Ways towards Justice

Is International Law Moving towards Criminalization?

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1 Introduction

Comparing the present state of international law, as it stands on the eve of the twenty-first century, with the vision elaborated by Wolfgang Friedmann in his ground-breaking book published more than thirty years ago, The Changing Structures of International Law, is indeed an undertaking of great interest.

The question of whether international law is moving towards criminalization is a vast subject. Within the scope of this paper I inevitably shall have to use a broad brush to sketch my view of the situation, an assignment that makes me uncomfortable because I will necessarily have to recall some points which are well known to readers. The still fluid state of discussions about the subject-matter jurisdiction of the proposed international criminal court further complicates my task.

Friedmann wrote that there has '[a]lways been an "international criminal law" of modest and ill-defined proportions'1 and that the only recognized crimes were piracy jure gentium, and war crimes. As a result, Friedmann wondered whether the crimes stated in the Nuremberg Charter, other than genocide, would become part of universal criminal law.2 He recognized, however, that the Nuremberg Charter's influence would extend international crimes by establishing individual responsibility for certain internationally recognized offences, such as murder, deportation and the planning, preparation and initiation or waging of a war of aggression.3 Thus, he was able to foresee that such individual responsibility would exercise a strong influence over the legal responsibility of states and governments.4 Friedmann's discussion of the possibilities for extending international criminal offences beyond political state action proves equally interesting. In his opinion, such a broadening of international criminal law would depend both on the general principles of criminal law recognized by civilized nations and on the extent to which such offences are accepted in the criminal laws of the various nations.5 In discussing new offences, especially in the economic arena, Friedmann recognized the growing extraterritorial aspects of such crimes as, for example, violations of anti-trust legislation.6

Beyond these normative considerations, Friedmann's writings examined the institutional arena as well. His prediction that expanding international law would ultimately require the creation of an international criminal court7 is now being realized through the United Nations discussions.

Friedmann's conception of a broader corpus of international criminal law governing crimes by individuals has already largely become a reality, with the exception, perhaps, of crimes against peace. The new offences in the economic arena to which he alluded, especially those with extraterritorial effects such as violations of anti-trust legislation, have become extraordinarily important. These offences, as well as acts resulting in major environmental disasters, are nearly always caused by corporations or legal persons. Since corporations are by far the most important actors in our contemporary experience, the criminalization of their offences is a vital issue for debate.

2 Criminalization of Acts of Corporations

Friedman himself referred to the trend of criminalizing offences by legal persons, such as corporations.8 In opposition to the ILC's adoption of the concept of international crimes, many cite the maxim impossibile est quod societas delinquat. However, the increasing departure from this maxim in national laws suggests that opposition to the concept of international crimes stems from state sovereignty rather than from the character of the state as a legal person.

In addition to the individual criminal responsibility of the officers of a corporation,9 in the modern business world a corporation itself may be criminally liable for the actions or omissions of agents acting on the corporation's behalf,10 i.e., in the scope of their employment. The movement towards this form of criminalization began in areas of strict liability, where no mens rea was required, but soon expanded to crimes requiring a certain mental state.11 This was achieved through imputing to the corporation not only the acts, but also the mental state, of its employees.12 Whereas individuals would be punished by imprisonment or even death, corporations have been penalized by fines or punitive damages.

Even though labelled civil rather than criminal, treble damages for anti-trust violations have become a

major feature in evaluating the movement of the law towards the imposition of punitive sanctions. The role of parallel developments in many countries, which influence general principles of law and, in many cases, general principles of criminal law, reinforces the impact of such treble damages.

The action for civil treble damages in the United States for violation of the Sherman Act or other anti-trust legislation may be initiated by either the government, private individuals or corporations. This civil action is in addition to governmental enforcement through both criminal and civil action,13 for example, by enjoining an illegal transaction. Governmental criminal action leads to fines on corporations and their officers and, whenever appropriate, imprisonment of the corporation's officers. Allowing private parties to sue to supplement governmental enforcement means that private parties are allowed to act, in effect, as private attorneys general. I emphasize this point to illustrate that significant sanctions can also be carried out through private agents. Thus, the dividing line between civil and criminal action may be becoming blurred in several areas of the law.

