

Cambridge University Press

978-0-521-86073-4 - War Crimes in Internal Armed Conflicts

Eve La Haye

Excerpt

[More information](#)

---

## Introduction

For the second year running, all the major armed conflicts in the world in 2004 and 2005 fell within the category of internal armed conflicts.<sup>1</sup> The UN Secretary-General remarked that ‘as internal armed conflicts proliferate, civilians have become the principal victims. It is now conventional to say that, in recent decades, the proportion of war victims who are civilians has leaped dramatically to an estimated 75 per cent and in some cases even more . . . Furthermore, and particularly in conflicts with an element of ethnic or religious hatred, the affected civilians tend not to be the incidental victims of these new irregular forces: they are their principal object.’<sup>2</sup> Since 1949, a growing body of international norms has become applicable in internal armed conflicts, but at the same time actual observance of these rules by belligerents has been limited. An example of this phenomenon is the agreement reached between the parties to the conflict in Bosnia-Herzegovina on 22 May 1992 whereby all belligerents recognised the applicability of substantive principles of the laws and customs of war<sup>3</sup> to the conflicts in Bosnia.<sup>4</sup> The four following years of conflicts and the fall of Srebrenica are tragic evidence of the extent to which this agreement was disregarded in practice.

Bert Röling noted that ‘the laws of war derive their authority, during a war, from the threat of reprisals, prosecution and punishment after the war’.<sup>5</sup> Until the adoption of the statute of the International Criminal Tribunal for Rwanda, conventional law applicable in internal armed conflicts did not establish individual criminal responsibility for war crimes committed in these conflicts and did not contain any enforcement mechanism. States coming out of an internal armed conflict often granted unconditional amnesties to individuals who had violated the laws of war during the conflict.<sup>6</sup> With no real risk of prosecutions for war crimes, there were therefore few incentives for belligerents to respect the laws of war in internal armed conflicts.

In the 1990s, the Security Council recognised the direct link between justice and peace when it established the International Criminal

Cambridge University Press

978-0-521-86073-4 - War Crimes in Internal Armed Conflicts

Eve La Haye

Excerpt

[More information](#)

Tribunals for the former Yugoslavia and Rwanda.<sup>7</sup> It also sent the clear message that amnesties for war crimes were not acceptable whatever the nature of the armed conflict.<sup>8</sup> The Government of Rwanda affirmed in 1994: 'it is impossible to build a state of law and arrive at true national reconciliation' without eradicating 'the culture of impunity'.<sup>9</sup> The Secretary-General affirmed recently that 'amnesty cannot be granted in respect of international crimes such as genocide, crimes against humanity or other serious violations of international humanitarian law'.<sup>10</sup> Even if some doubt the wisdom of criminal prosecutions,<sup>11</sup> justice allows for the exposure of the truth and enables a society to move beyond the pain and horror of the past.<sup>12</sup> Furthermore, prosecutions establish the responsibility of individuals, rather than having whole groups shouldering the burden of collective guilt. They bring public and official acknowledgement to the victims and are an important step in their healing process.<sup>13</sup> It is submitted that prosecutions of war crimes committed in internal armed conflicts are a necessary ingredient to secure enduring peace in the aftermath of a civil conflict.<sup>14</sup>

This book shows the extraordinary change that the law of internal armed conflict underwent in the last fifteen years. It aims to assess whether individuals can be held individually responsible for war crimes committed in internal armed conflicts and if so, how that responsibility can be enforced.

The state of the laws of war today will be explored in order to establish the existence of an international law norm creating individual criminal responsibility for serious violations of the laws of war or war crimes committed in internal armed conflicts. Chapter 1 defines the contours of the concept of internal armed conflict and adopts a working definition of it for the purpose of this book. The laws of war, both conventional and customary norms applicable in internal armed conflicts, are then studied in turn in chapter 2 before sketching the regime of war crimes in chapter 3. Chapter 4 assesses the quantum leap which took place in the 1990s when a number of treaties extended the principle of individual criminal responsibility to war crimes committed in internal armed conflicts. Particular attention is paid in the second part of chapter 4 to the state of customary international law. The practice and *opinio juris* of states and international organisations are studied in detail to find out if this principle is reflected in customary law today.

