APPLICABILITY OF THE GENEVA CONVENTIONS TO NON-INTERNATIONAL CONFLICTS

Thesis
Course number R.23.3.1.3
7 June 2007

by:
D.M.S. Merten
Stationssingel 17b
3033 HA Rotterdam
M: 06 40 22 49 29
E: d.merten@chello.nl
student number: 838.281.385
## CONTENTS

1 Introduction 3

2 Geneva Conventions 5
   2.1 History 5
   2.2 Armed conflict 9
   2.3 International armed conflict 11
   2.4 Non-international armed conflict 11
   2.5 Conclusion 16

3 Position Geneva Conventions in international law 18
   3.1 General 18
   3.2 Evolution of the Geneva Conventions and international human rights law 18
   3.3 Overlap between the Geneva Conventions and human rights law 20
   3.4 Conclusion 24

4 Direct effect 26
   4.1 General 26
   4.2 Self-executing treaties 27
   4.3 Freedom of implementation 27
   4.4 Limitations to the freedom of implementation rule 29
   4.5 International law of a humanitarian character 31
   4.6 Jus cogens 33
   4.7 Conclusion 35

5 Sovereignty 37
   5.1 General 37
   5.2 Internal / external sovereignty 38
   5.3 Transfer of sovereignty 39
   5.4 State sovereignty in the international field 41
   5.5 Conclusion 43

6 International Courts 45
   6.1 General 45
   6.2 International Criminal Tribunal for the former Yugoslavia 45
   6.3 International Criminal Court 52
   6.4 Conclusion 54

7 Conclusions 55

Literature 57
APPLICABILITY OF THE GENEVA CONVENTIONS TO NON-INTERNATIONAL CONFLICTS

"What is inhumane, and consequently proscribed, in international wars, cannot but be inhumane and inadmissible in civil strife"

Appeals Chamber on jurisdiction Tadić Case, paragraph 119

Introduction

Since the beginning of mankind conflicts and wars have been a part of life. In the 20th century, however, after the experiences of two world wars and the holocaust against the Jewish people, the United Nations organization was established with the main objective to prevent war and disseminate respect for human rights. Due to the sovereignty of states and the character of the United Nations as a political, inter-state organization, it can intervene in internal state affairs only as a last resort. This is most poignant if an internal conflict gets out of hand as happened in Rwanda, Yugoslavia, Sierra Leone or Somalia. Conflicts of an ethnic origin are most complex and placing armies between the belligerent parties cannot be but a temporary solution. The solution lies in times of peace, when deeply rooted convictions should be dug up and exposed to broad daylight where they may evaporate and "they" appear to be "us". The applicability of the Geneva Conventions to non-international conflicts will not prevent ethnic confrontations, nor will it influence hatred or indifference. It may be just a drop in the ocean, but then at least that drop is there.

In this thesis I will research the possibility of the application of the Geneva Conventions to non-international conflicts, as they may give a better protection to civilians in an ethnic civil war. To obtain an idea of the structure of applicability of the Geneva Conventions I will describe them in the first chapter and in the second chapter I will look at their position in international law and compare them with human rights law as there seems to be a connection between the two bodies of law. In the third chapter the possibilities of direct effect will be explored as well as the applicability of the notion of jus cogens to humanitarian law. As it is often suggested that today the sovereignty of states is eroding
to the benefit of international organizations, I will discuss sovereignty in the fourth chapter. The fifth chapter contains the discussion on the jurisdiction of the Yugoslavia tribunal in the Tadić case and a comparison of the outcome with the ICC Statute. I will conclude in the sixth chapter.
2 Geneva Conventions

2.1 History

On 24 June 1859, after 15 hours of bitter fighting, the battle of Solferino between the French-Sardinian army and the Austrians, was over. The ground was covered with the bodies of 40,000 dead and wounded men. At the time of the battle, Henry Dunant, a Swiss citizen on business, visited the nearby village of Castiglione delta Pieve when casualties filled up the town. He was horrified by the sight of thousands of wounded, lying there while the army medical services proved to be inadequate to care for them and the corpses were not being retrieved. There was a lack of medical care, water and food for those who fought bravely for their country and paid dearly for the privilege. Only 140 doctors were available and they had no choice but to perform life threatening surgery under dreadful circumstances. There was a lack of anaesthetics, medicine, bandages and shelter. Wounds infected causing men to die who could have lived given proper care. Knapsacks and food were stolen from the wounded and boots from the dead. However, there were also soldiers and civilians helping the enemies' wounded, giving them water and staying with them in their last minutes.

On his return home Dunant wrote a book about his experiences, “A Memory of Solferino”, in which he gives a truthful description of the battle.

"When the sun came up on the twenty-fifth, it disclosed the most dreadful sights imaginable. Bodies of men and horses covered the battlefield; corpses were strewn over roads, ditches, ravines, thickets and fields; the approaches of Solferino were literally thick with dead. The fields were devastated, wheat and corn lying flat on the ground, fences broken, orchards ruined; here and there were pools of blood. The villages were deserted and bore the scars left by musket shots, bombs, rockets, grenades and shells. Walls were broken down and pierced with gaps where cannonballs had crushed through them. Houses were riddled with holes, shattered and ruined, and their inhabitants, who had been in hiding, crouching in cellars without light or food for nearly twenty hours, were beginning to crawl out, looking stunned by the terrors they had endured. All around Solferino, and especially in the village cemetery, the ground was littered with guns, knapsacks, cartridge-boxes, mess tins, helmets, shakoes, fatigue-
caps, belts, equipment of every kind, remnants of blood-stained clothing and piles of broken weapons."  

Dunant was not just a businessman. He was brought up with religious convictions and high moral principles. From an early age on he engaged in several charitable and religion-based organizations and was a regular visitor to the city prison, where he labored to help reform transgressors of the law. No wonder that he took the events in Solferino to heart and was determined to do something to improve the fate of soldiers in the battlefield. In his book he not only described the battle but he also showed a realistic view of the future:

"Since new and terrible methods of destruction are invented daily, with perseverance worthy of a better object, and since the inventors of these instruments of destruction are applauded and encouraged in most of the great European States, which are engaged in an armament race;

... And since finally the state of mind in Europe combines with many other symptoms to indicate the prospect of future wars, the avoidance of which, sooner or later, seems hardly possible;"

and proposed:

"Would it not be possible, in time of peace and quiet, to form relief societies for the purpose of having care given to the wounded in wartime by zealous, devoted and thoroughly qualified volunteers?"

And these volunteers, organised in national societies, would be called upon to assist the army medical services and were to be recognized and protected through an international agreement. The neutrality of the organization was and still is a crucial point for the protection of the volunteers. Henry Dunant was realistic as to the fact that peace, in the narrow sense of life without war, was not feasible and therefore chose the next best, that is, if there has to be war, let it be as little damaging for people as possible with care for

1 Dunant 1862.
2 ICRC website.
3 Dunant 1862.
the wounded regardless their nationality. He recognized the damaging effect of modern weapons and foresaw more wars in the future and therefore called upon states to prevent or at least limit the destruction that these weapons and wars would cause. His focus was on human beings and humane treatment. He did not have a political message. In fact the more his idea was realised, the more he retreated. He was a realist with a vision, but not one to stand in the lime-light.

In 1863 a private committee was set up by the Geneva Society for Public Welfare, a charitable association, to consider how Dunant's ideas might be realised. The committee consisted of General Dufour, Gustave Moynier, physiciens Théodore Maunoir and Louis Appia, and Henry Dunant himself and it organized a conference in Geneva, to which sixteen countries and four philanthropic institutions sent their representatives. The conference recommended the creation of national societies, with the protection and support of their governments. Furthermore the conference proposed that in time of war lazarets and field hospitals be declared neutral, as well as medical staff, volunteers and the wounded themselves.

In 1864 the Swiss Federal Council convened a Diplomatic Conference in Geneva with plenipotentiaries of 12 countries taking part. The conference drew up the "Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field", which later became Convention I, and was signed on 22 August of that year and ratified by almost all the States in the years that followed. The recommendations of the committee of five were formalized in the convention and it contained the basic principle that wounded and sick soldiers must be taken in and cared for without distinction of nationality.

From then on the organization gradually developed into what is now known as the International Committee of the Red Cross with national societies in almost every country of the world. The national Red Cross societies are grouped in a world federation, the League of Red Cross Societies. In 1928 the ICRC and the League joined in an umbrella organization, the International Red Cross, with the ICRC as the promoter and custodian of international humanitarian law. As the focus of the organization developed over time the original 1864 Convention was adapted and supplemented.

In 1899 the first International Peace Conference was held at The Hague and a new convention "for the Adaptation to Maritime Warfare of the Principles of the Geneva

---

4 Hereinafter: ICRC.
Convention of 22 August 1864" was signed by the representatives of the States. The second Peace Conference, also held in The Hague in 1907 adopted the "regulations concerning the laws and customs of war on land" which prohibit means of waging war which cause cruel and unnecessary suffering and stipulate humane treatment of prisoners of war and the observance of certain fundamental rights of inhabitants of occupied territories. These conventions are known as "Hague law" and primarily seek to lay down the conduct of military operations. They restrict the freedom of belligerent states to attack specified persons and objectives and ban the use of certain methods and means of combat in the conduct of war.

The 1864 Geneva Convention was revised in 1906, when the relief societies were added, and in 1929 when the "Geneva Convention Relative to the Treatment of Prisoners of War" was adopted, which added in greater detail the rules contained in The Hague law on war on land, taking into account the experience of World War I.

In 1949 an extensive revision of the Law of Geneva already in force was undertaken and a new legal instrument, the "Geneva Convention Relative to the Protection of Civilian Persons in Time of War" was added. This Convention again relates to the regulations of The Hague law on war on land, but it also takes into account the experience of World War II. Whereas The Hague law and the Geneva Conventions both seek to protect human beings, humanitarian concerns are more pronounced in the Geneva Conventions, which deal directly with problems relating to persons affected by war and The Hague law concerns the obligations during and limitations of warfare. The 1949 Geneva Conventions were supplemented in 1977 by two Additional Protocols, adopted by the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, which had been meeting in Geneva since 1974 on invitation by the Swiss Federal Council. Protocol I deals with international armed conflicts, and Protocol II with non-international armed conflicts. There now exists a substantial body of universally recognized rules known as the Geneva Conventions and their two Protocols, also known as international humanitarian law, for the protection of those who do not/no longer take part in the hostilities.