3 Criminal Responsibility of States

I shall not dwell on the criminal responsibility of states, in the nature of Article 19 of the articles on state responsibility adopted by the International Law Commission (ILC),14 even though Friedmann mentions this concept of the criminal responsibility of states and governments15 and it continues to have conceptual and moral significance. The term 'international crime' in Article 19 does not necessarily mean criminal in the ordinary sense as applied to the penal responsibility of individuals in either internal or international law. I agree with Professor Georges Abi-Saab 'that what is invoked here is not to instill a mirror-image system of penal law addressed to States, but simply to attach graver consequences to violations constituting "international crimes", and to emphasize that such violations cannot be reduced to a mere bilateral relation between the victim and the perpetrator…'16 In their edition of Oppenheim, Jennings and Watts also speak of a special and more severe type of responsibility.17

Furthermore, I am also in agreement with Abi-Saab that the standing of third states offers a significant value added to international crimes,18 provided, however, that focusing on remedies for jus cogens violations does not erode the remedies for violations of erga omnes norms. Some of the punitive measures against states for international crimes, such as the use of force in violation of the Charter or threats to the peace, are, of course, under the authority of the United Nations.

Second, as the ILC states in Article s 51-53 of the 1996 text on state responsibility,19 international crimes do not necessarily have penal consequences. Rather, these articles address certain obligations for all states and reinforce the principle that an injured state's entitlement to restitution or satisfaction is not subject to certain restrictions stated in the articles.

Third, the term international crime itself is not written in stone.

4 Recent Trends

I will primarily discuss the criminal responsibility of individuals for violations of international humanitarian law. In the process, I will make the necessary distinction between international and internal armed conflicts.

In terms of actual practice, not much had happened since Friedmann's book, or even since Nuremberg, except for a number of national prosecutions for war crimes and crimes against humanity, until the atrocities in Yugoslavia shocked the conscience of mankind. Within a short time, these events triggered the Security Council, acting under Chapter VII of the UN Charter, to promulgate the Statutes of the International Criminal Tribunals for the Former Yugoslavia20 and for Rwanda.21 They also provided the impetus for the ILC to adopt its draft statute for the proposed international criminal court.22

In the interim period, despite the lack of ongoing practice, the opinio juris and the international consensus on the legitimacy of the Nuremberg principles, the applicability of the principle of universal jurisdiction to crimes under international law, and the need to punish those responsible for egregious violations of international humanitarian law solidified. In addition, many treaties providing for national prosecution of crimes of international concern were adopted. Universal jurisdiction has been thus recognized with regard to such crimes as attacks on the safety of civil aviation and maritime navigation, and also in case of egregious infringement of human rights, as for example, torture under the 1984 United Nations Convention. This trend is well articulated in the draft basic principles and guidelines on the right of reparation for victims of gross violations of human rights and humanitarian law, which provide that: 'Every State shall provide for universal jurisdiction over gross violations of human rights and humanitarian law which constitute crimes under international law.'23

The statutes of the two ad hoc Tribunals represent a major advance over the Charter of Nuremberg. First, grave breaches of the Geneva Conventions and the crime of genocide occupy the central place in

the statutes. Second, the Yugoslav Statute recognizes crimes against humanity for non-international armed conflicts, not only for international wars, and the Rwanda Statute arguably acknowledges such crimes even in peacetime.24 The Appellate decision of the Hague Tribunal in the Tadic case gave a judicial imprimatur to this broad scope of crimes against humanity,25 following the direction of Control Council Law No. 10. Even before these developments, however, there was very strong support in the opinio juris for the universality of jurisdiction over crimes against humanity. Third, rape has been criminalized as a crime against humanity.26 Finally, and most importantly, by recognizing the criminality of violations of common Article 3 and of Additional Protocol II to the Geneva Conventions, the Rwanda Statute constitutes an extremely positive statement of international humanitarian law concerning internal atrocities.27

However, an interesting question is whether we are not witnessing a certain erosion of the Nuremberg concept of crimes against peace, despite its recognition in the proposed draft statute of the international criminal court and in the ILC's Code of Offences against Peace and Security of Mankind. Consider, for example, the failure even to try to invoke these crimes in international practice, as for example in the aftermath of the second Gulf War, and the continuing controversy about their inclusion in the subject-matter jurisdiction of the proposed international criminal court.