The second objective of this book is to study the means of enforcement of individual criminal responsibility for war crimes when committed in internal armed conflicts. First, domestic prosecutions on the basis of

Cambridge University Press

978-0-521-86073-4 - War Crimes in Internal Armed Conflicts

Eve La Haye

Excerpt

[More information](#)

either the territoriality principle or universal jurisdiction are evaluated. The strengths and weaknesses of both types of prosecutions are assessed, with special emphasis placed on the concept of universal jurisdiction. The state of customary law is explored again in chapter 5 to find out whether there is a right enshrined in customary law for states to extend universal jurisdiction over war crimes committed in internal armed conflicts.

Secondly, the 1990s have seen the establishment of international criminal tribunals set up to prosecute individuals for international crimes, including war crimes committed in internal armed conflicts. Individuals have been successfully prosecuted for war crimes committed in internal armed conflicts for the first time in history. The achievements and the legacy of the ad hoc tribunals are studied before turning to the potential role that the International Criminal Court could play in the fight against impunity. War criminals now need to think twice about their actions in internal armed conflicts.

### Notes

1. See *SIPRI Yearbook, armaments, disarmament and international security* (Oxford: Oxford University Press, 2005 and 2006) p. 83 and p. 108. Nineteen major armed conflicts were recorded in 2004 and seventeen in 2005. This research shows that 2004 is the first year that no interstate conflict has been reported (p. 83). This research uses the terminology of 'intra-state conflict', which covers the concept of internal armed conflict, as defined in this book.
2. Report of the Secretary-General to the Security Council on the protection of civilians in armed conflict, UN.Doc.S/2001/331 (30 March 2001) para. 3.
3. For convenience hereafter referred to as 'the laws of war'.
4. Reported in the *Tadić* jurisdiction decision, para. 73.
5. B. Röling, 'Criminal responsibility for violations of the laws of war' (1976) *Revue belge de droit international* 10.
6. Up to the First World War, amnesties were regarded as an essential element of the establishment of peace and were included in most international peace treaties.
7. On this point, see R. Goldstone, 'Justice as a tool for peace-making: truth commissions and international criminal tribunals' (1996) 28 *International law and politics* 486–87.
8. Article 6.5 of Protocol II provides that 'at the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict'. This provision was understood by some commentators and courts to support amnesties of serious violations of the laws of war in internal conflicts. The ICRC is, however, clear that this article is

Cambridge University Press

978-0-521-86073-4 - War Crimes in Internal Armed Conflicts

Eve La Haye

Excerpt

[More information](#)

inapplicable to amnesties that extinguish penal responsibility for persons who have violated international law. It only encourages amnesties for those detained or punished for the mere fact of having participated in hostilities, see N. Roht-Arriaza and L. Gibson, 'The developing jurisprudence on amnesty' (1998) 20 *Human rights quarterly* 865. See also the whole vol. 59 of *Law and contemporary problems* entitled 'Accountability for international crime and serious violations of fundamental human rights'. In particular, M. Scharf, 'The letter of the law: the scope of international legal obligation to prosecute human rights crime' (1996) 59 *Law and contemporary problems* 41; K. Ambos, 'Impunity and international criminal law, a case study on Colombia, Peru, Bolivia, Chile and Argentina' (1997) 18 *Human rights law journal* 1; T. Farer, 'Restraining the barbarians: can international criminal law help?' (2000) 22 *Human rights quarterly* 90–117; M. Freeman Harris *et al.*, 'Bringing war criminals to justice: obligations, options, recommendations' in D. Orentlicher *et al.* (ed.), *Making justice work: the report of the Century Foundation* (New York: Century Foundation Press, 1998) pp. 27–32; L. Olson, 'Provoking the dragon on the patio. Matters of transitional justice: penal repression vs. amnesties' (2006) 88 *IRRC* 275–94.

9. See UN.Doc.S/PV.3453 (1994) p. 14.
10. Report of the Secretary-General on the establishment of a Special Court of Sierra Leone, S/2000/915 (4 October 2000) para. 22.
11. For an overview of the major objections raised to criminal prosecution, see M. Osiel, 'Why prosecute? Critics of punishment of mass atrocities' (2000) 22 *Human rights quarterly* 118.
12. Truth can be established in a variety of ways other than criminal prosecutions. They include fact-finding commissions, prosecutions of a few leaders or truth and reconciliation commissions. These methods, however, fall outside the scope of this book.
13. On these points, see A. Cassese, 'Reflections on international criminal justice' (1998) 61 *The modern law review* 1–10 and Goldstone 'Justice as a tool for peace-making' 488–90.
14. This book will concentrate on criminal prosecutions only and does not cover civil liability actions that could be open to victims before domestic courts.

