tadić, (IT-94-I-T), \textit{reprinted in} 36 I.L.M. 908 (1997). See also, e.g., \textsc{Scharf}, \textit{supra} note 42.
\item[117.] Meron, \textit{supra} note 7, at 237, 239. Professor Dinstein agrees that intervention by a foreign state on behalf of the insurgents turns a civil war into an interstate war. Specifically with regard to Yugoslavia Meron writes:

\begin{quote}
The \textit{Tadić}...trial chamber has already accepted that, before the announced withdrawal of JNA forces from the territory of Bosnia-Herzegovina, the conflict was an international armed conflict. The facts of the situation and the rules of international humanitarian law should determine whether the JNA continued to be involved after that date and during the period pertinent to the indictments; if so, the international character of the conflict would have remained unchanged. The provisions of the Fourth Geneva Convention on termination of the application of the Convention, including Article 6, are relevant, not the legal tests of imputability and state responsibility. Finally, the appeals chamber would also be well-advised to abandon its adherence to the literal requirements of the definition of protected persons and help adapt it to the principal challenges of contemporary conflicts.
\end{quote}

Meron, \textit{supra} note 7, at 242.
\end{enumerate}
\end{footnotesize}
The Tadić case was not an issue of (state) responsibility at all. Identifying the foreign intervenor was . . . only the question of state responsibility. Conceptually, it cannot determine whether a conflict is international or internal. In practice, applying the Nicaragua test to the question in produces artificial and incongruous conclusions.

Indeed, even a quick perusal of international law literature would establish that imputability is not a test commonly used in judging whether a foreign intervention leads to the internationalization of the conflict and the applicability of those rules of international humanitarian law that govern armed conflicts of an international character.

This decision led several government experts at the ICC Diplomatic Conference to express their fear that, unless the war crimes provision of Article 8 was clearly and unambiguously drafted, that judges may, in the future, interpret Article 8 in a confusing or expansive manner, and thus create new law by judicial fiat. Such concern for strict judicial interpretation did not however produce the desired lack of ambiguity. On the contrary, it gave, in my opinion, more opportunities for non-strict interpretative approaches.

Thus, in these two judgments, which are the first of an international jurisdiction since the close of World War II and the subsequent proceedings at Nuremburg and in the Far East, we find more confusion than clarity regarding the following issues:

118. See London Charter, supra note 25. For the proceedings before the IMT, see International Military Tribunal sitting at Nuremberg, reported in TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL (1949) (commonly known as the “Blue Series”). For the subsequent proceedings of the IMT, see TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW No. 10 (1949) (commonly known as the “Green Series”).

A. Generally

1. What norms of conventional law of armed conflicts have become part of customary law, and how is that evidenced?

2. What norms of customary law have been codified in conventional law, and how is that evidenced?

B. Specifically

1. Does customary law include all the “grave breaches” of the 1949 Geneva conventions?

2. Does customary law include all or some of the “grave breaches” of Protocol I, and, if so, which ones?

3. Does customary law include common Article 3 of the 1949 Geneva conventions?

4. Does customary law include all or some of the provisions of Protocol II, and, if so, which ones?

5. What other treaties on the regulation of armed conflicts, particularly those concerning the prohibition and use of certain weapons, have become part of customary law, and on what basis?

C. Legal Standards

1. Are the standards applicable to state responsibility applicable also to the determination of whether a conflict is of an international or non-international character; and, if applicable, is it exclusively applicable or simply applicable as one of several legal standards?

2. Is the determination of the nature of a given armed conflict based on one or more standards deemed part of customary law, and, if so, to what extent does customary law rely on legal standards that derive from:

   (a) Common Article 3 of the 1949 conventions; and

   (b) Protocol II.

These and other questions still loom large in the law of armed conflicts; and, as stated above, they are reflected in the range of governmental positions on the definition of war crimes in the draft statute of the ICC.121

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120. See Bassion, supra note 8.

121. See PrepCom Committee, infra Appendix IV.
In 1995, the United Nations General Assembly established an *Ad Hoc* Committee for the Establishment of an International Criminal Court.\(^{122}\) In 1996, it established a Preparatory Committee for an International Criminal Court.\(^{123}\) Subsequently, during three-and-a-half-years of deliberations, the question of defining war crimes became the subject of detailed discussions. Questions were raised, in particular, about whether all of the contents of protocols I and II have risen to the level of customary law, about the specific contents of customary law, and still more particularly, about the rules governing conflicts of a non-international character and the prohibitions of the use of certain weapons in all categories of conflicts. While there was no dispute that the "grave breaches" provisions of the 1949 Geneva conventions are applicable, and substantial agreement that most of the "grave breaches" in Protocol I are included, there was less agreement that some of the Protocol II prohibitions can be deemed part of custom. In fact, the texts proposed, and the one adopted reflect, a partial regression from the norms contained in Protocol I and a substantial regression from the norms contained in Protocol II. The draft provision submitted to the diplomatic conference evidences these divergent views,\(^{124}\) as set forth in the chart contained in Appendix V detailing the sources of law for war crimes. The chart was developed and circulated at the Preparatory Committee for the Establishment of an International Criminal Court\(^{125}\) and, in setting forth the various sources for the provisions, highlights the overlaps and gaps.

The ICC adopted a similar text, contained in Appendix V, but the distinction between conflicts of an international and non-international character is reflected in the distinction between "grave breaches" and other violations of common Article 3 in this instance. Protocols I and II are neither specifically nor entirely applied, but norms are taken selectively therefrom and are listed under what can be termed "war crimes" under customary law. Subparagraph 2(a) of Article 8 refers specifically to the "Grave Breaches of the Geneva Conventions of 12 August 1949, . . ." and lists eight such under this heading:

(i) Wilful killing;

(ii) Torture or inhuman treatment, including biological experiments;


\(^{123}\) See PrepCom Committee, *infra* Appendix IV.