Crimes against peace had a considerable foundation in the normative statements prohibiting aggressive war as national policy and defining aggressive war as a crime. It was the United States, and especially Justice Jackson, who insisted on criminalizing war of aggression in the Nuremberg Charter. In Nuremberg, the United States clearly viewed this crime as one for which responsibility attaches to individuals. Nonetheless, in a recent statement on the proposed international criminal court, the United States expressed many caveats about attaching responsibility to individuals for the crime of aggression. Instead, it described aggression as essentially a crime of states, which is problematic for two reasons: it is ill-defined and liable to be politicized.28 Other countries found the role of the Security Council in authorizing judicial involvement by the international criminal court troubling.29

5 International Armed Conflicts

I will start with the relatively well-developed system of humanitarian law in international armed conflicts, which consists primarily of the law of The Hague and the law of Geneva. The first issue to address is the problem of grave breaches of the Geneva Conventions. For international armed conflicts, the Geneva Conventions of 12 August 1949 introduced the grave breaches system, which requires state parties to criminalize certain acts and to prosecute or extradite perpetrators.30 These provisions represented a clear break with the earlier tradition of humanitarian law instruments, which did not contain specific rules governing criminality.

The advantage of this system lies in its clarity and transparency; its disadvantage is the creation of a category of other breaches, involving the violation of all remaining provisions of the Conventions, which are arguably less categorically penal.31 The fact that the Geneva Conventions created the obligation of aut dedere aut judicare only with regard to grave breaches does not mean that significant other breaches of the Geneva Conventions may not be punished by any state party to the Convention, or by international criminal tribunals, provided that they reflect significant obligations and customary law. In my view, any third state has the right, although probably not the duty, to prosecute serious violations of the Geneva Conventions, including those of common Article 3, even when it has no special nexus with either the offender or the victim.

Beyond the Geneva Conventions, the major problem for international humanitarian law is how to distinguish between norms that merely prohibit conduct and those that also impose individual criminal responsibility on the violators. Of course, it is simply not sufficient that treaties or customary international law proscribe certain types of conduct. The prohibited conduct must also lead to the individual criminal responsibility of the violators.

Three additional facets of international humanitarian law aid in understanding the imposition of individual criminal responsibility. First, the question of criminality should not be confused with jurisdiction and penalties. Second, the fact that an obligation is explicitly addressed to governments does not dispose of the penal responsibility of individuals, an understanding that clearly emerges from the jurisprudence of Nuremberg. As the International Military Tribunal stated, '[c]rimes against international law are committed by men, not by abstract entities….'32 Third, whether international law creates individual criminal responsibility depends on such considerations as whether the prohibitory norm in question, which may be conventional or customary, is directed to individuals, whether the prohibition is unequivocal in character, the gravity of the act, and the interests of the international community. Those factors are all relevant for determining the criminality of various acts.

Nevertheless, the legal criteria for judging criminality in this area are still far from clear, as shown by the lack of clarity as to whether violations of environmental treaties, the use of land mines, or the use of

blinding laser weapons, for example, involve individual criminal responsibility. There is a move in the direction of criminalization, as demonstrated by the proposals submitted to the preparatory conference of the international criminal court.

The ILC's core crimes for the proposed international criminal court include crimes under general international law, such as genocide, aggression, serious violations of the laws and customs applicable in armed conflict, crimes against humanity, and certain enumerated treaty crimes.33 Among the treaty crimes, the ILC added grave breaches of the Geneva Conventions and of Additional Protocol I, violations of the Hague and Montreal conventions on civil aviation, and of the Rome convention on maritime navigation, apartheid, hostage-taking, attacks on internationally protected persons, torture and drug related offences.34 Neither violations of common Article 3 nor violations of Protocol II were included as either treaty crimes or crimes under general international law. Although the core crimes now under consideration may exclude many violations originally called treaty crimes, grave breaches of the Geneva Conventions will probably be incorporated under the heading of war crimes.