---

5 A third Additional Protocol entered into force on 8 December 2005. It introduces a fourth distinctive emblem, next to the red cross, the red crescent and the red lion and sun, a red frame in the shape of a square on edge on a white ground, the purpose of which is to prevent the possibility of offence taken by some countries of the existing emblems leading to a possible threat for those protected by the emblems.

6 In fact humanitarian law consists, besides the Geneva Conventions and the Protocols, of refugee law, the UN Genocide Convention and the conventions prohibiting chemical and biological weapons. I would
In the next paragraph I will describe the structure of the application of the Geneva Conventions. I will first look at what armed conflict is according to the Conventions and then specify this term to international and non-international armed conflict.

2.2 Armed conflict

In the Geneva Conventions the term "armed conflict" is used instead of the term "war". These Conventions, or any other convention that codifies armed conflict, do not provide a definition of the term. I will therefore try and deduce from the texts of the Geneva Conventions which conflicts the term "armed conflict" might embrace. According to the Dutch dictionary Van Dale "war" means: "a conflict between two or more peoples, kings or states". This is a broad definition and it could also apply to a civil war. As the Geneva Conventions are traditional conventions, respecting state sovereignty, any reference to civil strife or civil war may have been intentionally excluded by the states and the neutral term "armed conflict" may have been chosen instead. From the Conventions and their Additional Protocols we learn:

- Common article 2, in describing the field of application of the Geneva Conventions, speaks of "... all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them", therefore using the terms "war" and "armed conflict" in the specific (traditional) meaning as a conflict between two or more states, either or not declared.

- Protocol I, article 1 paragraph 4 adds to common article 2 those armed conflicts in which: "... peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination,"

- Common article 3, when stating "... 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, ...", does not specify the parties to the conflict and therefore this definition of an internal armed conflict also include the first Optional Protocol to the Convention on Rights of the Child on the involvement of children in armed conflicts.

7 For example The Hague Conventions on warfare.
is in fact quite broad, it can be any internal armed conflict, provided the term "Party" does not equal the term "High Contracting Party".\footnote{According to this Greenwood this not the case. Greenwood 2004, p. 48, sub 2.}

- Protocol II, article 1 paragraph 1 declares to apply to "all armed conflicts" not covered by article 1 of Protocol I, but then limits them by adding: "… which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol".

- Protocol II, article 1 paragraph 2 describes armed conflict negatively: "… situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature," are not armed conflicts.

Therefore armed conflict, as far as can be deduced from the texts of the Geneva Conventions and the two Additional Protocols, means:

- an armed conflict between two or more states, either or not declared as war;
- colonial liberation and alien occupation conflicts and conflicts against racists regimes, therefore the so-called "liberation fights";
- any armed conflict in the territory of a Party;
- an armed conflict in the territory of a Party between its armed forces and other forces, provided the latter have quite a high quality of organization, with the exclusion of internal disturbances.

I conclude that the term "armed conflict" as used in the Geneva Conventions is broader than the term "war" as used commonly. As said above, the Geneva Conventions and their Additional Protocols are traditional conventions, respecting state sovereignty and as such they distinguish between international and non-international conflicts, as the latter are considered internal affairs of a state. Therefore not all of the regulations of the Geneva Conventions and their Additional Protocols apply to all four of the mentioned armed conflicts. However, according to David,\footnote{According to this Greenwood this not the case. Greenwood 2004, p. 48, sub 2.} the rules that apply to the "smaller" conflict also apply to the "larger" conflict, therefore, common article 3 and Protocol II apply to internal conflicts as well as to international ones. I will now take a closer look at the distinction.
2.3  International armed conflict

Article 2 common to the four Geneva Conventions and Additional Protocol I apply to international armed conflict, either or not declared as war. This is the traditional interstate military conflict, no matter the intensity of the fight, the number of casualties or prisoners. The field of application is quite liberal as long as it concerns an interstate conflict. Additional Protocol I supplements the armed conflicts of the Geneva Conventions for the protection of war victims and covers the abovementioned freedom fights. Common article 2, subparagraph 2 adds to these armed conflicts: "The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting party, even if the said occupation meets with no armed resistance". The reason I did not mention this situation in the preceding paragraph is, that there is no reference to the term "armed conflict". The situation of occupation is – apparently – not considered to be an armed conflict, even if there is armed resistance. Furthermore, subparagraph 2 of common article 2 is written in neutral terms, whereas article 1, paragraph 4 of Additional Protocol I not only refers to armed conflict, it is also written from the point of view of the defending people. In common article 2, subparagraph 2 the parties negotiating the Geneva Conventions chose not to make the distinction between an occupation that met with armed resistance and could therefore be considered an armed conflict, and an occupation that did not meet with armed resistance. The occupation of common article 2, subparagraph 2, I would say, is broader than the one of article 1, paragraph 4 of Additional Protocol I. The latter referring to armed conflict of peoples against alien occupation in the exercise of their right to self-determination. It may therefore be interesting to look at the occupation as described in common article 2, subparagraph 2, especially whether only the traditional interstate (military) occupation is meant or whether it is possible for people of a state to occupy their own state’s territory. As this is closer to non-international conflict I will look into it in the next paragraph.

2.4  Non-international armed conflict

In case of a non-international conflict there are two regulations within the Geneva Conventions that apply: Article 3 common to the four Geneva Conventions and Additional Protocol II. However, as to the applicability of these two regulations a distinction in non-

---

international armed conflicts must be made based on the level of intensity. Common article 3 applies to all non-international armed conflicts in the territory of one of the High Contracting Parties, without giving any further specifics. It could therefore apply to riots, as well as terrorist attacks. As seen above, according to article 1, paragraph 1 of Additional Protocol II, this protocol applies only to those armed conflicts in which the armed forces of the High Contracting Party and other, specifically described, organized armed groups take part. As to Additional Protocol II, the same applies here as described above regarding Additional Protocol I: it narrows a term used in the Geneva Conventions down. Not the Conventions themselves though, as in paragraph 1 of article 1 Additional Protocol II it states that this protocol "... develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions or application ...". Therefore, the fact that "... situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, ..." are not armed conflicts applies only to Additional Protocol II and strictly speaking would not limit the term "armed conflict" of common article 3. One could ponder, however, what the armed aspect of disturbances, tensions, riots etc. could be. There must be a certain intensity of use of arms for a disturbance to become an armed conflict. Therefore a literal explanation could lead to the conclusion that article 1, paragraph 1 Additional Protocol II cannot limit common article 3 of the Geneva Conventions, but in practice the difference is but small. There will only be a limited amount of situations in which an internal disturbance carries such amount of arms that it becomes an armed conflict. For those states which signed and ratified the International Criminal Court’s Statute common article 3 is limited by article 8, paragraph 2, sub d of the ICC Statute in the same way Additional Protocol II does. According to David, G. Gidel for the Commission of Experts on the Non-International Armed Conflict of 1955 and R. Pinto for the same Commission of 1962, common article 3 indeed does not apply to internal disturbances and tensions. The terms "develop and supplement" of article 1, paragraph 1 of Additional Protocol II apparently also mean "specify" as this protocol can narrow the term "armed conflict" of common article 3 down. According to the ICRC in the Commentaries to the Additional Protocols article 1 paragraph 1 of Additional Protocol II distinguishes its situation from the one of common article 3 by intensity, the former being

---

10 Hereinafter: ICC.
a full-scale civil strife, the latter anything between disturbances and civil strife. If the conditions of the protocol are met, common article 3 also applies, but in the reverse situation the protocol does not. As said above, common article 3 therefore has a wider application than article 1, paragraph 1 of Additional Protocol II. For the application of common article 3 the minimum criteria for a non-international armed conflict are: a minimum of organization such that one can speak of "parties", being or controlling armed forces, and an open and collective display of hostilities. The duration of the conflict, the prisoners taken, the victims made and the nature and level of the violence distinguish the situation of common article 3 from internal disturbances and riots. If the situation becomes such that intervention of the governmental forces is necessary, this could trigger the application of Additional Protocol II, provided the conditions of article 1, paragraph 1 as to the organizational level of the opposing parties are met.

David offers two interesting views as to the Statute of the ICC. The first one is, that, although the Statute only applies to the ICC, due to the number of signatories it holds the opinion of the larger part of states or at least the states which participated in the diplomatic conference for the negotiation and conclusion of the ICC Statute. One could, therefore, support the idea that the Statute represents the opinion iuris of 1998 as to non-international armed conflict. David's second point of view is that the ICC Statute extends the scope of the non-international armed conflict in article 8, paragraph 2, sub f. At first the Statute follows article 1, paragraph 2 of Additional Protocol II as to the limitation of an internal armed conflict by the exclusion of disturbances, riots, etc., but then extends the term "armed conflict" by adding "protracted armed conflict" [emphasis added] and extends article 1, paragraph 1 of Additional Protocol II by adding the situation of an armed conflict between organized armed groups [emphasis added], thereby abandoning the condition that one of the parties to the conflict should be the governmental authorities, as well as the condition of the level of organization.

In article 8, paragraph 2 sub f, the ICC Statute follows the ICTY in the Tadić case. The extension of the scope of Additional Protocol II would, according to David, not only be the point of view of an international tribunal, it is also the opinio iuris of the states participating in the diplomatic conference on the ICC Statute. As the ICC Statute is a lex posterior to the Geneva Conventions, article 8, paragraph 2, sub f would substitute the

13 Also Greenwood 2004, p. 48, sub 2.
15 As to article 3 common to the Geneva Conventions it only extends the term "armed conflict".
provisions of the Geneva Conventions. In my opinion, David, as to his view on the opinio iuris, has the idea of a constitutional state, more specifically the element of separation of powers, against him. Diplomats, negotiating a treaty, are the executive of a state, not the legislature. Signing the treaty is expressing the intention on the part of the state to ratify the treaty and be bound by it. Whether ratification will follow however is decided by the legislature and in a democratic state that will be the elected (houses of) parliament.