---

## Towards a workable definition of internal armed conflicts

Internal armed conflict can be defined as the use of armed force within the boundary of one state between one or more armed groups and the acting government, or between such groups.<sup>1</sup> Different terms can cover such situations: rebellion, revolution, internal disturbances, violence, terrorism, guerrilla warfare, resistance, internal uprising, civil war, war of self-determination . . . These terms depict the scale, the various levels of intensity of a conflict, or express for some of them the method of combat, such as guerrilla warfare, or the goal of the conflict, such as war of self-determination. They all carry a certain political weight and some fall within the legal category of internal armed conflict.<sup>2</sup> Whereas certain scholars have studied the concept of internal armed conflict by looking at the causes of such conflicts,<sup>3</sup> international lawyers have started to define the concept of internal armed conflict when international law was deemed to regulate some aspects of such conflicts. The 1949 Geneva Diplomatic Conference on the laws of war established the modern distinction between international armed conflicts, replacing the old concept of war, and internal armed conflicts, defined as a conflict of a non-international character. Prior to that date, it had been generally agreed that it was the sovereign right of each government in power to maintain internal order and 'to punish the insurgents in accordance with its penal laws'.<sup>4</sup> When a specific treaty provision was adopted to regulate certain aspects of internal armed conflicts, it became important to define the contours of this category of conflict and to determine in which cases international law was applicable.<sup>5</sup> This exercise proved to be, and remains, a very controversial issue, which is at the heart of the enforcement of the laws of armed conflicts.

An internal armed conflict has the characteristics of a chameleon: it is an evolving situation, which gathers under the title of internal armed conflict many successive levels of conflict, each of them being dependant on contextual evidence and therefore not easily apprehensible by the law. There is always some type of violence within a state. The early stages

Cambridge University Press

978-0-521-86073-4 - War Crimes in Internal Armed Conflicts

Eve La Haye

Excerpt

[More information](#)

of armed violence may fall short of an armed conflict, whereas later stages will fall within the general category of internal armed conflicts. The approach chosen here is to examine the characteristics of an internal conflict, by differentiating such conflict from internal disturbances on the one hand, and from international conflicts on the other. In determining the lower threshold between internal violence and an armed conflict, the various definitions of internal armed conflicts found in treaties and international case law will be discussed.

Next, the higher threshold which separates internal conflict from international conflict will be considered, looking especially at the circumstances in which an internal armed conflict is considered in international law to amount to an international armed conflict. This can happen through recognition of belligerency, a third-state intervention or a UN armed forces intervention in the internal armed conflict. These categories of internationalised conflicts, together with so-called wars of self-determination, will be dealt with briefly, for they are not central to the subject at hand.<sup>6</sup>

### 1. Establishment of an armed conflict

The first attempt to define the characteristics of a civil war came with the institution of the recognition of belligerency during the eighteenth and nineteenth centuries. It gradually became acceptable to apply the rules of war to certain large-scale civil wars, in instances where the rebels' side was recognised as being belligerents by the legitimate government or a third party. The recognition of belligerency was a discretionary and purely subjective recognition by a state of the factual existence of a war providing certain specific conditions were fulfilled. Four conditions had to be satisfied before a state of belligerency could be recognised:<sup>7</sup>

- i) an armed conflict within the state concerned, of a general, as opposed to a local character;
- ii) the insurgents must occupy and administer a substantial part of the state territory;
- iii) they must conduct their hostilities in accordance with the laws of war, through organised armed forces under a responsible command;
- iv) circumstances exist that make it necessary for third states to make clear their attitude to those circumstances by recognition of belligerency.<sup>8</sup>

Cambridge University Press

978-0-521-86073-4 - War Crimes in Internal Armed Conflicts

Eve La Haye

Excerpt

[More information](#)

The category of civil war regulated by international law at that time consisted only of armed conflicts of a general character where the rebels were an organised force under a responsible command and occupying a substantial part of state territory. These criteria were the first defined characteristics of large-scale civil wars. If the conflict in question was not seen as fulfilling these criteria, its regulation would be considered to fall within the reserved domain of the state.<sup>9</sup>

### 1.1 *Definition of armed conflicts in international treaties*

There are three distinct definitions of internal armed conflict given in international treaties. Common Article 3 of the 1949 Geneva Conventions<sup>10</sup> and 1977 Protocol II additional to the Geneva Conventions<sup>11</sup> are the two main instruments regulating the conduct of hostilities in internal armed conflicts. Each instrument has a different definition of this concept, resulting in the fragmentation of the legal regimes regulating internal armed conflicts. More recently, the Rome statute of the International Criminal Court<sup>12</sup> also gives a definition of the general category of internal armed conflicts.