6 Non-international Armed Conflicts

An additional hurdle arises in non-international armed conflicts. In such conflicts, before considering the question of criminality, one must first address the actual applicability of the rules.

In our contemporary world, few conflicts are truly internal; many are at least mixed or internationalized. However, the received wisdom is that most rules of international humanitarian law clearly apply only to international armed conflicts, which are relatively rare; but few rules actually apply to the frequent, cruel and violent non-international armed conflicts.

After first sketching the state of the law for non-international armed conflicts, I will discuss some strategies for expanding the applicable rules, including using the Hague Tribunal and customary law. Under the traditional view of the law, neither common Article 3 nor Protocol II additional to the Geneva Conventions impose individual criminal responsibility for violations and the Hague law is largely inapplicable in a non-international conflict, certainly as a system of norms whose violations involve individual criminal responsibility.

The draft statute for the international criminal court, as currently under discussion in the United Nations, will probably include violations of common Article 3 under the rubric of war crimes, but the possibility of including Protocol II in this framework is still uncertain. A working paper by New Zealand and Switzerland,35 based on a paper by the International Committee of the Red Cross, includes elements of Protocol II, but the United States proposal does not.36 Fairly responsive to the need to criminalize violations of international humanitarian law in internal armed conflicts, the Code of Crimes tracks the language of common Article 3, and of Article 4 of Additional Protocol II for non-international armed conflict, but omits Hague law violations.

1. The first strategy is to eliminate the distinction between international and non-international armed conflicts, often artificial in contemporary conflicts, and to apply the same comprehensive set of norms to all armed conflicts. One approach is to focus on applying international rules to their maximum effect, even in situations regarded as primarily internal. The Appeals Chamber in the Tadic case followed this tactic, using a combination of assertive statute interpretation and enlightened analysis of customary law to deem the bulk of international humanitarian law applicable to non-international armed conflicts, with the exception of grave breaches of the Geneva Conventions. In this way, the Tribunal established the individual criminal responsibility of the perpetrators.37 The advantage of this technique lies in applying protective norms and penalizing violators even in situations that appear to be internal.

The Hague Trial Chambers demonstrate another approach in its cases involving Rule 61 of the Tribunal's Rules of Procedure. The involvement of Serbia and Croatia allowed the Chambers to view the conflict as essentially international and to introduce the entire panoply of international rules, including, of course, grave breaches of the Geneva Conventions and the Hague Regulations, in a way that sparks fewer complaints of ex post facto.38 In the 1997 decision on Tadic, one chamber dissented from this approach and deemed the conflict to be non-international. This decision has been appealed.

2. The second strategy is to enhance the content of the norms of international humanitarian law applicable in non-international armed conflicts by treaties, typically adopted in specially convened diplomatic conferences. Although any evolution in this area is inevitably slow, some important progress has already been made. For example, Article 19(1) of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict39 makes parts of the Convention applicable to civil wars, and the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction of 197240 as well as the Convention on Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their

Destruction of 199341 apply in all situations. Similarly, the scope of the application of Protocol II on mines to the Conventional Weapons Convention now extends to non-international armed conflicts falling under common Article 3 of the Geneva Conventions (President's text, 13 October 1995), and the Protocol on blinding laser weapons is understood to apply in all circumstances.

Aside from these advances, the broader prospects for using diplomatic law-making conferences to extend to internal conflicts those rules of international humanitarian law now applicable to international wars are not promising. Governments are determined to deal with rebels harshly and to deny them legal recognition and political status. Despite the beneficial impact of human rights law, the reluctance of international law-making conferences to extend to civil wars the protective rules applicable to international wars has dampened prospects for redress through orderly treaty-making. Nevertheless, treaty norms governing the use of weapons and methods of warfare in international conflicts are likely to trickle down to non-international armed conflicts. For example, if the international criminal court's subject-matter jurisdiction for international armed conflicts included violations of the Chemical Weapons Convention of 1993, and the Convention were applicable to non-international armed conflicts, it is inconceivable that even violations in non-international armed conflicts would not be regarded as international crimes.