Separation of powers, being an element of a constitutional state, plays an important part in the ratification of a treaty and therefore a treaty negotiated and, as an intention to be bound, signed in the name of the state, needs to be ratified by the legislature to take effect. If the signing of the treaty by diplomats would express the opinio iuris of states, they can not be bound by it as a constitutive element of being bound has not taken place yet. Only those states which signed and ratified the ICC Statute are bound by it and for those states the scope of application of Additional Protocol II is extended according to article 8, paragraph 2, sub f of the ICC Statute. The latter being a lex posterior to the former. For those states which signed the ICC Statute, but did not ratify it, I would say, their legislature, by not agreeing to ratification, explicitly denied the intention to be bound by the treaty and with that implicitly denied to having the opinio iuris. On the other hand, David's opinion that signing a treaty is a proof of an opinio iuris of a state could imply that David adheres to the idea of a division of sovereignty in an external and an internal sovereignty and that the former, separately, represents the opinion of the state. I will return to this later in the chapter of sovereignty, but in my view such division of sovereignty would undermine the element of separation of powers, which is a system of checks and balances within a state. As we will see in the chapter on direct effect, according to Ferdinandusse's research national courts do limit a state's freedom to disregard signed, unratiﬁed treaties on humanitarian law, but in just as many cases they do not, based on the fact that a state cannot be bound if the treaty is not ratified. As said, how then can a – only – signed treaty express the opinio iuris of the state or states? The answer could be that although a state cannot be bound by the opinio iuris it has, the state still is of the opinion that the contents of the signed treaty express norms as they should be. Which explanation concurs with the "intention to be bound". One can ponder what the value of the opinio iuris, as one can never connect any consequences to a state's opinio iuris.¹⁶ Let alone, consider states which did not sign the ICC Statute to be bound by an

---

¹⁶ This is different in case a treaty has direct effect, as we will see in chapter 4.
extension of the term "non-international armed conflict" based on the fact that the majority of states has an opinio iuris. The opinio iuris becomes interesting when it is connected with state practice, as it may then lead to the conclusion that a rule of customary law exists.

A different subject arises from article 2, subparagraph 2 common to the four Geneva Conventions considering occupation. Imagine the situation that the "citizens" of a state occupy it in such a way that the state effectively loosens control over (part of) its territory. If we consider the purpose of occupation to be obtaining the land, with or without the people that live on it, occupation will in general be seen as an interstate action. The question now is whether a ethnic cleansing conflict could be seen as an attempt to occupy the land for oneself? The purpose of ethnic cleansing is to kill all people of a certain race and the spin-off is that one has the land to himself. The purpose, therefore, is not to occupy the land. Occupation of the land by citizens with the purpose to obtain it for themselves, would be more in line with a liberation fight, in which case Additional Protocol I applies, if signed and ratified. David refers to a similar situation when discussing the application of Additional Protocol II to conflicts between two or more armed groups, not being state forces. If, in his view, a state would lose control and one of the parties to the conflict claims to be the High Contracting Party, it would be contrary to the principle of non-intervention to deny this party that right and Additional Protocol II would apply, under the condition that the state did lose control and the party claiming to be the High Contracting Party satisfies the conditions of article 1, paragraph 1 of Additional Protocol II as to their level of organization. Mutatis mutandis this could apply to the occupation under subparagraph 2, common article 2 of the Geneva Conventions. The idea comes in three steps. First, if the occupation meets with armed resistance, the idea of civilian occupation resembles the situation of the "freedom fights" of Additional Protocol I. Second, the occupation does not meet with armed resistance and a situation can occur like Tibet, being colonized by the Chinese, or Western Sahara, colonized by the Moroccans, the Palestinian Territories, colonized and walled by the Israeli. The longer the occupation last, the more it becomes internal. If (official) resistance against the occupation continues and on a large enough scale, the occupying state cannot claim the land as there is no acquiescence of the occupied state with the situation and the Geneva Conventions would continue to apply. Third, people want to liberate themselves from an

---

17 In whatever form.
unwanted regime and claim the land for themselves. We have to think of strikes, demonstrations, sit-ins, public prayers, all on a very large scale, continuously, at several places in the state, simultaneously. If this occurs on such a scale that it disrupts the economy and the intimidating or forceful (re)actions of the government no longer have any effect, it has no other option but to step down. The parallel with David’s situation lies in a party claiming to be the government, which cannot be denied. It would not trigger the application of the Geneva Conventions as there is no foreign element to the occupation. Article 3 common to the Geneva Conventions and Additional Protocol II do not apply either, as it is not an armed conflict.

The system of non-international armed conflict is as follows, in decreasing intensity:

- article 1, paragraph 1 Additional Protocol II;
- article 8, paragraph 2, sub f (for those states that signed and ratified the ICC Statute);
- common article 3 Geneva Conventions (for those states that did not sign and ratify the ICC Statute);
- depending on the interpretation of article 1, paragraph 1 Additional Protocol II, theoretically, another level of intensity could be inserted here. There may not be much practical use of this level as the transition from one level to another will be fluent.
- internal disturbances and tensions.

David considered the possibility of an extra category, but decided against it as he assumes the situation of article 8, paragraph 2 sub f ICC Statute to apply to all states party to the Geneva Conventions, derived from an *opinio iuris* based on the number of signatories to the ICC Statute.

2.5 Conclusion

The purpose of the Geneva Conventions is to protect those who do not or no longer participate in hostilities, to treat adversaries humanely and respect human dignity in general during times of conflict. The Conventions are traditional international treaties, respecting the sovereignty of states. For the application of the Geneva Conventions a distinction must be made between international armed conflict and non-international conflict. According to article 2 common to the Geneva Conventions the former applies to

---

18 David 2002, p. 120.
armed conflict between two or more States Party to the Conventions, in which case the scope of application of the Conventions is quite liberal. Protocol I adds the so-called freedom fights and the protection of war victims to the general application of article 2 common to the Geneva Conventions. In case of non-international armed conflict, depending on the level of intensity, Additional Protocol II or article 3 common to the four Geneva Conventions applies, the latter being the general article. For those states that signed and ratified the ICC Statute article 8, paragraph 2, sub f creates a level of intensity between the two mentioned levels as it contains "protracted armed conflict" and "between organized armed groups". A forth and lowest level of intensity is formed by the internal disturbances and riots as these cannot be called "armed" conflicts. In theory, dependant on the interpretation of article 1, paragraph 1 Additional Protocol II, a level of intensity could be considered between the third and the forth level, but as the transition from one level to another will be fluent, in practice this level will hardly be noticeable.

Within the system of article 2 common to the four Geneva Conventions I looked at the possibility of occupation by a state's own civilians, but as there is no foreign element in this kind of occupation the Geneva Conventions would not apply, nor would article 3 common to the Geneva Conventions or Additional Protocol II as peaceful resistance is not an armed conflict.

I will now look at the position of the Geneva Conventions in international law and more specifically at the relationship between the Geneva Conventions and human rights law, as both these bodies of law protect human dignity.
Position of Geneva Conventions in international law

3.1 General
Traditionally a strict separation existed between the law of peace and the law of war. States were in a state of either one, there was no middle ground. In general it was thought that war had to be declared by a state in order to take effect. The idea of a rigid distinction between the law of war and the law of peace has been abandoned today. Since 1945 states rarely regard themselves to be in a formal state of war. During a conflict diplomatic relations are not necessarily severed and non-hostile relations as trade may continue. Treaty relations between states engaged in armed conflict or even proclaimed war may continue as in peacetime and the more these non-hostile relations continue, the more important the law of peace will be. A distinction should be made here as to private law and public law. Whereas the continuance of the former will be the prerogative of the states, the continuance of the latter is not. Conventions on international criminal law, human rights law, the Geneva and Hague Conventions, provided states are party to them, can only be derogated from if and as far as the conventions allow. Principles of international law and peremptory norms will continue to apply during armed conflict. In this chapter I would like to focus on human rights law, because (i) it continues to apply during armed conflict and (ii) it is national law and an overlap between human rights law and the Geneva Conventions may be in support of the idea of applicability of the Geneva Conventions to non-international conflicts. I will first look at the evolution of both bodies of law to obtain a better view as to their position towards each other and then zoom in on the overlap between them.

3.2 Evolution of the Geneva Conventions and international human rights law
Although the similarity of their aims gives the impression that they are closely related, as both bodies of law protect basic human rights, international humanitarian law and international human rights law, were not intended to be related from the outset. According to Kolb\(^\text{19}\) there are two kinds of reasons for the almost total independence of international humanitarian law and international human rights law. The first reason relates to the genesis and development of both bodies of law. The law of war originates from Antiquity, not only in Persia, Greece and Rome, but also in India, the Islamic Region, Ancient China

---
\(^{19}\) Kolb 1998.
and in Africa ideas about warfare were known. These ideas developed further when European states emerged and fought their wars. The uniform character of these ideas led to the creation of customary rules of law, which were mainly viewed as inter-state law, consolidated and greatly influenced by the views of writers like Grotius\textsuperscript{20} and Rousseau.\textsuperscript{21} As seen above, when discussing the history of the Geneva Conventions, only in the 19\textsuperscript{th} century, when new and destructive weapons were used, a law based on mutual conventions was developed.

The idea of human rights, however, is of a much younger date. It originates from the Age of Enlightenment, the idea of natural law, and is expressed in domestic constitutional law, as it considers the relationship between states and their citizens. For example the 1628 Petition of Rights, 1679 Habeas Corpus Act and the 1689 Bill of Rights of England, the 1776 Virginia Bill of Rights of America and the 1789 Déclaration de droit de l'homme et du citoyen of France. Only after the Second World War, as a result of the atrocities of this war, human rights developed within international law. It was then that international human rights law was placed alongside the law of war, but it was a new and young body of law and hardly considered an interesting object of analysis.