\(^{124}\) Id.

(iii) Wilfully causing great suffering, or serious injury to body or health;

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

(v) Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;

(vi) Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;

(vii) Unlawful deportation or transfer or unlawful confinement;

(viii) Taking of hostages.\textsuperscript{126}

Subparagraph 2(b) of Article 8 refers to "Other serious violations of the laws and customs applicable in international armed conflict . . . .\textsuperscript{127} It incorporates the customary law of armed conflict and some of the provisions of Protocol I.

In subparagraphs 2(c) and 2(d) of Article 8, the ICC Statute then focuses on the distinction between conflicts of an international character and those of a non-international character. In so doing, it invokes the domain of common Article 3 of the four 1949 Geneva conventions. Subparagraph 2(c), focusing on "the case of armed conflict not of an international character," refers to the serious violations of Article 3 common to the four Geneva Conventions of 12 August 1949,\textsuperscript{128} thus adding the limitation of "serious" to the "violations" of common Article 3 for the exclusive purposes of the ICC's statute. Subparagraph 2(c), like subparagraph 2(a), embodies the contents of the 1949 Geneva conventions, the former relative to "grave breaches" and the latter relative to the prohibitions contained in common Article 3. The latter prohibits the following acts:

(i) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (ii) committing outrages upon personal dignity, in particular humiliating and degrading treatment; (iii) taking of hostages; (iv) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.\textsuperscript{129}

\textsuperscript{126} ICC Statute, supra note 13, infra Appendix VI, at art. 8, para. 2(a).
\textsuperscript{127} Id at para. 2(b).
\textsuperscript{128} Id at para 2(c).
\textsuperscript{129} Id.
Subparagraph 2(d) of Article 8 emphasizes, like Protocol II, that subparagraph 2(c) "does not apply to situations of internal disturbances and tensions, such as riots, isolated and specific acts of violence or other acts of a similar nature." The specificity contained herein by far exceeds what Protocol II contains and it is therefore specific to this statute.

Subparagraph 2(e) of Article 8 is the counterpart of subparagraph 2(b) and it applies customary law to armed conflicts not of an international character. What follows is an extensive list that includes most of the provisions of Protocol II and overlaps in part with common Article 3. It also adds several specifics that Protocol II does not contain, but which have come to be recognized as part of customary law. Further, it is progressive when it comes to sexual violence in (vi) and to the protection of children in (vii). It reads as follows:

(e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts:

(i) intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;

(ii) intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva conventions in conformity with international law;

(iii) intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the law of armed conflict;

(iv) intentionally directing attacks against building dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;

(v) pillaging a town or place, even when taken by assault;

130. Id at para 2(d).
(vi) committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in Article 7, paragraph 2, enforced sterilization, and any other form of sexual violence also constituting a serious violation of Article 3 common to the four Geneva Conventions;

(vii) conscripting or enlisting children under the age of fifteen years into armed forces or groups using them to participate actively in hostilities;

(viii) ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand;

(ix) killing or wounding treacherously a combatant adversary;

(x) declaring that no quarter will be given;

(xi) subjecting persons who are in the power of another party to the conflict to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his interest, and which cause death to or seriously endanger the health of such person or persons;

(xii) destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict;

(f) Paragraph 2(e) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in a territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.

The structure of the foregoing formulation of “war crimes” is thus divided into four parts, reflecting the different sources of applicable law, conventional and customary, and the two relevant contexts, of international and non-international conflicts. Regrettably, these distinctions were maintained even though the overlaps are glaringly evident. Suffice it to compare subparagraphs 2(b) and 2(e) which incorporate what the drafters believed to be customary law, even though it also clearly reflects existing conventional
law, to wit, Protocol II. The ICC missed the opportunity to eliminate these distinctions and to focus on the protected persons and protected targets irrespective of the conflicts' context. But, then, the ICC was an exercise in political feasibility, not progressive codification. From this perspective, it must be said that the definition of "war crimes" is as good as can be achieved at the present time, taking into account the diversity of concerns and interests.

V. CONCLUSION

Not only are there overlaps in some applications of the sources of law relevant to war crimes, crimes against humanity, and genocide, there also are gaps and ambiguities in their content and scope. So far, however, there is no political will to close the gaps and eliminate the ambiguities. Thus, it is necessary to examine these sources of law separately in order to establish which source applies to which context and then to determine whether the legal elements contained in the applicable sources apply to the facts.132

Some 188 states have so far embodied "war crimes" in their military codes. This is a requirement of the Geneva conventions and therefore every state party must domesticate their provisions and criminalize "grave breaches" violations. However, prosecutions for "war crimes" or "grave breaches" or an equivalent term (such as violations of the military code) have, with the exception of the prosecutions arising out of World War II,133 been few and far between. Since 1949, Germany has prosecuted an estimate of 60,000 cases mostly in the categories of genocide and war crimes, but the United States, in relation to the Vietnam War, prosecuted only two cases for war crimes—the Calley134 and Medina135 cases. It is noteworthy, too, that the only case brought against one of the World War II Allies for war crimes, by Japanese citizens for the use by the United States of atomic weapons against Japan, which killed and injured an estimated 225,000 innocent civilians,136

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131. The United States did not ratify either Protocol and wanted to avoid any references to these Protocols, insisting that whatever norms were derived therefrom should be drafted as part of customary law. In a sense the United States' position is defensible because the Protocols essentially embody customary law and that too evidences the overlap between the two sources of applicable law.

132. For a distinction between humanitarian law norms and human rights law norms as customary law, see THEODOR MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW (1989).