Conferences frequently make decisions by consensus and try to adopt texts generally acceptable to all, so even a few recalcitrant governments can prevent the adoption of more enlightened provisions. Therefore, development of the law will depend largely on other strategies, including the development of customary law, action by the Security Council of the United Nations, judgments of international and national tribunals, national laws implementing international conventions and international customary law, and national statutes conferring extraterritorial jurisdiction on national courts.

Given the limitations of space, I shall restrict my remarks to the development of customary law through international tribunals and the role of national courts in applying extraterritorial and universal jurisdiction concepts.

3. A third major strategy is to use customary law to expand the reach of the norms and enhance the criminality of violations. Recent developments in this area merit a fresh examination of the role of customary law. The fact that practice of states lags behind opinio juris and that general principles of law, including general principles of penal law, play an important part in international humanitarian law is to be expected. International criminal tribunals will thus have the important role of articulating that opinio juris. Although the primary task of international tribunals is to apply and interpret their statutes, their judgments provide rare and authoritative vehicles for the clarification of customary law.

The Hague Appeals Chamber's decision in the Tadic case42 proves useful in demonstrating the renewed vitality and potential of customary law. In that decision, the Hague Tribunal formally adhered to the traditional twin requirements for the formation of customary international law, practice and opinio juris. In effect, however, it weighed statements as both evidence of practice and articulation of opinio juris, the latter of which is dominant in the formation of humanitarian and human rights law. Thus, without explicit acknowledgement, the Tribunal came close to reliance on opinio juris or general principles of humanitarian law distilled, in part, from the Geneva and Hague Conventions,43 applying a methodology similar to that used in the field of human rights. With a number of caveats disallowing, for example, the mechanical transplantation of rules from international to internal conflicts, the Tribunal found that customary rules have matured to the extent that they govern internal conflicts and cover the bulk of the Hague law,44 and that common Article 3 and other customary rules on internal conflicts engage the individual criminal responsibility of violators.45
Two factors further strengthen the Hague Tribunal's impact. First, its decisions show that international investigation and prosecution of war crimes and crimes against humanity are credible and feasible. Second, the Tribunal has prepared a comprehensive set of Rules of Procedure and Evidence, which is the first code of international criminal procedure and evidence, in the words of the Tribunal, and will help pave the way for future prosecution of such crimes.

Enforcement of international humanitarian law cannot depend on international tribunals alone. Neither ad hoc tribunals nor the proposed international criminal court will be able to consider a large number of cases. They will always be complementary to national justice systems, rather than a substitute for national courts. However, the record of national prosecution of violators of even such unequivocal norms as grave breaches of the Geneva Conventions is disappointing and the record of prosecuting internal atrocities has been even worse. Lack of resources, evidence and, above all, political will have stood in the way of effective enforcement of international norms.

We must therefore encourage national prosecutors and judges to place greater reliance on international humanitarian law. This use of international law should not present major legal difficulties, especially regarding national prosecution of crimes committed in the national territory of the state where the conflict occurs. However, national states may not wish to prosecute violations of internal atrocities

committed by their agents or in their countries for political reasons. Consequently, this reluctance, along with the inevitably limited role of international tribunals, makes the role of third states and pertinent penal and jurisdictional elements of international humanitarian law, especially universal jurisdiction, critically important.

Nonetheless, perhaps due to the Hague Tribunal's impact, nations around the world have recently been more ready to prosecute human rights and humanitarian atrocities, including Korea, where even ex-presidents have been convicted, Ethiopia, where several thousand persons are being prosecuted for genocide and war crimes, and Honduras. In addition, prosecutions are under way in South Africa against persons who did not cooperate fully with the truth commission by coming forward, reporting the entire truth, and seeking amnesty.

Beyond national prosecution of national offenders, which is still infrequent, the exercise of universal jurisdiction by third states is vital to the enforcement of international humanitarian law. Many states have adopted statutes allowing them to prosecute violations of international humanitarian law committed abroad. Unfortunately, actual prosecution of persons who have committed violations on foreign soil remains a rare phenomenon.