The 1949 Diplomatic Conference was the first opportunity for states both to consider the issue of internal armed conflict and to adopt substantive law applicable in such conflicts. In 1949, a majority of states agreed on the necessity of adopting some rules for internal armed conflicts; however, it became clear that the future conventions themselves could not be applied irrespective of the nature of the conflict.<sup>13</sup> For most of the participants, it was necessary to define precisely the context in which states would have to apply these rules. In fact, it was not acceptable for the great majority of states seriously to erode their capacity to maintain internal order. The study of the *travaux préparatoires* shows that there was a consensus to have certain internal situations excluded from the scope of common Article 3,<sup>14</sup> i.e. ‘forms of disorder, anarchy or brigandage’<sup>15</sup> or ‘mere riot or disturbances’.<sup>16</sup> This interpretation<sup>17</sup> was specifically included in the final version of Protocol II in its Article 1.2. Protocol II is not deemed to apply to situations which are not armed conflicts: ‘internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature’. Protocol II ‘develops and supplements Article 3 without modifying its existing conditions of application’.<sup>18</sup> The exclusion of internal disturbances and tensions from the scope of application of Protocol II is, however, an accepted principle for the general category

Cambridge University Press

978-0-521-86073-4 - War Crimes in Internal Armed Conflicts

Eve La Haye

Excerpt

[More information](#)

of internal conflict falling under common Article 3.<sup>19</sup> It can therefore be concluded that an armed conflict presupposes the existence of hostilities of a certain scale or duration, as they cannot be either isolated or sporadic acts.<sup>20</sup>

The threshold between internal disturbances and an armed conflict is however difficult to determine in practice, if one does not specify the character or the intensity of these hostilities. During the 1949 Diplomatic Conference, several criteria were proposed: the organised character of the rebels groups, their control over part of the territory, the use of regular military forces against them, or the duration and intensity of the conflict.<sup>21</sup> None of these criteria appears in the final version of common Article 3, as the conference could not agree on an acceptable definition of internal conflict.<sup>22</sup> They finally adopted an article listing a few provisions applicable to a wide and vague category of conflicts, qualified as not of an international character.<sup>23</sup> At present, however, it is reasonable to believe that an armed conflict, as defined in common Article 3, presupposes the existence of armed hostilities in the territory of one of the high contracting parties, between the regular military forces and some organised armed groups, or between these groups; moreover these hostilities need to be regarded as being sufficiently serious and prolonged. There is no established formula or test furthering the level of seriousness or the length of the hostilities. Concerning the extent of organisation of the rebel groups, it is generally agreed that 'rebels should be organised to such a degree as to be able to carry out those obligations and assume responsibility for their implementation'.<sup>24</sup>

The absence of a precise definition of internal armed conflict, coupled with the absence of any mechanism for the monitoring and enforcement of its application in common Article 3, enabled states on whose territory such a conflict was taking place to argue that the hostilities encountered did not amount to an armed conflict. In the few decades which followed the adoption of common Article 3, the record of application and respect of common Article 3 turned out to be poor.<sup>25</sup> The 1974–77 Geneva Diplomatic Conference tried to tackle these lacunae as well as to adopt more substantive rules of the laws of war applicable in internal armed conflicts.