133. See Bassiouni, From Versailles to Rwanda, supra note 10.


was dismissed by the Supreme Court of Japan on technical jurisdictional grounds.\(^{137}\)

With respect to "crimes against humanity," Canada, France, and Israel have been the only countries to have carried out prosecutions. In Israel, the Eichmann\(^{138}\) and Demjanjuk\(^{139}\) cases were carried out, both for crimes not committed in the territory of the prosecuting state. Demjanjuk was acquitted because he turned out to be the wrong person. In France, prosecutions have occurred for Barbie,\(^{140}\) Touvier,\(^{141}\) and Papon.\(^{142}\) In 1989, Canada prosecuted

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137. Shimoda v. The State, 355 Hanrel Jiho (Supreme Court of Japan 7 December 1963); also quoted in part in 2 Friedman, supra note 1, at 1688. See also Richard A. Falk, *The Shimoda Case: A Legal Appraisal of the Atomic Attacks Upon Hiroshima and Nagasaki*, 59 Am. J. Int’l L. 759 (1965). The claim in that case was against the United States of America for dropping atomic bombs on Nagasaki and Hiroshima in violation of the laws and customs of war.


140. The Barbie judgments:


For information on the Barbie case see generally Ladislas de Hoyas, Klaus Barbie (Nicholas Courtin trans., 1985); Brendan Murphy, *The Butcher of Lyon* (1983).

141. The Touvier judgments:


142. The Papon case:

the first case under a 1987 statute that permits retrospective application of international law.\textsuperscript{143} This writer served as Canada's chief legal expert in testifying on what constituted "crimes against humanity" before 1945. \textit{Regina} resulted in the acquittal of Hungarian Gendarmerie Captain Finta on the facts but the judgment recognized the existence of "crimes against humanity" under international law before 1945. Prosecutions before the ICTY and ICTR have included "war crimes," "crimes against humanity," and "genocide," but when the opportunity arose to prosecute Pol Pot for such crimes in Cambodia, it was not seized.\textsuperscript{144}

Many of the specific acts deemed criminal are contained within the definitions of "war crimes," "crimes against humanity," and "genocide." That is where the overlap exists. Thus, legal questions arise as to when the same acts constitute one or the other of these three crimes. At this point, a jurist must examine the other legal elements required in the sources of law applicable to these three categories of crime. The "grave breaches" of the 1949 Geneva conventions\textsuperscript{145} and Protocol I\textsuperscript{146} are the clearest enunciation of what

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\textsuperscript{145} See Conventions cited supra note 85.

\textsuperscript{146} See 1977 Protocol I, supra note 86.
the elements of "war crimes" are, but that is because they apply to the context of conflicts of an international character. This is not quite the case with respect to common Article 3 of the 1949 Geneva conventions\(^{147}\) and Protocol II,\(^{148}\) which apply to conflicts of a non-international character, but with the exclusion in Protocol II of conflicts between internal dissident groups. Still, the gap between normative proscriptions applicable to the two contexts of conflicts exists, as does the overlap between these violations. The overlaps essentially are aimed at individual deviant conduct, the same type of criminal conduct that falls also within the scope of crimes against humanity and genocide, since the latter two crimes apply to all contexts of armed conflicts as well as to non-armed conflicts contexts and to tyrannical regime victimization. Clearly, such a situation need not exist since it would be easy to articulate the elements of each of these three categories of crimes clearly, in a way that prevents these unnecessary overlaps and gaps. So far, however, the political will to do so is nonexistent.

Because there is a connection between the rigors of evidentiary requirements to prove "war crimes," "crimes against humanity," and "genocide," and access to that evidence, the major governments who have the capacity to obtain such evidence remain in control of its use, and thereby in control of any eventual prosecution. This leaves such governments with the option to barter the pursuit of justice in exchange for political settlements.\(^{149}\) An examination of what happened in all types of post-World War II conflicts clearly indicates that the pursuit of justice has been almost always bartered away for the pursuit of political settlements.\(^{150}\) Consequently, the pursuit of justice has become part of the toolbox of political settlement negotiations.\(^{151}\) This is true for all three major crimes, essentially because they are committed by armies, police, and paramilitary groups which act pursuant to orders from the state's highest authorities. The need for an integrated codification of these three categories of crimes is self-evident. But when that opportunity arose in connection with the establishment of a permanent international criminal court, it was carefully avoided for lack of political will by many governments, including the major powers.

The road ahead is arduous and the same hurdles that have long existed continue to bar the way for the effective protection of the victims of these three major crimes. The voices of millions of victims since World War I continue to cry unheard by the politicians of this world, and the sway of conscience represented by civil society is insufficient to overcome the

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147. See Conventions cited supra note 85.
149. See Bassiouni, supra note 14.
150. See id. See also Bassiouni, From Versailles to Rwanda, supra note 10; TRANSNATIONAL JUSTICE (3 vols., Neil Kritz ed., 1995).
steadfastness of realpolitik. To recall the words of a popular ballad of the sixties: “When will they ever learn.”

Impunity for international crimes, and systematic and widespread violations of fundamental human rights, is a betrayal of our human solidarity with the victims of conflicts to whom we owe a duty of justice, remembrance, and redress. To remember and to bring perpetrators to justice is a duty we owe also to our own humanity and to the prevention of future victimization. To paraphrase George Santayana, if we cannot learn from the lessons of the past and stop the practice of impunity, we are condemned to repeat the same mistakes and to suffer their consequences. The reason for our commitment to this goal can be found in the eloquent words of John Donne:

No man is an island, entire of itself;  
every man is a piece of the continent, a part of the main . . .  
Any man’s death diminishes me because I am involved in mankind,  
and therefore never send to know for whom the bell tolls;  
it tolls for thee . . . .