The second kind of reasons, according to Kolb, are more connected with the respective organizations that developed the two branches of law. From the outset, the United Nations refused to include any discussion on the law of war as it was not considered to fit within the object and purpose of the organization, which was to promote international peace and security, therefore a \textit{jus contra bellum}. The ICRC, on her part, thought it essential to stay neutral as a protection of her volunteers and therefore independent of the United Nations, which is a political organization of states. The two branches, human rights law and the law of war, developed separately as can be seen both from the Universal Declaration of Human Rights of 1948, which does not mention human rights in times of conflict and the absence of a reference to human rights in the drafts of the Geneva Conventions of 1949. The ICRC's more practical and realistic view stems from Dunant, who, as said above, realised in 1862 that war would be hard to vanquish and therefore focused on limiting the consequences of it. The focus on peace of the United Nations results from, as the preamble of the Charter states, the experience of two world wars in one lifetime. Although both organizations are established as a result of the atrocities of war, their focus is quite opposite, one on (limiting the effects of) war, the

\textsuperscript{20} De iure belli ac pacis.
ICRC, and the other, the United Nations, on peace. The same applies to their method, one, the ICRC, practical, and the other, the United Nations, political. Their respective bodies of law's point of convergence is, that both protect the dignity of individual human beings. But in this convergence there is again a divergence as human rights treaties attribute (supreme) subjective rights to individuals for states to implement in their domestic law, and are therefore mainly seen as a domestic issue, whereas humanitarian law is based on the objective concept of the protected person defined according to his status in relation to the events of mainly international war, adding an element of reciprocity. I will now take a look at a possible overlap between the Geneva Conventions and human rights law and if the consequences for the applicability of the Geneva Conventions in non-international conflicts.

3.3 Overlap between Geneva Conventions and human rights law

Although the Geneva Conventions apply in times of armed conflict this does not exclude the applicability of the law of peace. Nevertheless, derogation from provisions or treaties during times of war is possible. This can be done either by invoking articles 61 (impossibility of performance) and 62 (fundamental change of circumstances) of the Vienna Convention on the Law of Treaties or by invoking provisions on derogation in the treaties themselves, as for example article 4 ICCPR, article 15 ECHR and article 27 IACHR. In case of the ICCPR derogation is possible when two conditions are met (i) an emergency which threatens the life of the nation and (ii) official proclamation by the state of the emergency. Both the ECHR and the IACHR have similar provisions. The extent of derogation from the provisions of the ICCPR is limited by (i) the exigencies of the situation, (ii) other obligations under international law, (iii) prohibition of discrimination. The first limitation reflects the principle of proportionality and regards duration, geographical coverage and material scope of the emergency. As to the second limitation, according to the Human Rights Committee in General Comment no. 29, article 4 cannot be read as a justification for derogation from the Covenant if this would entail a breach from a state's other international obligations, whether based on a treaty or general

---

21 Du contrat sociale.
23 International Convention on Civil and Political Rights.
international law, particularly the rules of international humanitarian law. The third limitation regards the prohibition of discrimination solely on the ground of race, color, sex, language, religion or social origin.

Article 4 paragraph 1 ICCPR, therefore, creates the possibility of unilateral, temporal derogation from (some) human rights provisions in time of war. It does not state this derogation as rule, on the contrary, it is the exception to the rule. The rule being that human rights apply during time of emergency threatening the life of the nation. Article 4 also makes an exception to the exception in paragraph 2: the non-derogable rights of articles 6 (right to life), 7 (prohibition of torture or cruel, inhumane or degrading punishment, or of medical or scientific experimentation without consent), 8, paragraph 1 and 2 (prohibition of slavery, slave-trade and servitude), 11 (prohibition of detention for non-compliance contract), 15 (nullem crimen, nulla poena sine praevia lega poenali), 16 (recognition of everyone as a person before the law) and 18 (freedom of thought, conscience and religion).

According to the Human Rights Committee this enumeration of non-derogable rights is related to, but not identical with, the question whether some human rights obligations bear the nature of peremptory norms of international law and the Committee sees this enumeration partly as a recognition of the peremptory nature of some of the mentioned rights e.g. articles 6 and 7. On the one hand, some of the provisions are mentioned as non-derogable as it can never be necessary to derogate from them, e.g. articles 11 and 18. On the other, the category of non-derogable norms extends beyond the mentioned list in article 4, paragraph 2 ICCPR and states cannot invoke article 4 as a justification to violate humanitarian law or peremptory norms of international law, "for instance by taking hostages, by imposing collective punishments, through arbitrary deprivations of liberty or by deviating from fundamental principles of fair trail, including the presumption of innocence."

The Committee then continues that in assessing the scope of legitimate derogation from the ICCPR she finds a criterion in the definition of crimes against humanity as codified in articles 5 and 7 of the ICC Statute. The argument is: "If action conducted under the authority of a State constitutes a basis for individual criminal responsibility for a crime

---

26 CCPR/C/21/Rev.1/Add.11 of 31 August 2001, replacing General Comment no. 5 at the thirteenth session (1981).
27 Para 11 of General Comment no. 29.
28 Para 11 of General Comment no. 29.
against humanity by the persons involved in that action, article 4 of the Covenant cannot be used as justification that a state of emergency exempted the State in question from its responsibility in relation to the same conduct." The Committee is quite right, it cannot be that a person, acting under the authority of a state, is responsible where the state is not. The Committee lists "elements" of provisions not mentioned as non-derogable in article 4 paragraph 2, which in the Committee's opinion cannot be subject to derogation:

a) All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person, as prescribed in article 10 ICCPR is, according to the Committee, a norm of general international law not subject to derogation. This is supported by reference to human dignity in the preamble of the ICCPR and by close relations of articles 7 and 10.

b) The prohibition against the taking of hostages, abductions or unacknowledged detention (article 9 ICCPR) are norms of general international law and as such not subject to derogation.

c) International protection of persons belonging to minorities includes elements that must be respected in all circumstances. According to the Committee this is reflected in the prohibition against genocide, in the inclusion of a non-discrimination clause in article 4 paragraph 1 ICCPR as well as in the non-derogable nature of article 18.

d) Deportation or forcible transfer of population without grounds is a crime against humanity according to article 7d of the ICC Statute. According to the Committee the legitimate right to derogate from article 12 of the ICCPR during a state of emergency can never be accepted as justifying such measures.

e) No state of emergency may be invoked to justify propaganda for war, or advocacy of national, racial or religious hatred that would constitute incitement to discrimination, hostility or violence as prohibited by article 20 ICCPR.

Although not based on the definition of crimes against humanity the Committee finds the following provisions also non-derogable:

f) Article 2, paragraph 3 ICCPR, the state must provide an effective remedy in case of lawful derogation from any provision of the ICCPR, based on the fact that it constitutes a treaty obligation inherent in the covenant as a whole.

g) As it is inherent in the protection of non-derogable rights mentioned in article 4 ICCPR that they must be secured by procedural, often judicial guarantees, those
provisions of the ICCPR that provide procedural safeguards may never be derogated from.

h) The Committee is of the opinion that the principles of legality and the rule of law as laid down in article 4 as safeguards to derogation demand that fundamental requirements of fair trial must be respected during a state of emergency. Especially as international humanitarian law explicitly guarantees certain elements of fair trial during armed conflict, the Committee finds no justification for derogation from these guarantees during other emergency situations.

Finally, article 6 of Protocol II to ICCPR prohibits derogation from article 1, paragraph 1 of this protocol based on article 4 of the ICCPR. In article 1, paragraph 1 Protocol II to ICCPR execution is prohibited, unless a reservation according to article 2 of the Protocol is made at the time of ratification or accession "that provides for the application of the death penalty in time of war pursuant to a conviction of a most serious crime of a military nature committed during wartime".

The non-derogable rights of article 4 paragraph 2 ICCPR are often referred to as the hard core of human rights, but according to the Human Rights Committee in General Comment 29, as discussed above, many more rights are considered non-derogable in time of war.

What does this mean as to the applicability of the Geneva Conventions in non-international armed conflicts? To extent the applicability of the Geneva Conventions to internal armed conflicts two ways can be followed, either direct application of the Geneva Conventions to national law, which I will address in the next chapter, or extent national law, human rights law, such that there is more overlap with the Geneva Conventions. The overlap lies in the non-derogable rights during time of war. As non-derogable human rights are implemented and thus part of the national legal order, they apply during non-international armed conflicts. One could say that the Geneva Conventions are pulled into the national legal order by extension of the non-derogability of human rights.

The comment I have to the above is comparable with the one I had on David's idea on opinio iuris. The criterion the Human Rights Committee uses is based on the ICC Statute, a treaty signed and ratified by about half of the states party to the ICCPR. For those states that signed and ratified both treaties the reasoning of the Committee is correct, but for those states that did not the scope of non-derogable rights of the ICCPR is extended.
by way of a treaty, the ICC Statute, that they did not sign and/or ratify and to which they
cannot be not bound. The ICCPR is a treaty a state, once party, cannot denounce or
withdraw from. To extend the scope of the treaty without a state's consent, might weaken
the effect of the treaty as states have no obligation to extend their national law
accordingly. As we will see in the next chapter, national courts are not consistent in the
application of international law to national law and often they consider national law to
determine the applicability of international law. The effect of the abovementioned
extension by the Human Rights Committee may therefore be minimal in national
jurisdictions.
The same applies to the Geneva Conventions, part of which is pulled into national law by
the reasoning of the Human Rights Committee, although states cannot be bound if they
did not sign and/or ratify the ICC Statute. If there is a way to apply the Geneva
Conventions to non-international conflicts I believe it should be done within the system of
both international and national law.
As to the overlap between the Geneva Conventions and human rights law I agree with
David: "…nous préférons laisser de côté les tableaux 'indéalistes' proposés par la
doctrine et auxquels nous nous étions, nous-mêmes, raliés jadis, et synthétiser de la
maniè re suivante ce qui nous semble être la réalité." According to David the overlap
consists of the right to life and the right to physical integrity, which concurs with what the
Human Rights Committee considers to be peremptory norms: the right to life and the
prohibition of torture, article 6 and 7 ICCPR, although the latter is somewhat narrower
than the right to physical integrity. Nieto-Navia\textsuperscript{29} considers these two basic human rights
only within the Genocide Convention, articles 1 and 2, to be peremptory norms of
international law, as only those two provisions satisfy the conditions of article 53 Vienna
Convention of the Law of Treaties.\textsuperscript{30} David's point of view on humanitarian law as \textit{jus
cogens} I will discuss in the chapter on direct effect.

3.4 Conclusion
Because the idea of a strict separation between the law of peace and the law of war has
been abandoned and since 1948 states do not consider themselves to be in a formal
state of war, the law of peace has gained significance in times of armed conflict. This is
especially the case for human rights law, as it is one of the bodies of law states cannot

\textsuperscript{29} Nieto-Navia 2003.
denounce or freely derogate from. A comparison between the Geneva Conventions and human rights law resulted in an overlap as to the right to life and the right to physical integrity. This means that in times of armed conflict national law and inter-state law overlap in these two basic human rights. The question is what the effect of this overlap is on the applicability of the Geneva Conventions in non-international conflicts. Or, to put it differently, is this overlap broad enough to support the applicability of the Geneva Conventions to non-international conflicts? In my opinion it is not and to broaden the basis I will now turn to the question of direct effect to find out if this can add to support the idea of the applicability of the Geneva Conventions in non-international conflicts.