As I already explained, any third state has the right to prosecute serious violations of the Geneva Conventions other than grave breaches, including those of common Article 3, even when they have no nexus with the offender or the victim except the presence of the offender in its territory. This is also true of some provisions of Additional Protocol II, given the essentially customary and prohibitive character of its provisions and, increasingly, of the Hague law. Furthermore, crimes against humanity, whether committed in international or in internal wars, are subject to universal jurisdiction. In my view, this is also true of crimes against humanity committed in peacetime. In addition, the crime of genocide is increasingly recognized as cause for prosecution by any state, despite the absence of a provision on universal jurisdiction in the Genocide Convention.

The state practice of extending the universal jurisdiction of courts to all breaches of the Geneva Conventions, including common Article 3 and Protocol II, is evolving, as demonstrated by the Belgian law of 16 June 1993 entitled Crimes de droit International.46 Although usually less broad than the Belgian version, statutes granting national courts jurisdiction over violations of international humanitarian law committed in third states have been adopted by a significant number of states.

Expansive extraterritorial jurisdiction of national courts under the protective principle, especially in matters pertaining to narcotic drugs and terrorism, triggers further developments. Parallel to crimes under general international law, the list of treaty crimes relating to offences of international concern has greatly expanded, as the list of some of the relevant treaties annexed to the ILC 1994 draft Statute47 for the International Criminal Court demonstrates.

7 Conclusions

Any comparison between the law of today and that of five years ago demonstrates that in the area of individual criminal responsibility, international law has clearly moved towards much greater criminalization. This shift appears in the international arena, involving both international criminal tribunals and international humanitarian law, and on the national level, with regard to the expanding criminal responsibility of corporations. In national legal systems, concepts of universality of jurisdiction and protective jurisdiction have gained added force. International institutions and, more specifically, international tribunals have enhanced the development of international criminal law. The future pace of progress will depend primarily on the establishment and the efficacy of the international criminal court and on the future success of the Yugoslav and Rwanda tribunals.

A broad vision of the various principles of international law pertaining to prosecution of violations of humanitarian law shows that the whole is greater than the sum of the parts. Some commentators choose, however, a more fragmented perspective. They argue, for example, that because the Geneva Conventions establish a system of universal jurisdiction over grave breaches, that jurisdiction is limited to the courts of the powers concerned, thus excluding international criminal tribunals. Others argue that because the Genocide Convention conferred jurisdiction on the state where the act was committed or on such international penal tribunals as may have jurisdiction, prosecution by third states under the principle of universality of jurisdiction was precluded.

International lawyers should avoid tunnel vision, looking instead at universal jurisdiction in relation to, rather than in isolation from, the jurisdiction of international criminal tribunals. Although the enumerated offences subject to the jurisdiction of international criminal tribunals should not be conflated with international offences subject to national jurisdiction under the universality of jurisdiction principle, there is a clear synergy between the two. Indeed, the Nuremberg tribunals invoked the fact that certain acts were criminal under either customary international law or the general principles of criminal justice of the

international community as an answer to ex post facto challenges to its jurisdiction.

In addition to addressing crimes under general international law, the ILC also considered whether there is universal jurisdiction over particular crimes in selecting the treaty crimes within the international criminal court's subject-matter jurisdiction. The broader list of crimes now emerging from the further preparatory work on the international court will in turn inevitably impact national laws governing crimes subject to universal jurisdiction. That is why the broader importance of the international criminal court's statute exceeds its immediate goal.

Under the impact of the atrocities in the former Yugoslavia and Rwanda, we have witnessed the creation of a powerful new coalition driving the movement towards the further criminalization of international law. Much like the earlier coalition that stimulated the development of both a corpus of international human rights and the institutions involved in its enforcement, this new coalition includes scholars that promote legal concepts and give them theoretical credibility, NGOs that provide public relations and political support, and a number of enlightened governments that spearhead law-making efforts in the United Nations. Now, on the eve of the twenty-first century, international law is indeed moving towards a greater degree of criminalization.