152. To paraphrase the classic and profoundly insightful characterization of George Orwell, “Who controls the past, controls the future; who controls the present, controls the past.” GEORGE ORWELL, 1984 (2d ed. 1977). Thus, to record the truth, educate the public, preserve the memory, and try the accused, it is possible to prevent abuses in the future. See Stanley Cohen, State Crimes of Previous Regimes: Knowledge, Accountability and the Policy of the Past, 20 L. & Soc. Inquiry 7, 49 (1995).

153. JOHN DONNE, DEVOTIONS UPON EMERGENT OCCASIONS XVII (1624).
Appendix I


Article 5(c)

Crimes against Humanity: Namely, murder, extermination, enslavement, deportation, and other inhumane acts committed before or during the war, or persecutions on political or racial 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 where perpetrated. Leaders, organizers, instigators and accomplices participating in the formation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any person in execution of such plan.


Article II(c):

Crimes against Humanity: Atrocities and offences, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds, whether or not in violation of the domestic laws of the country where perpetrated.


PRINCIPLE VI:

(c) Crimes against humanity:

Murder, extermination, enslavement, deportation and other inhuman acts done against any civilian population, or persecution on political, racial or religious grounds, when such acts are done or such persecutions are carried
on in execution of or in connexion with any crime against peace or any war crime.


Article 2:
The following acts are offences against the peace and security of mankind:

Inhumane acts such as murder, extermination, enslavement, deportation, or persecutions, committed against any civilian population on social, political, racial, religious, or cultural grounds by the authorities of a State or by private individuals acting at the instigation or with the toleration of such authorities.


Article 21. Systematic or mass violations of human rights.
An individual who commits or orders the commission of any of the following violations of human rights:

- murder
- torture
- establishing or maintaining over persons a status of slavery, servitude or forced labour
- persecution on social, political, racial, religious or cultural grounds in a systematic manner or on a mass scale, or
- deportation or forcible transfer of population shall, on conviction thereof, be sentenced [to ...]

Article 5:

Crimes against humanity

The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population:

(a) murder;
(b) extermination;
(c) enslavement;
(d) deportation;
(e) imprisonment;
(f) torture;
(g) rape;
(h) persecution on political, racial and religious grounds;
(i) other inhumane acts.


Article 3:

Crimes against humanity

The International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds:

(a) Murder;
(b) Extermination;
(c) Enslavement;
(d) Deportation;
(e) Imprisonment;
(f) Torture;
(g) Rape;
(h) Persecution on political, racial and religious grounds;
(i) Other inhumane acts.


Article 18:
Crimes against humanity

A crime against humanity means any of the following acts, when committed in a systematic manner or on a large scale and instigated or directed by a Government or by any organization or group:

(a) murder;
(b) extermination;
(c) torture;
(d) enslavement;
(e) persecution on political, racial, religious or ethnic grounds;
(f) institutionalized discrimination on racial, ethnic or religious grounds involving the violation of fundamental human rights and freedoms and resulting in seriously disadvantaging a part of the population;
(g) arbitrary deportation or forcible transfer of population;
(h) arbitrary imprisonment;
(i) forced disappearance of persons;
(j) rape, enforced prostitution and other forms of sexual abuse;
(k) other inhumane acts which severely damage physical or mental integrity, health or human dignity, such as mutilation and severe bodily harm.
Article 7:

Crimes against humanity

1. For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

(a) Murder;
(b) Extermination;
(c) Enslavement;
(d) Deportation or forcible transfer of population;
(e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
(f) Torture;
(g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
(h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
(i) Enforced disappearance of persons;
(j) The crime of apartheid;
(k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

2. For the purpose of paragraph 1:

(a) "Attack directed against any civilian population" means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack;
(b) "Extermination" includes the intentional infliction of conditions of life, inter alia the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population;
(c) "Enslavement" means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the
exercise of such power in the course of trafficking in persons, in particular women and children;

(d) “Deportation or forcible transfer of population” means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law;

(e) “Torture” means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions;

(f) “Forced pregnancy” means the unlawful confinement, of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy;

(g) “Persecution” means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity;

(h) “The crime of apartheid” means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime;

(i) “Enforced disappearance of persons” means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.

3. For the purpose of this Statute, it is understood that the term “gender” refers to the two sexes, male and female, within the context of society. The term “gender” does not indicate any meaning different from the above.
Appendix II


Article II

In the present Convention, genocide means any of the following acts committed with 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.


Article 4

Genocide

1. The International Tribunal shall have the power to prosecute persons committing genocide as defined in paragraph 2 of this article or of committing any of the other acts enumerated in paragraph 3 of this article.

2. Genocide means any of the following acts committed with 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.

3. 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.


Article 2

Genocide

1. The International Tribunal for Rwanda shall have the power to prosecute persons committing genocide as defined in paragraph 2 of this article or of committing any of the other acts enumerated in paragraph 3 of this article.

2. Genocide means any of the following acts committed with 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.

3. 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.

Article 6
Genocide

For the purpose of this Statute, “genocide” means any of the following acts committed with 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.
Appendix III


Article 22:
1. The belligerents shall not have the unlimited right of choice of methods they use to attack the enemy.

Article 23:
1. Apart from the prohibition covered by special agreements, the following are especially prohibited:
   a. the use of poison or poisoned weapons
   b. killing or wounding through the betrayal of individuals from the enemy nation or army
   c. killing or wounding an enemy who, having laid down his or her arms or no longer able to defend himself or herself, has surrendered
   d. to declare that no quarter shall be given
   e. to use arms, projectiles, or materials designed to cause unnecessary harm
   f. to misuse the parliamentary flag, the national flag or the military insignia and uniform of the enemy, as well as the distinctive marks of the Geneva Convention
   g. to destroy or to seize the enemy property, except cases where such destruction or seizure are necessary for the prosecution of the war
   h. to declare that the national rights of the other Party are abolished, suspended or unrecognized in law
2. It is also forbidden to a belligerent to force nationals of the opposing Party to take part in military operations directed against their country, even if they have been in its service prior to the start of the war.