30 Hereinafter: VCLT.
Direct effect

4.1 General

The question of direct effect of international law depends on the view one has of the relationship between national and international law. These views are since long divided between monism and dualism. In monistic thought international law and national law constitute one legal order and international law is part of and therefore valid in the national legal order. In dualistic thinking both bodies of law are separate legal orders. It is, however, not as easy as it seems, e.g. a problem that arises in the monistic system is the question of hierarchy and the evaluation of a monistic or dualistic system is often confused with political or ideological questions, a point that will return in the chapter on sovereignty. According to Ferdinandusse it is actually quite difficult to establish from state practice whether a monistic or dualistic view is applied, as rules of reference can often be explained either way. For example, if rules of reference are declarative this could evidence a monist attitude and in case of a constitutive rule it might be dualist. State practice may not even be consistent in its attitude towards the applicability of international law depending on its national law, not only as to rules of implementation but also as to the level of detail or the subject of the treaty. In his study, "Direct Application of International Criminal Law in National Courts", he "assumes that international law can, at least partly, regulate its own application in national courts." He does acknowledge, however, that in many states so many obstacles in national law are created as to the application of international law that the result is a de facto separation between international and national law. In order to obtain an idea of the possibilities of direct effect and therefore the limitations of the freedom of the state to implement international law as it wishes along either monistic or dualistic lines or both, I will discuss freedom of implementation of states. I will base this on the findings of Ferdinandusse's extensive study in his abovementioned book. First, however, I look at the subject of self-executing treaties, as this is a from of direct effect that is often limited by states based on their freedom of implementation.

31 Ferdinandusse 2006, p. 131.
4.2 Self-executing treaties
It is not possible to give a clear definition of a (non)self-executing provision, but Ferdinandusse deduces some general criteria, to be divided into objective and subjective criteria. As objective criteria, first, a treaty provision is non-self-executing when its subject is not amenable to adjudication in national courts. Second, when a treaty provision requires legislative action to take effect, either because the subject falls under the exclusive competence of the legislature, or the provision lacks precision, or it refers explicitly to legislation itself. The result of the objective criteria is that incomplete or imprecise treaty provisions are not to be applied by national courts. Whether or not treaty provisions are incomplete or imprecise is deduced from the content and language of the specific provision, although intent of the parties may be taken into account. The subjective criterion considers a treaty provision non-self-executing when parties did not intent the provision to be enforced in national courts. Here the content and language is subordinate to the parties’ intent, which can be expressed by a clause in the treaty or a unilateral declaration at any point during the conclusion or implementation of the treaty. Although these criteria seem clear, Ferdinandusse finds that in practice courts are not. They often assume provisions to be self-executing only if they create rights for the individual or they assume non-self-execution when direct application might cause undesired consequences. The latter of course leads to violation of the treaty norm and when the provision is not implemented in some way or other the pacta sunt servanda principle is violated as well.

4.3 Freedom of implementation
International law itself does not proscribe how it should be applied or enforced at the national level. Treaties for example refer to "respect and ensure respect"\(^{32}\) or "... in accordance with its constitutional processes ... to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant."\(^{33}\) The first is rather open, leaving it to the state how to respect and ensure respect, whereas the second phrase is an instruction to implementation, but how the rights should be implemented is left to the state. The only norm is that the national legislation should give effect to the rights recognized in the Covenant. As a rule states are free as to the implementation and fulfilment of their obligations under international

\(^{32}\) Article 1 common to the four Geneva Conventions.
law, as long as they meet their obligations under international law and do not violate the *pacta sunt servanda* principle. The origin of the freedom of implementation stems first of all from the idea of the sovereignty of the state. Separation of powers and the, either or not democratic, legitimacy of the law for example are derived from the idea of state sovereignty. A strict regime of international rules of implementation would infringe on these and other prerogatives of the state. It could also interfere with democratic rights, as at the international level negotiations are often performed by the executive, diplomats and professional, non-elected/non-political, civil servants. A second, more practical, reason for freedom of implementation is that international law is negotiated by multiple parties, what may lead to vagueness and uncertainties in treaties. States are considered to have better knowledge of their own legal system and its peculiarities and are supposed to be better able to implement their international obligations effectively. However, a counterargument could be that a more strict rule of implementation might lead to more equality between states as to the fulfilment of their international obligations and a better effectuation of international law. States may know best how to effectively implement international obligations into their own legal system, this does not mean that they will always do it, regardless their possible influence during the negotiations and the possibility of making reservations. And while implementing, is international law adapted to national law or the other way around? A remnant of the monistic-dualistic dichotomy? This may lead to subtle differences. While the freedom of implementation rule is uncontroversial and states can freely separate national and international law and choose which organ will enforce the international obligations as well as demand reciprocity from other states or make judicial application subject to the doctrine of self-executing treaties, according to Ferdinandusse, the freedom of implementation should not be overestimated. Once a treaty is signed and ratified a state is bound by it based on the *pacta sunt servanda* rule. As said, states have to effectively comply with the treaty they freely entered into. Nevertheless, they are able to legislate in violation of their international obligations. It is then left to the courts to either or not apply international law. It appears that national courts are not consistent in their response to breaches of the *pacta sunt servanda* rule and look "predominantly and sometimes even exclusively to national law in order to decide whether and to what extent to give effect to international law." Thus allowing

---

33 Article 2, paragraph 2 ICCPR.
34 Ferdinandusse 2006, p. 132, not 794.
violations of international obligations by the national executive and/or legislature. On the other hand, it appears that, based on separation of powers and the *pacta sunt servanda* rule, national courts often strictly adhere to international obligations, limiting the freedom of implementation of the state, normally when the state has had time to legislate, but failed to do so at all or not effectively. In the next paragraph will discuss the limitations of the freedom of implementation rule. This is relevant as a general international obligation of states of direct application of international norms would not be compatible with the freedom of implementation rule. As said, limitations and to what extent they apply may give some insight as to the possibilities of direct effect of treaty obligations.

4.4 Limitations to the freedom of implementation rule

According to Ferdinandusse\textsuperscript{36} the extent of freedom of implementation is often overestimated by scholars and national courts, resulting in the idea that national law determines the effect of international law in the internal legal order of a state. He finds reasons to doubt this as (i) many national courts do take international law into account in their interpretation of national law based on consistent interpretation, which I will return to later, (ii) a historical analysis of the reception of international law in various legal orders shows that originally courts perceived a validity of international law into the domestic legal order based on international law itself, as at the time no national rule existed that required this, (iii) international procedural norms conflict with the idea of the necessity of a national rule, e.g. the duty to refrain from defeating the object and purpose of a treaty before its entry into force, (iv) national courts apply international procedural rules routinely, although it must be said that they are often quite strict as to international rules creating individual rights and duties, (v) in several cases Latin-American courts used article 27\textsuperscript{37} VCLT to overrule the freedom of implementation and pass by the national executive and legislature, as they held that this article requires state organs to give primacy to treaty obligations and ensure them effective application even in the face of contrary national law or gaps therein.\textsuperscript{38} As a reaction to the last point: what does it mean to "perform a treaty" and what is a "failure" to do so? As seen above, article 2, paragraph 2 of the ICCPR is quite clear about the implementation into national law of the rights.

\textsuperscript{36} Ferdinandusse 2006, p. 140.

\textsuperscript{37} This article reads: A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.

\textsuperscript{38} Ferdinandusse 2006, p. 144.
recognized in the covenant, but as to the extent of the implementation only the words "necessary to give effect" can be of guidance, leaving it to the state to decide what is necessary to give effect. This makes the obligation to implement an obligation sec. Consequently, the question arises: when is a treaty performed? And what about this question when no implementation is proscribed by the treaty, as is the case with the Geneva Conventions? The answer may lie with the abovementioned principle of consistent interpretation. It has a long history and is found in states all over the world. In such a way even, that according to Ferdinandusse it appears to be a general principle of law in the sense of article 38 paragraph 1 sub c of the ICJ Statute. In short, it is best explained as "an international duty for national courts to interpret, within their constitutional mandates, their national law in the light of international law". There are two different ways to do this. One way is to interpret according to the intent of the (national) legislature. This means that national law is interpreted according to international law and only if the (national) legislature explicitly violates international law and motivates why, the court will set international obligations aside. In fact, it is national law rather than international law which is respected. The other way focuses entirely on international law and the fulfilment of the obligations that flow from it instead of interpreting national law according to international law. Whatever way is used, most important is that the principle of consistent interpretation can limit the freedom of implementation: (i) it contradicts the idea that national law determines the effect of international law in the internal legal order and (ii) it can bypass obstacles created by national law as to implementation and application of international law in national courts. The principle of consistent interpretation can therefore influence the justiciability of rules of international law. Ferdinandusse does not distinguish between a treaty that proscribes implementation like the ICCPR and a treaty that does not, like the Geneva Conventions. In the next paragraph we will see that Ferdinandusse assumes that international human rights law and criminal law are part of, what he calls, international law of a humanitarian character. As for the principle of consistent interpretation it does not matter whether a treaty is implemented or not. Not only in case of the second abovementioned variant of the principle, when international obligations need to be fulfilled regardless national law, but also as to the first variant, when national law is interpreted according to international law. If the treaty was implemented, but does nevertheless not comply with international

39 Ferdinandusse 2006, p. 147.
law, the national court will apply international law, unless the legislature explicitly violated
the pacta sunt servanda rule and motivated why. In case the treaty was not implemented,
the national court will interpret whatever rule exists in national law and apply international
law if the national rules do not comply with it, unless, again, the national legislature
explicitly violated the pacta sunt servanda rule and motivates why. The next question is
whether the freedom of implementation applies equally to all norms of international law.
Within the scope of this thesis, international humanitarian law, which the Geneva
Conventions are part of, is the specific field to look at.