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1 W. Friedmann, The Changing Structure of International Law (1964) [hereinafter Changing Structure], at 167.
2 Ibid, at 168.
3 Ibid.
4 Ibid.
5 Ibid.
6 Ibid, at 169.
7 Ibid, at 168.
8 Ibid, at 213-31.
9 Ibid, 247-48. See also United States v. Park, 421 U.S. 658 (1574).
10 W.R. LaFave and A.W. Scott, Jr., Criminal Law (2nd ed. 1986), at 257.
11 Ibid.
12 Ibid.
13 First, 'General Principles Governing the Criminal Liability of Corporations, Their Employees and Officers', in O. Obermaier and R. Morvillo (eds.) White Collar Crime: Business and Regulatory Offenses (1990), ch. 5.
14 Report of the International Law Commission on the Work of its Forty-Eighth Session, Note by the Secretary General, 51st Session, Provisional Agenda Item 148, at 12, 17, UN Doc. A/51/332 (1996) (including draft articles on state responsibility).
15 Changing Structure, at 168.
16 Abi-Saab, 'The Concept of "International Crimes" and its Place in Contemporary International Law', in J.H.H. Weiler et al. (eds.), International Crimes of State (1989), at 141, 146.
17 R. Jennings and A. Watts (eds.), Oppenheim's International Law (9th ed. 1992), at 533.
18 Abi-Saab, supra note 16, at 148.
19 Report of the International Law Commission, supra note 14, at 28-29.
20 Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), UN Doc. S/25704 & Add.1 (1993), Annex (containing Statute of the Tribunal for the Former Yugoslavia)[hereinafter Yugoslav Statute].
21 Statute of the Rwanda Tribunal, SC Res. 955, UN SCOR, 3453rd mtg., UN Doc. S/RES/955 (1994)[hereinafter Rwanda Statute].
22 Draft Statute of the International Criminal Court.
23 UN Doc. E/CN.4/Sub.2/1996/17.
24 See Meron, 'International Criminalization of Internal Atrocities', 89 AJIL (1995) 554, at 557.
25 Case No. IT-94-1-AR72, Prosecutor v. Tadic, Appeal on Jurisdiction (2 October 1995), reprinted in 35 ILM (1996) 32 [hereinafter Tadic].
26 Yugoslav Statute, art. 5.
27 Meron, supra note 24, at 557-58.
28 Report of the Preparatory Committee on the Establishment of an International Criminal Court: Compilation of Proposals, UN GAOR Preparatory Comm. on the Establishment of an International Criminal Court, 51st Session, Supp. No. 22A, at 18, para. 68, UN Doc. A/51/22 (1996).
29 Ibid, at 18, para. 67.
30 Meron, supra note 24, at 564.
31 Ibid.
32 Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945-October 1946, 1 Official Documents (1947) 223.