Article 24:
1. Military ploys and the use of the resources required to discover intelligence about the enemy and on the ground are considered to be legitimate.
Article 25:
1. It is forbidden to attack or bomb, by any means whatsoever, towns, villages, human habitations or buildings which are undefended.

Article 26:
1. The commander of the attacking forces, before commencing the bombing, and except in the case of a heavy attack, must do everything he can to warn the authorities.

Article 27:
1. In sieges or bombings, every possible measures must be taken to spare, as far as possible, buildings dedicated to worship, the arts, the sciences and social welfare, historic monuments, hospitals and places where the sick and wounded are assembled, on condition that these are not also used for military purposes.
2. It is the duty of the besieged to designate such buildings or places of assembly using special, visible signs which shall be notified in advance to the besiegers.

Article 28:
1. It is forbidden to allow looting of a town or locality captured in an attack.

Article 130 (Third Convention)
Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully 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 the rights of fair and regular trial prescribed in this Convention.

Article 147 (Fourth Convention)
Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the present Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.


Article 85 - Repression of breaches of this Protocol
1. The provisions of the Conventions relating to the repression of breaches and grave breaches, supplemented by this Section, shall apply to the repression of breaches and grave breaches of this Protocol.

2. Acts described as grave breaches in the Conventions are grave breaches of this Protocol if committed against persons in the power of an adverse Party protected by Articles 44, 45 and 73 of this Protocol, or against the wounded, sick and shipwrecked of the adverse Party who are protected by this Protocol, or against those medical or religious personnel, medical units or medical transports which are under the control of the adverse Party and are protected by this Protocol.
3. In addition to the grave breaches defined in Article 11, the following acts shall be regarded as grave breaches of this Protocol, when committed wilfully, in violation of the relevant provisions of this Protocol, and causing death or serious injury to body or health:

(a) making the civilian population or individual civilians the object of attack;

(b) launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects, as defined in Article 57, paragraph 2 (a) (iii);

(c) launching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects, as defined in Article 57, paragraph 2 (a) (iii);

(d) making non-defended localities and demilitarized zones the object of attack;

(e) making a person the object of attack in the knowledge that he is hors de combat;

(f) the perfidious use, in violation of Article 37, of the distinctive emblem of the red cross, red crescent or red lion and sun or of other protective signs recognized by the Conventions or this Protocol.

4. In addition to the grave breaches defined in the preceding paragraphs and in the Conventions, the following shall be regarded as grave breaches of this Protocol, when committed wilfully and in violation of the Conventions or the Protocol:

(a) the transfer by the occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory, in violation of Article 49 of the Fourth Convention;

(b) unjustifiable delay in the repatriation of prisoners of war or civilians;

(c) practices of apartheid and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination;

(d) making the clearly-recognized historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples and to which special protection has been given by special arrangement, for example, within the framework of a competent international organization, the object of attack, causing as a result extensive destruction thereof, where there is no evidence of the violation by the adverse Party of Article 53, sub-paragraph (b), and
when such historic monuments, works of art and places of worship are not located in the immediate proximity of military objectives;

(e) depriving a person protected by the Conventions or referred to in paragraph 2 of this Article of the rights of fair and regular trial.

5. Without prejudice to the application of the Conventions and of this Protocol, grave breaches of these instruments shall be regarded as war crimes.


Article 3

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

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:
(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(b) taking of hostages;

(c) outrages upon personal dignity, in particular humiliating and degrading treatment;

(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

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

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

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

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

Article 4 – Fundamental guarantees

1. All persons who do not take a direct part or who have ceased to take a part in hostilities, whether or not their liberty has been restricted, are entitled to respect for their person, honour and convictions and religious practices. They shall in all circumstances be treated humanely, without any adverse distinction. It is prohibited to order that there shall be no survivors.

2. Without prejudice to the generality of the foregoing, the following acts against the persons referred to in paragraph 1 are and shall remain prohibited at any time and in any place whatsoever:

   (a) violence to the life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;

   (b) collective punishments;

   (c) taking of hostages;

   (d) acts of terrorism;

   (e) outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;
(f) slavery and the slave trade in all their forms;

(g) pillage;

(h) threats to commit any of the foregoing acts.

3. Children shall be provided with the care and aid they require, and in particular:

(a) they shall receive an education, including religious and moral education, in keeping with the wishes of their parents, or in the absence of parents, of those responsible for their care;

(b) all appropriate steps shall be taken to facilitate the reunion of families temporarily separated;

(c) children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities;

(d) the special protection provided by this Article to children who have not attained the age of fifteen years shall remain applicable to them if they take a direct part in hostilities despite the provisions of sub-paragraph (c) and are captured;

(e) measures shall be taken, if necessary, and whenever possible with the consent of their parents or persons who by law or custom are primarily responsible for their care, to remove children temporarily from the area in which hostilities are taking place to a safer area within the country and ensure that they are accompanied by persons responsible for their safety and well-being.
Appendix IV


War crimes

For the purpose of the present Statute, war crimes means:

A. Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

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

B. Other serious violations of the laws and customs applicable in international armed conflict within the established framework of international law, namely, any of the following acts:

(a) Option 1

intentionally directing attacks against the civilian population as such, as well as individual civilians not taking direct part in hostilities;

Option 2

No paragraph (a).

(a bis) Option 1

intentionally directing attacks against civilian objects which are not military objectives;

Option 2

No paragraph (a bis).
(b) **Option 1**

intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which is not justified by military necessity;

**Option 2**

intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be excessive in relation to the concrete and direct overall military advantage anticipated;

**Option 3**

intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment;

**Option 4**

No paragraph (b).

(b bis) **Option 1**

intentionally launching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects which would be excessive in relation to the concrete and direct military advantage anticipated;

**Option 2**

No paragraph (b bis).