4.5 International law of a humanitarian character

As said above in Ferdinandusse’s view international law of a humanitarian character
applies not only to international humanitarian law but also to international human rights
law and criminal law. What these three bodies of law have in common is that here
international law governs rights and duties of individuals and one could ponder if in such
case the state’s freedom of implementation is the same as with regards to other bodies of
international law governing inter-state law. As said, courts do not easily apply
international law creating individual rights and duties.

Ferdinandusse distinguishes three characteristics of international law of a humanitarian
character that may set it apart from general international law in such a way that a
modification of the freedom of implementation rule may be justified.

● Absence of reciprocity

The Genocide Convention, the Geneva Conventions and several human rights
bodies, e.g. the ICCPR and the IACHR, are considered to be multilateral
agreements creating binding commitments for states to respect human dignity
and the rights of the individual within their jurisdiction, irrespective of the acts of
the other state parties to these conventions.

● Limitation of the principle of consent

The Human Rights Committee has asserted repeatedly that “human rights
treaties devolve with territory”. A state can therefore not choose to be bound by
the ICCPR or not when it acquires territory from a state party, nor can states
denounce of withdraw from this covenant. The ICJ has stated that humanitarian
law is to be observed by all states whether or not they have ratified the

40 Ferdinandusse 2006, p. 147.
conventions that contain it, because it constitutes intransgressible principles of international law.\textsuperscript{41}

- More lenient demands for the formation of customary humanitarian law
  The emphasis being more on \textit{opino iuris} than on state practice. The ad hoc tribunals deduced individual criminal responsibility for acts in internal armed conflicts by relying on it.\textsuperscript{42}

As to the first bullet point, as said above the Geneva Conventions do not oblige states to implement them as for example article 2, paragraph 2 of the ICCPR does and therefore do not become national law. Despite the binding commitments for states as to human dignity in the Geneva Conventions, I believe there still is the element of reciprocity, even if only a remnant, not only because they remain inter-state law, but also, and more strongly, as they apply in a situation of conflict when the relation between states is at its worst, feeding the reciprocity element. As Ferdinandusse does not distinguish between international law and implemented international law the reciprocity aspect becomes less important.

With the development of international human rights law, international humanitarian law has moved away from its origin and has become more and more a lex specialis of the genus international human rights law, which is of a more universal and unconditional character and applies always, in war and peace. Mostly under the auspices of scholars, NGO's, international courts and ad hoc tribunals, attempts to diminish the roles of the principle of reciprocity and consent of states are made in order to enhance the efficacy of international law of a humanitarian character. However, we should bear in mind that their findings may not and probably are not consistent with existing law. An exception to the rule can probably be found as to core standards of humanity, but these are rather limited in number.

That being so, can international law of a humanitarian character limit the freedom of implementation based on its particular position within international law? Human rights bodies, especially Human Rights Committee, often argue the necessity of a specific legal regime in order to ensure effective enforcement of international law of a humanitarian character, either through a significant restriction of states' freedom of implementation or, rather, through mandatory direct applicability. There is logic in this as "[i]f some

\begin{itemize}
  \item ICJ, Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 8 July 1996, para. 79 (quoting Corfu Channel 1949, 1949 ICJ 22).
  \item Ferdinandusse 2006, p. 153 and following.
\end{itemize}
international norms are so fundamental that they bind States per se regardless of their consent, while proceedings on the national level provide the most, or even only, effective means of enforcement, it is difficult to accept that the applicability of those norms in national courts is subject to the discretion of the State."43 However, although states may limit their freedom of implementation for international norms of a humanitarian character and national courts have limited the principle of reciprocity or a state's freedom to disregard signed, unratified treaties, in many other cases these norms were treated the same as any other norms of general international law. It can therefore only be concluded that the position of international law of a humanitarian character is in development, in a sense that there is a certain tendency to limit the freedom of implementation of states, but this should not be overstated.44 I will now turn to David's opinion on jus cogens, to see if a wider application of the Geneva Conventions, more specifically to non-international conflicts, is possible.

4.6 **Jus cogens**

Although never "officially" proclaimed to be *jus cogens* David finds three reasons to consider the law of armed conflict to be part of it.

- The specific nature of the law of armed conflict.
  
The law of armed conflict concurs with the non-derogable rights of human rights instruments as they are both minimal norms. As the application of the law of armed conflict is the result of the violation of a norm of *jus cogens* – the prohibition of recourse to force – David considers the law of armed conflict to be part of *jus cogens* itself.

- The law of armed conflict corresponds with the definition of *jus cogens*.
  
The Hague law of 1907 and the Geneva Conventions contain norms accepted and recognized by the international community of states as a whole.
  
David deduces the imperative character from article 1 common to the Geneva Conventions which states that the conventions should be "respected" and "ensured to be respected" "in all circumstances". This is stricter than article 26 VCLT which states that treaties must be performed "in good faith".

---

43 Ferdinandusse 2006, p. 163.
44 Ferdinandusse 2006, p. 163.
Furthermore, the law of armed conflict cannot be denounced and insofar as it can (e.g. the Geneva Conventions), the Martens clause\(^\text{45}\) applies and although hard to determine the provisions this clause would apply to, David assumes it concerns those provisions which are "protected" because they contain (i) expressions that underlie their imperative character, or (ii) the prohibition of reprisals, or (iii) an international criminal penalization. This hard kernel constitutes minimal humanitarian *jus cogens*.

David refers to the Legality of the Threat or Use of Nuclear Weapons Case of the ICJ, where the court did not express itself on the question whether humanitarian law could be considered as *jus cogens*, but it stated: "It is undoubtedly because a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and "elementary considerations of humanity" as the Court put it in its Judgment of 9 April 1949 in the Corfu Channel case (ICJ Reports 1949, p. 22), that the Hague and Geneva Conventions have enjoyed a broad accession. Further these fundamental rules are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of *international customary law.*" According to David intransgressible principles and imperative norms from which no derogation is possible\(^\text{46}\) are "*chou vert et vert chou*" and he concludes that the ICJ implicitly confirmed that most of the provisions of humanitarian law are *jus cogens* norms.

- **Factors of unassailability of some of the provisions.**
  - A first factor David finds in the wording of some provisions of the Geneva Conventions, where the imperative character is underlined.
  - A second factor lies in the prohibition of reprisals and reciprocity.
  - A third factor is the individual criminal responsibility on top of the states' responsibility.
  
  Because these provisions are more obligatory than others, David considers them *jus cogens* rules.

It is very difficult to comment on this, as *jus cogens* rules are hard to prove. I would say that as to the law of armed conflict, not the provisions, but the underlying values are *jus

\(^{45}\) …remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience.

\(^{46}\) Article 53 VCLT.
**cogens:** the right to life and the right to physical integrity. But, if the Geneva Conventions are *jus cogens* norms, they are undoubtedly applicable to non-international conflicts, as according to article 53 VCLT no derogation from these norms is possible, not even a state's sovereignty can be reason. Unless, of course, these conventions are *jus cogens* norms as they are: not applicable to non-international conflicts. But then, what is left of the content of the notion of *jus cogens*? It seems to me one has to be restrictive when attributing *jus cogens* to treaties, if not, the notion becomes void, hence my opinion of the underlying values.

### 4.7 Conclusion

The Geneva Conventions are traditional inter-state treaties and, like human rights treaties, they create duties and rights for individuals. Not only in the vertical sense, between individual and state, but also horizontally, between individuals. If a direct effect would apply to these conventions it would apply as they are and would therefore not extend their scope to non-international conflicts. Ferdinandusse distinguishes three characteristics that may set international law of a humanitarian character apart from general international law in such a way that a modification of the freedom of implementation rule may be justified: the absence of reciprocity, the limitation of the principle of consent and more lenient demands for the formation of customary humanitarian law. One could ponder that if international law of a humanitarian character would indeed be set apart from general international law, could the underlying reason be enough to apply the Geneva Conventions to non-international conflicts? When I look at the motivation behind the three characteristics I would say that the aspect that binds the three is respect for human dignity. When states would acknowledge that human dignity is of such importance that it sets international law of a humanitarian character or, in the narrow sense the Geneva Conventions, apart from general international law such that it limits the freedom of implementation rule, in my opinion this would result in the applicability of the Geneva Conventions to non-international conflicts. If human dignity is considered by states to be of such importance as to create direct effect, states would want to protect it in the best possible way during internal conflict, which means apply those norms that apply to international conflict. In my opinion the Geneva Conventions are applicable to non-international conflicts as soon as humanitarian law has direct effect.
As to David's view of the law of armed conflict being *jus cogens* norms I believe this is not yet so, although a development may be in that direction.

As it appears to be so that states not only determine their internal affairs, but also the measure of protection of universal and inherent rights, such as human dignity, it is necessary to take a look at sovereignty.
5 **Sovereignty**

5.1 **General**

Originally sovereignty was connected with an individual, the "king". He had absolute power over his territory and everyone and everything in it. His power was directly derived from god in the Christian societies or from a supreme power differently named in non-Christian societies. Jean Bodin was the first to provide a theory of state sovereignty in his Six livres de la République published in 1576. He separates sovereignty as a function from the person of the sovereign. It can be attributed to any person or institution. About a hundred years later, Thomas Hobbes creates the first version of the contract theory. Sovereignty is the result of a contract between individuals and is therefore no longer original and unconditional. Fifty years after Hobbes John Locke derives his theory on sovereignty from a contract between individuals and the sovereign, who can be held accountable for violation of the contract. Locke finds it important to limit the powers of the sovereign and ensure a division of powers and constitutional control. A few years later Jean-Jacques Rousseau submits the exercise of sovereignty of political institutions to the respect of the general will and political sovereignty becomes a reflection of popular sovereignty. From then on sovereignty and democracy are bound and sovereignty is considered absolute when original and limited when it corresponds to derived political or institutional sovereignty. To be sovereign means to have supreme legal authority, therefore not to be subjected to any legal order superior to ones own. However, the state is considered to be subjected to norms of morals in general.\(^{47}\) The Treaty of Westphalia (1648) is often seen as the birth of the concept of the modern state, which means that the principle of territorial delimitation of state authority and the principle of non-intervention were formally established. In international law the minimum requirements for recognition of a state are (i) territory, (ii) people in it, and (iii) government which controls the territory with the people and is independent of other states. In this last element of the state sovereignty is embedded.