33 Article 20 listed crimes within the jurisdiction of the international criminal court. Article 20(e) defined the remainder of the Court's jurisdiction – treaty crimes. The criteria for inclusion were as follows:
(a) that the crimes are themselves defined by the treaty so that an international criminal court could apply that treaty as law in relation to the crime, subject to the nullum crimen guarantee contained in article 39.
that the treaty created either a system of universal jurisdiction based on the principle aut dedere aut judicare or the possibility for an international criminal court to try the crime, or both, thus recognizing clearly the principle of international concern.'
Report of the International Law Commission on the Work of its Forty-Sixth Session, May 2-July 22, 1994, UN Doc. A/49/10 (1994).
34 Ibid.
35 Working Paper Submitted by the Delegations of New Zealand and Switzerland, UN Preparatory Committee on the Establishment of an International Criminal Court, Working Group on the definition of crimes, 11-21 February 1997, UN Doc. A/AC.249/1997/WG.1/DP.2 (14 February 1997).
36 Proposal Submitted by the United States, UN Preparatory Committee on the Establishment of an International Criminal Court, Working Group on the definition of crimes, 11-21 February 1997, UN Doc. A/AC.249/1997/WG.1/DP.1 (14 February 1997).
37 Tadic, 36, para. 67.
In the case of Dragan Nikolic (review of indictment) [Dragan Nikolic, Case No. IT-94-2-R61, Decision of Trial Chamber I on Review of Indictment Pursuant to Rule 61 (20 October 1995)], Trial Chamber I discussed the specific requirements for the application of Article 2 (grave breaches) of the Statute:
The relevant parts of the record tend to show that JNA forces from Novi Sad, under the control of the government in Belgrade, took part in the occupation of Vlasencia after the Republic of Bosnia and Herzegovina had been recognised as an independent State.
The Evidence of expert witness, Mr. Gow, suggests, moreover, that the armed conflict in the territory of the former Yugoslavia may be viewed in its entirety as one major armed conflict, that reportedly began in the autumn of 1991, with its aim to establish ... a new ... state. This conflict was international in character and that Article 2 may therefore be applicable. Ibid, at 17.
In the cases of Radovan Karadzic and Ratko Mladic (review of indictment) [Radovan Karadzic and Ratko Mladic, Cases No. IT-95-5-R61 & No. IT-95-18-R61, Decision of the Trial Chamber I on Review of the Indictment Pursuant to Rule 61 (11 July 1996)[hereinafter Karadzic and Mladic]], Trial Chamber I again concluded that the conflict in the former Yugoslavia is international. Ibid, at 49-50, para. 88. The Chamber wrote that the conflict involved several states and that at the beginning of the military operations in Bosnia and Herzegovina in April 1992 Bosnia and Herzegovina was already an independent state. Ibid, at 49, para. 88. 'The Trial Chamber ... considers that at the time it began in Bosnia and Herzegovina, the present conflict was international in character insofar as it involved two distinct States, the Republic of Bosnia and Herzegovina and the SFRY, later FRY.' Ibid. The Appeals Chamber then held that '[i]nternational humanitarian law applies from the initiation of ... armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached. Tadic, para. 70. Both that ruling and provisions of the Geneva Convention (Article 6, para. 2 of the Fourth Geneva Convention) suggest that 'it may continue to apply until a conclusion of peace is reached. Karadzic and Mladic, at 49-50, para. 88. The Chamber found that facts concerning the apparent continuation of the JNA's involvement in Bosnia and Herzegovina after its official withdrawal indicate that all violations were committed during international conflict. Ibid, at 50, para. 88.
Again in its decision of 3 April 1996 (Vukovar), Mile Mrksic, [Miroslav Radic, Veselin Sljiv Anacanin, Case No. IT-95-13-R61, Decision of Trial Chamber II on Review of Indictment Pursuant to Rule 61 (3 April 1996).] Trial Chamber I reaffirmed its conclusion that the conflict is international, as the acts charged occurred after the declaration of Croatia's independence and while the city of Vukovar was being subjected to an attack by JNA. Ibid, at 11, para. 25.
In the particularly interesting Rajic case [Ivica Rajic, Case No. IT-95-12-R61, Decision of Trial Chamber II on Review of Indictment Pursuant to Rule 61 (13 September 1996)], Trial Chamber II confirmed the existence of an international armed conflict between the Republic of Bosnia and Herzegovina and the Republic of Croatia at the time the alleged crimes were committed. It based such a finding (i) on the direct involvement of Croatian army in support of Bosnian Croats and against the Government of Bosnia, which was sufficient to convert the conflict between the Bosnian Croats and the Bosnian Government into an international one and (ii) an agency relationship through the control of the Bosnian Croats by the Croatian Government. Ibid, at 9-18, paras. 13-32.
39 14 May 1954, 249 UNTS 240.
40 10 April 1972, 26 UST 583, 1015 UNTS 163.
41 32 ILM (1993) 800.
42 Tadic.
43 Meron, 'The Continuing Role of Custom in the Formation of International Humanitarian Law', 90 AJIL (1996) 238, at 239-40.
44 Tadic, 67-68, para. 127.
45 Ibid, at paras. 127-28.
46 Loi de 16 juin 1993 relative a la repression des infractions graves aux conventions internationales de Geneve du 12 aout 1949 et aux protocoles I et II du 8 juin 1977, additionnels a ces conventions,

Moniteur Belge, 5 August 1993.
47 Report of the International Law Commission on the Work of its Forty-Sixth Session, May 2-July 22, 1994, Annex 141-42.