(c) **Option 1**

attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended;

**Option 2**

making non-defended localities and demilitarized zones the objects of attack;

(d) killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion;

(e) making improper use of flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury;
(f) Option 1
the transfer by the Occupying Power of parts of its own civilian population into the territory it occupies;

Option 2
the transfer by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;

Option 3
(i) the establishment of settlers in an occupied territory and changes to the demographic composition of an occupied territory;
(ii) the transfer by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;

Option 4
No paragraph (f).

(g) Option 1
intentionally directing attacks against buildings dedicated to religion, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not being used at the time for military purposes;

Option 2
intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not being used at the time for military purposes;

(h) subjecting persons who are in the power of an adverse Party to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his interest, and which cause death to or seriously endanger the health of such person or persons;

(i) killing or wounding treacherously individuals belonging to the hostile nation or army;

(j) declaring that no quarter will be given;

(k) destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war;
(l) declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party;

(m) compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war;

(n) pillaging a town or place, even when taken by assault;

(o) **Option 1**

employing the following weapons, projectiles and material and methods of warfare which are calculated to cause superfluous injury or unnecessary suffering:

(i) poison or poisoned weapons,

(ii) asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices,

(iii) bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions,

(iv) bacteriological (biological) agents or toxins for hostile purposes or in armed conflict,

(v) chemical weapons as defined in and prohibited by the 1993 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and On Their Destruction;

**Option 2**

employing the following weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering:

(i) poison or poisoned weapons,

(ii) asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices,

(iii) bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions,

(iv) bacteriological (biological) agents or toxins for hostile purposes or in armed conflict,

(v) chemical weapons as defined in and prohibited by the 1993 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and On Their Destruction,
(vi) such other weapons or weapons systems as become the subject of a comprehensive prohibition pursuant to customary or conventional international law;

Option 3

employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate;

Option 4

employing the following weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate:

or

employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate, such as but not limited to:

(i) poison or poisoned weapons,

(ii) asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices,

(iii) bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions,

(iv) bacteriological (biological) agents or toxins for hostile purposes or in armed conflict,

(v) chemical weapons as defined in and prohibited by the 1993 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and On Their Destruction,

(vi) nuclear weapons,

(vii) anti-personnel mines,

(viii) blinding laser weapons,

(ix) such other weapons or weapons systems as become the subject of a comprehensive prohibition pursuant to customary or conventional international law;

(p) Option 1

committing outrages upon personal dignity, in particular humiliating and degrading treatment;
Option 2

committing outrages upon personal dignity, in particular humiliating and degrading treatment as well as practices of apartheid and other inhuman and degrading practices involving outrages upon personal dignity based on racial discrimination;

(p bis) committing rape, sexual slavery, enforced prostitution, enforced pregnancy, enforced sterilization, and any other form of sexual violence also constituting a grave breach of the Geneva Conventions;

(q) utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations;

(r) intentionally directing attacks against buildings, material, medical units and transport, and personnel using, in conformity with international law, the distinctive emblems of the Geneva Conventions;

(s) intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions;

(t) Option 1

forcing children under the age of fifteen years to take direct part in hostilities.

Option 2

recruiting children under the age of fifteen years into armed forces or using them to participate actively in hostilities.

Option 3

(i) recruiting children under the age of fifteen years into armed forces or groups; or

(ii) allowing them to take part in hostilities;

Option 4

No paragraph (t).

***

OPTION I

Sections C and D of this article apply to armed conflicts not of an international character and thus do not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.
C. In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(b) committing outrages upon personal dignity, in particular humiliating and degrading treatment;

(c) taking of hostages;

(d) the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.

D. Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts:

(a) Option 1
   intentionally directing attacks against the civilian population as such, as well as individual civilians not taking direct part in hostilities;
   
   Option 2
   No paragraph (a).

(b) intentionally directing attacks against buildings, material, medical units and transport, and personnel using, in conformity with international law, the distinctive emblems of the Geneva Conventions;

(c) Option 1
   intentionally directing attacks against buildings dedicated to religion, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not being used at the time for military purposes;
   
   Option 2
   intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not being used at the time for military purposes;

(d) pillaging a town or place, even when taken by assault;
(e) committing outrages upon personal dignity, in particular humiliating and degrading treatment;

(e bis) committing rape, sexual slavery, enforced prostitution, enforced pregnancy, enforced sterilization, and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions;

(f) Option 1
forcing children under the age of fifteen years to take direct part in hostilities;

Option 2
recruiting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities;

Option 3
(i) recruiting children under the age of fifteen years into armed forces or groups; or

(ii) allowing them to take part in hostilities;

Option 4
No paragraph (f).

(g) ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand;

(h) killing or wounding treacherously a combatant adversary;

(i) declaring that no quarter will be given;

(j) subjecting persons who are in the power of another Party to the conflict to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his interest, and which cause death to or seriously endanger the health of such person or persons;

(k) destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict;

(l) Option 1
No provision on prohibited weapons.

Option 2
A reference to arms, in the light of the discussions on paragraph B(o).
OPTION II

Insert the following provisions in section D:

- intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions;

- intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment;

- intentionally launching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects which would be excessive in relation to the concrete and direct military advantage anticipated;

- slavery and the slave trade in all their forms;

OPTION III

Delete the opening clause of sections C and D.

OPTION IV

Delete section D.

OPTION V

Delete sections C and D.

* * *

Elsewhere in the Statute:

Option 1

The jurisdiction of the Court shall extend to the most serious crimes of concern to the international community as a whole. The Court shall have jurisdiction in respect of the crimes listed in article X (war crimes) only when committed as part of a plan or policy or as part of a large-scale commission of such crimes.