\(^{47}\) Kelsen 1960.
5.2 Internal / external sovereignty

Internal control or ultimate power and external independence are the two sides of the sovereign coin. Besson\textsuperscript{48} considers these two sides to be historically and conceptually linked, but nevertheless thinks it important to distinguish between them for three reasons, (i) "different institutions exercise sovereignty in both cases." The executive acting as sovereign in external affairs and the legislature as such in internal affairs, (ii) "their functions differ". Internal sovereignty covers all political and legal matters and external sovereignty usually only cooperation between distinct sovereign entities, (iii) difference in status, as internal sovereignty is final/ultimate and external is equal at the most. Although the said differences do apply, the executive and the legislature are organs of the state and it is the state which is sovereign, not its organs. As said, internal and external sovereignty are two sides of the same coin. If one of the features of state sovereignty is Kompetenz-Kompetenz, meaning the competence to decide ones own competence, then all three differences fall together in one sovereignty. The state decides which organ/institution is best suited to fulfill a certain task, also called the principle of subsidiarity or power allocation principle. For internal affairs that can be the national legislature, but, as is the case with the European Union\textsuperscript{49}, it can very well be an institution created outside of the national sphere if (a) state(s) consider(s) this to be (economically) better. Internal and external sovereignty may differ in functions, but that is caused by the third point Besson makes, the difference in status.

My objection to Besson's position is that the more the two sides of the sovereign coin are separated, the more the attribution of a task to a state's institution becomes fixed. In my view the point of Kompetenz-Kompetenz is the flexibility of the state to adjust competences to a changing world, demanding reactions from a state. Over time, many changes that may influence the sovereignty of the state occurred, e.g. establishment of the UN and the EU, emergence of and increasing influence of NGO's and multinational corporations, economic globalization, the importance of human rights and, to a lesser extent, jus cogens norms. Some of these phenomena, however, were initiated by states and may therefore be less of an erosion of state sovereignty, than an exercise of it. States may be well aware that because of globalization and an increase in interdependence between them, cooperation becomes more important. Is it not a exercise of sovereignty of the state to decide upon it's own competence? If, however,

\textsuperscript{48} Besson 2006, p. 151.
sovereignty is seen in the narrow sense, as power, one perceives a change in state competence as a limitation of that power. Whereas it could simply be another division of competences as a necessary reaction to changes in the world. Due to the abovementioned globalization and interdependence of states, decision making may have shifted to the international level in the past decennia and states have responded to that evolution by an increase in their cooperation. Hence, an increase in focus on international politics and as a result an increase of international agreements, international institutions and international courts. The question then arises whether in this process sovereignty is transferred to institutions outside of the state, as for example the EU, which is considered to be supranational.

5.3 Transfer of sovereignty
The transfer of sovereignty is not without problems, for example how much sovereignty can be transferred for a state to remain a state. This problem cannot be solved by distinguishing between internal and external sovereignty, as it is not only external sovereignty that is transferred. The point in the transfer of sovereignty is that supranational legislation affects the internal legal order directly. This too, shows that the distinction between internal and external sovereignty, even if considered linked as Besson does, is a problematic one, as supranational legislation is a result of the exercise of external sovereignty, but nevertheless restrains the internal sovereignty as well. The transfer of sovereignty can therefore only be both internal and external. But, to return to the question at hand, to what extent can sovereignty be transferred? For example, if a state transfers 50% of its sovereignty is it still a state? Or should one look at the kind of sovereignty transferred to decide whether a state is still sovereign. This leads to the question whether a hierarchy exits in law in a sense that e.g. private law is of another ranking than criminal law or administrative law. Could law that regulates state actions be of a higher level? That could be human rights law. But it would not be realistic to assume that, because as soon as states’ sovereignty is limited by international treaties, states feel an urge to implementation at national level, where they can decide who does what and to what extent, as we have seen in the chapter on direct effect.

A spin-off of the transfer of sovereignty to supranational organizations like the EU is, that sovereignty is detached from democracy with which it is traditionally linked. In case of the

49 Hereinafter: EU.
EU a parliament exists, but it does not have as much influence as a national parliament in general has and the distance from Brussels to citizens in the EU does not only exist in kilometers. The democratic influence decreases as sovereignty is transferred to supranational organs.

Another problem in the EU, created by the concept of transfer of sovereignty, is that of hierarchy of rules. The European Convention for the Protection of Human Rights and Fundamental Freedoms\(^{50}\) is a, one could say, traditional human rights treaty, as it contains broad terms and must be implemented at national level. The implementation of human rights treaties by states at national level is generally seen as a necessity as to the efficacy of exercise of their rights by individuals. Enforcement at a national level is easier than at an international level and therefore the protection of the rights is better ensured at the national level. The result of implementation, however, is that the protected rights "degrade" from international law to national law. In itself not a problem, but within the EU it leads a subordination of human rights law to economic law, the latter being supranational. An example being the case of Viking Line\(^{51}\) where the right to strike may be considered national law and therefore subordinate to EU law, as a result of which the strike may be prohibited. An extraordinary result, as every state becoming a member of the EU automatically becomes a party to all its conventions, including the ECHR, which, as a treaty, is not national law. Furthermore, it seems to be in violation of the object and purpose of the ECHR. The reasoning of the European Court of Justice\(^{52}\) is that the EU is more than the sum of the parties and that the EU is not a party to the ECHR and can therefore not be bound by it. In its decision in the Van Gend & Loos case\(^{53}\) the ECJ explained this "more" in this way: "The objective of the EEC treaty, which is to establish a common market, the functioning of which is of direct concern to interested parties in the community, implies that this treaty is more than an agreement which merely creates mutual obligations between the contracting parties." The ECJ sees a confirmation of its point of view in (i) the preamble referring not only to governments, but also to people, (ii) the establishment of institutions endowed with sovereign rights, the exercise of which affects states and their citizens, and (iii) the nationals of the states party are called upon to cooperate through the intermediary of the European parliament and the Economic and

\(^{50}\) Hereinafter: ECHR.

\(^{51}\) European Court of Justice, C-438/05, International Transport Workers’ Federation and Finnish Seamen’s Union/Viking Line, no decision taken yet.

\(^{52}\) Hereinafter: ECJ.

\(^{53}\) See also Van Gend & Loos, case 26/62, p. 3.
Social Committee. The "more" the ECJ refers to seems to be based on "direct effect" of the ECC treaty towards the states' citizens. As it is not within the scope of this thesis to research the finesses of European law I will leave it to this. My point was to prove that the concept of transfer of sovereignty may lead to unsolvable problems.

Another objection I have to the separation of internal and external sovereignty is that it does not concur with state practice, it seems too artificial. The executive may act externally, but it also acts internally. It may actually be the same people in both cases. They may put on another hat when negotiating with their colleagues in other states, they still represent their own state and the internal state policy will influence the external negotiations. They may even be chosen by the state to participate in certain negotiations because they have knowledge on a specific – internal state – field. The same applies to other distinctions often made as to sovereignty: absolute/limited and unitary/divided. By making these distinctions the state and its function is chopped up in small parts more or less perceived as autonomous, but somehow also linked. But this is first a simplification of reality and second the state becomes an almost virtual living thing, a thing in itself. A state, however, is a complex organization of human beings, with multiple – organizational – subdivisions. To quote Besson: "The problem with this kind of model of pooled, divided or shared sovereignty, however, is that by being everywhere, it seems that sovereignty is nowhere particularly important".  

She makes a plea for cooperative sovereignty, based on a combination of subsidiarity and sovereignty. This corresponds, according to Besson, with the general development of multilevel governance in a post-national constellation.

Sovereign political entities can no longer exercise their traditional competences and function alone, as they overlap within the same territory and apply to the same legal and political community.

5.4 State sovereignty in the international field

What happens in the international field where states act as equal sovereign entities? First of all, in the international field not only states operate, as said above, there are all kinds of actors as NGO's and multinational corporations, as well as several phenomena like globalization, economics, environmental issues, poverty, epidemics or natural disasters. Secondly, actors as well as phenomena have become more and more interconnected, because mankind expanded over the years, as did its influence on the world as a whole.

54 Besson 2006, p. 155.
Sovereign states therefore do not have a choice but to cooperate, not only between them, but also with the other actors in the international field, some of which may be based in certain states, but their objectives can be quite different from those of the state they are based in. The interests of all actors become intertwined and decision making is shifted to the international level. The more this happens, the more important the state becomes as intermediate between people and the level where decisions are made. One could ponder, therefore, what interests are pursued when NGO’s, international tribunals, publicists and others claim that state sovereignty is being eroded and perceive this to be a good thing. Especially in the light of human rights.

Kelsen finds that when "international law obligates and authorizes the state to behave in a certain way [this] means that international law leaves it to the state to determine which (group of) individual(s) by their behavior will fulfill the obligations imposed by international law" as "only the behavior of human beings can be the content of legal obligations and legal rights". The state as a subject of international law is the personification of the national legal order. According to Kelsen the problem of sovereignty of the state is the problem of the sovereignty of the national legal order in its relation to the international legal order. This relationship is either dualistic, which means that both legal orders are simultaneously valid, or monistic, in which view the national and international legal order form a unity. The dualistic view cannot be maintained if it is recognized that international law delegates to the state to allocate its obligations and rights under international law to its organs. If the monistic view is adapted the next question is whether there is a primacy of national law or a primacy of international law. In the first case international law is deemed valid if a state recognizes it as valid for its organs, either expressly or tacitly. Sovereignty of a state means that it is presupposed that the national legal order is a supreme order, which is not derived from a superior order. In the view of primacy of international law the validity of national law is sought in international law and this is done through the principle of efficacy. As said above, for a state to be recognized by international law it needs (i) territory, (ii) people, (iii) effective control and (iv) independence of other states. In this case international law is superior and universal and the national legal orders coexist and are subjected to superior international law. Kelsen offers a very interesting theory: if the primacy of national law is supposed, then only one state can be sovereign. If state A recognizes international law

55 Kelsen 1960, p. 628.
as its national law, then international law becomes now national law of state A. According to international law other legal orders are "states" if state A's law recognizes them as such. As a consequence of the primacy of national law the other states must be regarded as subordinated to the national legal order of state A, which includes international law. Hence they cannot be presupposed as sovereign. Only state A, on the basis of which recognition of international law took place, can be presupposed to be sovereign, for only this national law is not subordinated to international law as the latter is a part of this national law. This, however, is not what states have in mind when they suppose a primacy of national law. Whether international law is considered to be valid within national law or the other way around does not affect the content of both international or national law. Kelsen refers to the Bezugssystem of Max Planck who explains this: whether the sun turns around the earth or the earth around the sun is a matter of a different system of reference. "In the antagonism of these two formulations there is neither contradiction nor obscurity; there are only two different ways of viewing the object." According to the theory of relativity, both ways of viewing are correct and legitimate. It is impossible to decide between them. The science of law can only describe the two systems and ascertain that one of the two has to be accepted in order to decide the relationship between national and international law. This decision is outside the science of law. It is therefore, according to Kelsen, a political decision to favor the primacy of national law over the primacy of international law or the other way around. He warns to keep in mind that the first does not entail declining the ideal of a world organization as the latter does not decline the ideal of state sovereignty, however, the first is an iron part of the political ideology of imperialism and the latter a decisive part of the political ideology of pacifism.