The scope of application of Protocol II is more restricted than the scope of common Article 3, creating two types of internal armed conflict governed by different treaty provisions. Negotiators agreed on a more precise definition of internal armed conflict but their definition only governed Protocol II without modifying the conditions under which common Article 3 is applicable. This instrument defines internal armed



Cambridge University Press

978-0-521-86073-4 - War Crimes in Internal Armed Conflicts

Eve La Haye

Excerpt

[More information](#)

conflict as a conflict which ‘takes place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organised armed groups, which under responsible command exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this protocol’.<sup>26</sup> There are evident similarities between these conditions and the classic conditions of the recognition of belligerency, as well as with the definition of internal armed conflict proposed by the French during the 1949 Diplomatic Conference.<sup>27</sup> The Protocol only applies to conflict between governmental forces and dissident armed groups, and not to conflicts between two or more dissident groups.<sup>28</sup> Furthermore, these dissident armed groups must be organised under a responsible command and control a sufficiently great part of the territory to enable them to carry out sustained and concerted military operations. Nothing is stated concerning the amount of territory they must control, or for how long, nor who will ultimately judge whether the applicable conditions are fulfilled.<sup>29</sup> Furthermore, by requiring dissident groups to be able to implement the Protocol, this condition recalls the principle of reciprocity<sup>30</sup> and seems to make the link between the organisation of the group and their ability to implement the Protocol more obvious.<sup>31</sup> The definition in Protocol II, while being more precise about the character of internal armed conflicts, seems only to cover a small category of internal armed conflicts of high intensity within the larger category of internal armed conflicts governed by common Article 3. Interestingly, when the Rome conference for the creation of a permanent International Criminal Court faced the question of the definition of internal armed conflict, the delegations deliberately and substantially deviated from the definition appearing in Protocol II.<sup>32</sup> The ICC statute contains a definition inspired by the case law of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and creates a much lower threshold than the one appearing in Protocol II. According to Article 8.2.f) of the statute, the court will have jurisdiction over serious violations of the laws and customs of war committed in armed conflicts that take place in the territory of a state when there is protracted armed conflict between governmental authorities and organised armed groups or between such groups.<sup>33</sup>

### *1.2 Definition of armed conflicts in international case law*

International tribunals have rarely dealt with the definition of internal armed conflict. The few cases at hand, however, are good illustrations of

Cambridge University Press

978-0-521-86073-4 - War Crimes in Internal Armed Conflicts

Eve La Haye

Excerpt

[More information](#)

the complexities of applying the criteria spelled out in treaties to factual circumstances.

Some judgments and decisions of the ICTY<sup>34</sup> throw some light on the definition of internal armed conflict. The appeal decision on jurisdiction in the *Tadić* case clarifies first that ‘the temporal and geographical scope of both internal and international conflicts extends beyond the exact time and place of hostilities’.<sup>35</sup> The rules contained in common Article 3 will therefore apply outside the actual theatre of combat operations ‘in the whole territory under control of a party whether or not actual combat takes place’.<sup>36</sup> The Appeals Chamber went on to define the existence of an armed conflict ‘whenever there is a resort to armed force between states or protracted armed violence between governmental authorities and organised armed groups or between such groups within a state’.<sup>37</sup> The Appeals Chamber in this case took the view that ‘different conflicts of different nature took place in the former Yugoslavia and that it would be for each Trial Chamber, depending on the circumstances of the case to make its own determination of the nature of the armed conflict upon the specific evidence presented to it’.<sup>38</sup> Since that first ruling, each judgment of the Tribunal has taken as a starting point the definition of armed conflict appearing in the *Tadić* case.<sup>39</sup> On the one hand they looked particularly at the organised nature of the rebel groups, and on the other the duration or intensity of the armed violence between such groups or between governmental authorities and a rebel group.<sup>40</sup> In assessing the intensity of the conflict, Trial Chambers have looked at various factors such as the seriousness of attacks and their recurrence,<sup>41</sup> the spread of these armed clashes over territory and time,<sup>42</sup> whether various parties were able to operate from a territory under their control,<sup>43</sup> an increase in the number of government forces, the mobilisation of volunteers and the distribution of weapons among both parties to the conflict,<sup>44</sup> as well as whether the conflict had attracted the attention of the UN Security Council and whether any resolutions on that matter had been passed.<sup>45</sup> In order to assess the organisation of the parties to the conflict, Trial Chambers took into account such factors as the existence of headquarters, designated zones of operation and the ability to procure, transport and distribute arms.<sup>46</sup>

In total, the existence of an international conflict in the place and time where the crimes were committed was found in seven ITCY cases, the *Tadić*, *Blaškić*, *Aleksovski*, *Kordić*, *Naletilić*<sup>47</sup>, *Brdjanin*<sup>48</sup> and *Čelebići* cases. In sixteen other cases, the Prosecutor chose to prove only the existence of an armed conflict.<sup>49</sup> In most instances, Trial Chambers