Option 2

The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court shall have jurisdiction in respect of the crimes listed in article X (war crimes) in particular when committed as a part of a plan or policy or as part of a large-scale commission of such crimes.
Option 3

- No provision on threshold.

* * *

Article V

(relating to the part of the Statute dealing with the definition of crimes)

Without prejudice to the application of the provisions of this Statute, nothing in this part of the Statute shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law.

N.B.

- Article Y could constitute a separate article or could be placed in article 5 (Crimes within the jurisdiction of the Court).

- Article 21, paragraph 3 (Nullum crimen sine lege) and article 20 (Applicable law) deal with related issues.
Appendix V


<table>
<thead>
<tr>
<th>Draft article as contained in A/AC.249/1997/WG.1/CRP.7</th>
<th>Sources</th>
<th>Reference to A/AC.249/1997/L.5</th>
</tr>
</thead>
<tbody>
<tr>
<td>A. Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:</td>
<td></td>
<td>A (a)</td>
</tr>
<tr>
<td>(a) wilful killing;</td>
<td>Art. 50 GC I; Art. 51 GC II; Art. 130 GC III; Art. 147 GC IV</td>
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<tr>
<td>(b) torture or inhuman treatment, including biological experiments;</td>
<td>Art. 50 GC I; Art. 51 GC II; Art. 130 GC III; Art. 147 GC IV</td>
<td>A (b)</td>
</tr>
<tr>
<td>(c) wilfully causing great suffering, or serious injury to body or health;</td>
<td>Art. 50 GC I; Art. 51 GC II; Art. 130 GC III; Art. 147 GC IV</td>
<td>A (c)</td>
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<td>(d) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;</td>
<td>Art. 50 GC I; Art. 51 GC II; Art. 147 GC IV</td>
<td>A (d)</td>
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<td>(e) compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;</td>
<td>Art. 130 GC III; Art. 147 GC IV</td>
<td>A (e)</td>
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</table>
(f) wilfully depriving a prisoner of war or other protected person of the rights of a fair and regular trial;  
Art. 130 GC III; Art. 147 GC IV  
A (f)

(g) unlawful deportation or transfer or unlawful confinement;  
Art. 147 GC IV  
A (g)

(h) taking of hostages.  
Art. 147 GC IV  
A (h)

B. Other serious violations of the laws and customs applicable in international armed conflict within the established framework of international law, namely any of the following acts:

(a) intentionally directing attacks against the civilian population as such, as well as individual civilians not taking direct part in hostilities;\(^{154}\)  
Art. 51 paras. 2 and 3 Add. Prot. I; Art. 85 para. 3 (a) Add. Prot. I  
B 4. (m); cf. also B 1. (a)

(b) Intentionally launching an attack with the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects [or widespread, long-term and severe damage to the natural environment] which is not justified by military necessity;\(^{155}\)  
cf. Art. 57 para. 2 (a) (iii) Add. Prot. I as well as Art. 35 para. 3 Add. Prot. I; Art. 85 para. 3 (b) Add. Prot. I  
B 1. (b)

(c) attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended;  
Art. 25 Hague IV 1907  
B 1. (d)

(d) killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion;  
Art. 23 para. 1 (c) Hague IV  
B 1. (e)

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154. The view was expressed that attacks against civilian objects should be considered in this context.

155. It has been accepted that it will be necessary to insert a provision, probably in the general principles section, which sets out the elements of knowledge and intent which must be found to have existed for an accused to be convicted of a war crime. For example, "in order to conclude that an accused had the knowledge and the criminal intention required to be convicted of a crime, the Court must first determine that, taking account of the relevant circumstances of, and information available to, the accused at the time, the accused had the requisite knowledge and intent to commit the crime."
(e) making improper use of flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury;

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<tr>
<th>(f) the transfer by the Occupying Power of parts of its own civilian population into the territory it occupies;</th>
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<tr>
<td>Art. 49 subpara. 6 GC IV; Art. 85 para. 4 (a) Add. Prot. I</td>
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<tr>
<td>B 2. (a)</td>
</tr>
</tbody>
</table>

(g) intentionally directing attacks against buildings dedicated to religion, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not being used at the time for military purposes;

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<tr>
<th>(h) subjecting persons who are in the power of an adverse Party to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his interest, and which causes death to or seriously endangers the health of such person or persons;</th>
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<tr>
<td>cf. Art. 27 Hague IV</td>
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<td>B 2. (d)</td>
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(i) killing or wounding treacherously individuals belonging to the hostile nation or army;

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<th>(j) declaring that no quarter will be given;</th>
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<tr>
<td>Art. 23 para. 1 (b) Hague IV</td>
</tr>
<tr>
<td>B 4. (a)</td>
</tr>
</tbody>
</table>

(k) destroying or seizing the enemy’s property unless such destruction or seizure be imperatively demanded by the necessities of war;

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<th>(l) declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party;</th>
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<tbody>
<tr>
<td>Art. 23 para. 1 (h) Hague IV</td>
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<tr>
<td>B 4. (f)</td>
</tr>
<tr>
<td>(m) compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent’s service before the commencement of the war;</td>
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<td>(n) pillaging a town or place, even when taken by assault;</td>
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<td>(o) employing the following weapons, projectiles and material and methods of warfare which are calculated to cause superfluous injury or unnecessary suffering;</td>
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<td>(i) poison or poisoned weapons;</td>
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<td>(ii) asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices,</td>
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<td>(iii) bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions,</td>
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<td>(iv) bacteriological (biological) agents or toxins for hostile purposes or in armed conflict,</td>
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<td>(v) chemical weapons as defined in and prohibited by the 1993 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and On Their Destruction;</td>
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<tr>
<td>(p) [committing] outrages upon personal dignity, in particular humiliating and degrading treatment, including rape, enforced prostitution and other sexual violence of comparable gravity;</td>
</tr>
<tr>
<td>(q) utilizing the presence of a civilian or other protected person to render certain points, areas, or military forces immune from military operations;</td>
</tr>
<tr>
<td>(r) intentionally directing attacks against buildings, material, medical units and transport, and personnel using, in conformity with international law, the distinctive emblems of the Geneva Conventions;</td>
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<td>(s) intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions;</td>
</tr>
<tr>
<td>[(t) [forcing] [recruiting] children under the age of fifteen years to take direct part in hostilities;]</td>
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<tr>
<td>*****</td>
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<td>Sections C and D of this Article apply to armed conflicts not of an international character and thus do not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.</td>
</tr>
<tr>
<td>[C. Serious violations of Article 3 common to the four Geneva Conventions of 12 August 1949 in the case of an armed conflict not of an international character namely any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause:</td>
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<td>(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;</td>
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<td>(b) [committing] outrages upon personal dignity, in particular humiliating and degrading treatment [including rape, enforced prostitution and other sexual violence of comparable gravity];</td>
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<tr>
<td>(c) taking of hostages;</td>
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<tr>
<td>(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.</td>
</tr>
<tr>
<td>[D. Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely any of the following acts:</td>
</tr>
<tr>
<td>(a) intentionally directing attacks against the civilian population as such, as well as individual civilians not taking direct part in hostilities; 156</td>
</tr>
<tr>
<td>(b) intentionally directing attacks against buildings, material, medical units and transports, and personnel using, in conformity with international law, the distinctive emblems of the Geneva Conventions;</td>
</tr>
<tr>
<td>(c) intentionally directing attacks against buildings dedicated to religion, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not being used at the time for military purposes;</td>
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<td>(d) pillaging a town or place, even when taken by assault;</td>
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<tr>
<td>(e) [committing] outrages upon personal dignity, in particular humiliating and degrading treatment, including rape, enforced prostitution and other sexual violence of comparable gravity;</td>
</tr>
</tbody>
</table>

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156. The view was expressed that attacks against civilian objects should be considered in this context (cf. 12).
| [(f) [forcing] [recruiting] children under the age of fifteen years to take direct part in hostilities;] | cf. Art. 4 para. 3 (c) Add. Prot. II; Art. 38 Rights of the Child Conv. | C 2. (p) |
| (g) ordering the displacement of the civilian population for reasons related to the conduct, unless the security of the civilians involved or military reasons so demand; | Art. 17 para. 1 Add. Prot. II | C 2. (q) |
| (h) killing or wounding treacherously a combatant adversary; | cf. Art. 23 para. 1 (b) Hague IV | C 2. (r) |
| (i) declaring that no quarter will be given; | cf. Art. 23 para. 1 (d) Hague IV | C 2. (s) |
| (j) subjecting persons who are in the power of another Party to the conflict to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his interest, and which cause death to or seriously endanger the health of such person or persons; | cf. Art. 5 para. 2 (e) Add. Prot. II | new |
| (k) destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict.] | cf. Art. 23 para. 1 (g) Hague IV | new |

*****

[Elsewhere in the Statute:

The jurisdiction of the Court shall extend to the most serious crimes of concern to the international community as a whole. The Court shall have jurisdiction in respect of the crimes listed in Article X [war crimes] only when committed as part of a plan or policy or as part of a large-scale commission of such crimes.]157

chapeau before A

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157. The view was expressed that the substance and placement of this proposal should be considered.
Appendix VI


Article 8

War Crimes

1. The Court shall have jurisdiction in respect of war crimes in particular when committed as a part of a plan or policy or as part of a large-scale commission of such crimes.

2. For the purpose of this Statute, "war crimes" means:

   (a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

      (i) Wilful killing;

      (ii) Torture or inhuman treatment, including biological experiments;

      (iii) Wilfully causing great suffering, or serious injury to body or health;

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

      (v) Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;

      (vi) Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;

      (vii) Unlawful deportation or transfer or unlawful confinement;

      (viii) Taking of hostages.

   (b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:

      (i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;

      (ii) Intentionally directing attacks against civilian objects, that is, objects which are not military objectives;

      (iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the
United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;

(iv) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;

(v) Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives;

(vi) Killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion;

(vii) Making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury;

(viii) The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;

(ix) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;

(x) Subjecting persons who are in the power of an adverse party to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;

(xi) Killing or wounding treacherously individuals belonging to the hostile nation or army;

(xii) Declaring that no quarter will be given;

(xiii) Destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war;

(xiv) Declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party;
(xv) Compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war;

(xvi) Pillaging a town or place, even when taken by assault;

(xvii) Employing poison or poisoned weapons;

(xviii) Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;

(xix) Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions;

(xx) Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to this Statute, by an amendment in accordance with the relevant provisions set forth in articles 121 and 123;

(xxi) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;

(xxii) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions;

(xxiii) Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations;

(xxiv) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;

(xxv) Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions;

(xxvi) Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.
In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause:

(i) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(ii) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;

(iii) Taking of hostages;

(iv) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.

(d) Paragraph 2 (c) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.

(e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts:

(i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;

(ii) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;

(iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the law of armed conflict;

(iv) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;

(v) Pillaging a town or place, even when taken by assault;
(vi) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions;

(vii) Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities;

(viii) Ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand;

(ix) Killing or wounding treacherously a combatant adversary;

(x) Declaring that no quarter will be given;

(xi) Subjecting persons who are in the power of another party to the conflict to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;

(xii) Destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict;

(f) Paragraph 2 (e) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.

3. Nothing in paragraphs 2 (c) and (d) shall affect the responsibility of a Government to maintain or re-establish law and order in the State or to defend the unity and territorial integrity of the State, by all legitimate means.