5.5 Conclusion
In my view sovereignty lies fully and undivided with the states. Not only would a division or a transfer of sovereignty lead to problems of hierarchy, it could also infringe on democracy, as international representation is quite often an executive, non-political, affair. Furthermore, as the interdependence of states has increased, so did their cooperation which in turn has lead to an increase in international law, in which states form the intermediate between their nationals and the international level. The influence of international law into the national legal order is a political decision, as Kelsen pointed out,
and in a democracy this decision can be influenced by the state's nationals. An example of which was the rejection of the European constitution by the French and Dutch peoples. Although not a fortunate one, as we have seen above.

As the influence of international law on the national legal order increases the necessity of a proper adjudication increases too. In the next chapter I will show that the prosecution of violations of international law of a humanitarian character is preferred to take place at the national level as the guarantees for a fair trial are best protected there.
International Courts

6.1 General
The events that took place in the former Yugoslavia and Rwanda shocked the world because of its brutality, its magnitude and the fact that this all took place among citizens of the same state, neighbors. Two international tribunals were established and although they served a worthy goal, one could ponder if this was the proper route to follow. As a woman from Belgrade told me: "If the money spent on the tribunal was used to help us restore the peace in our country, try our own and build the economy, we would have been further than we are now. Do not get me wrong, it is good to bring the criminals to justice, but some of the worst are still there." If justice must prevail, it should do so according to the law. The more the deviation from existing rules, the less credited the result. As an example I will now discuss parts of the Tadić Case on jurisdiction.

6.2 International Criminal Tribunal for the former Yugoslavia
The defense lawyers of Duske Tadić had argued before the Trial Chamber that the International Criminal Tribunal for the former Yugoslavia was unlawfully founded. The Trial Chamber, however, declared itself incompetent to decide upon this argument. In the interlocutory appeal before the Appeals Chamber the prosecutor argued in support of a negative answer as to the appealability of this decision "based on the distinction between the validity of the creation of the International Tribunal and its jurisdiction. The second aspect alone would be appealable whilst the legality and primacy of the International Tribunal could not be challenged in appeal." The Appeals Chamber finds this a narrow interpretation of the concept of jurisdiction which falls foul of a modern vision of the administration of justice and examines the constitutionality of the Tribunal. The argument of the defense was based on the fact that the ICTY was created by a Security Council resolution and not "established by law" as is provided in article 14, paragraph 1 of the ICCPR, which reads:

---

56 Hereinafter: ICTY.
57 Tadic (IT-94-1), Decision on the defence motion for interlocutory appeal on jurisdiction, 2 October 1995, § 4.
58 Tadic (IT-94-1), Decision on the defence motion for interlocutory appeal on jurisdiction, 2 October 1995, § 41.
"In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."

Article 6, paragraph 1 of the ECHR and article 8, paragraph 1 of the ACHR have similar texts. The ICCPR is an international human rights treaty achieved through the United Nations. The other two treaties are regional human rights treaties. As the condition that a tribunal should be established by law is found in three major human rights treaties, it can be accepted that in international law the establishment of a tribunal by law is one of the guarantees to a fair trial. The question arises what is meant by "law". Law can be interpreted in the strict way, the written text, act, bill or, in international law: the convention. Law can also be interpreted more broadly and referring to article 38 of the ICJ Statute where the sources of international law are listed, this "law" contains not only the strict interpretation of law, the text, but also custom, principles, decisions and teachings of qualified publicists as well. It may be clear that the stricter interpretation is meant with "established by law". In international law that would be a treaty. The Appeals Chamber finds three possible interpretations of the term "established by law":

1. Established by a legislature;
2. Established by a body which, though not a parliament, has a limited power to take binding decisions;
3. The establishment of the tribunal must be in accordance with the rule of law.

As to the first interpretation the Appeals Chamber assumes that the guarantee "established by law" is based on a division of powers, such that the administration of justice is regulated by laws made by the legislature. As the division of powers does not apply to the international community, because a parliament does not exist at this level, and more specifically the United Nations does not know a division of powers, the Appeals Chamber concludes: "Consequently the separation of powers element of the requirement that a tribunal be "established by law" finds no application in an international law setting. The aforementioned principle can only impose an obligation on States concerning the functioning of their own national systems." It is of course true that at the international level there is no legislature parallel to the municipal level. This is caused by the fact that the international community is set up as a community of independent, equal, sovereign
states\textsuperscript{60} in a, so to speak, private law, a horizontal, setting. The sovereign states constitute the legislature at the international level and law at this level is an agreement between equal partners, a treaty. My comment to the first interpretation of the Appeals Chamber is that the parallel drawn should be \textit{mutatis mutandis} and not strict.

As to the second interpretation the defense lawyers had argued that, as there is no division of powers within the United Nations, a tribunal can only be established through an amendment of the United Nations Charter. The Appeals Chamber disagrees stating that the Security Council has the competence to create an international tribunal if it is acting pursuant to an authority found within its constitution, the United Nations Charter. We now have to make a side step to another part of the Appeals Chamber's decision where it considers whether the Security Council could establish the tribunal as a measure under chapter VII of the Charter. According to the Appeals Chamber it could. I do not agree. The system of chapter VI and VII is one of increasing intensity of a dispute and an accordingly increasing reaction of the Security Council. Chapter VI concerns “pacific settlement of disputes”. Disputes or situations that may lead to international friction can be brought to the attention of the Security Council or the General Assembly (article 35 UN Charter) and parties are supposed to seek a solution through e.g. negotiation, arbitration or any other peaceful means (article 33 UN Charter). Actions of the Security Council are recommendations. In case of chapter VII, however, the situation has worsened and a threat to the peace exist or a breach of the peace or an act of aggression has taken place. According to article 39 of the Charter, the Security Council shall determine the existence of any threat to the peace, breach of the peace or act of aggression and decide whether it will turn to recommendations, the chapter VI route, or turn to chapter VII. In the latter case it can choose between article 40, provisional measures, according to the Appeals Chamber cooling-off or holding operations, article 41, preventive measures, more coercive, as economic sanctions or severance of diplomatic relations, anything but the use of armed forces, or article 42 which is, as an \textit{ultimum remedium}, the use of air, sea or land forces, therefore enforcement measures, even intervention (articles 43 through 51 jo. article 2, paragraph 7). The Appeals Chamber considers the establishment of ad hoc tribunals one of the measures under article 41. Although I believe that the measures to be taken under article 41 are not

\footnote{Declaration on principles of international law concerning friendly relations and co-operation among states in accordance with the Charter of the United Nations, Annex to Resolution 2625 (XXV), 24 October 1970, General Assembly and article 2, paragraph 1 UN Charter.}
limited by the ones mentioned there, I do not see, with the defense lawyers, how a tribunal can be a preventive measure, it seems to me more a measure after the fact. Furthermore, article 7 paragraph 1 of the UN Charter enumerates the principal organs of the United Nations and according to paragraph 2 subsidiary organs may be established in accordance with the Charter. As to subsidiary organs established by the Security Council this means, according to article 29 UN Charter, that these must be necessary for the performance of its, the Security Council’s, functions. The question is what the functions of the Security Council are, and more specifically what its functions are under article 41 of the UN Charter, as this is an specific situation: threat to the peace, breach of the peace or act of aggression. In his separate opinion, paragraph 64, judge R.S. Sidhwa refers to the ICJ's Advisory Opinion in "The Effect of Awards of Compensation Made by the United Nations Administration Tribunal" case where, according to Sidhwa, the ICJ "explicitly confirmed that a principal organ of the United Nations could create a subsidiary judicial body..." However, in this case a tribunal was established by the General Assembly which tried administrative cases within the United Nations. On page 58, top, the ICJ states: "Accordingly, the court finds that the power to establish a tribunal to do justice between the Organization [the United Nations] and the staff members may be exercised by the General Assembly". Therefore, not a general, as Sidhwa sees it, but a specific confirmation. The ICJ bases the power to establish the tribunal on article 7, paragraph 2 of the UN Charter: "Such subsidiary organs as may be found necessary may be established in accordance with the present Charter", article 22 of the UN Charter: "The General Assembly may establish such subsidiary organs as it deems necessary for the performance of its functions" and article 101, paragraph 1, where the General Assembly is given power to regulate staff relations: "The Staff shall be appointed by the Secretary-General under regulations established by the General Assembly". On page 61 of the Advisory Opinion the ICJ holds that the General Assembly "...was not delegating the performance of its own functions: it was exercising a power which it had under the Charter to regulate staff functions." The General Assembly was given the power to make regulations, not the power to adjudicate particular cases. It was the Secretariat under articles 97 and 101 of the UN Charter and ultimately the Secretary-General, who decided upon individual cases before the Administrative Tribunal was established.

---

61 S1954 ICJ Reports 47, p. 56-61C.
We now return to the question of the Security Council's specific functions of article 41 of the UN Charter. According to article 24, paragraph 1 of the UN Charter the Security Council has the primary responsibility for the maintenance of international peace and security and according to paragraph 2 of the same article it shall act in accordance with the Purposes and Principles of the UN Charter. The purposes are found in article 1 of the UN Charter. Paragraph 1 applies to the present subject: "To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace." [emphasis added] Can the establishment of a tribunal prevent, remove, suppress, adjust or settle a dispute? Or threats to the peace or acts of aggression? In casu: what is the effect of a tribunal in The Hague, the Netherlands, on an ethnic dispute in former Yugoslavia, deeply rooted in that society? According to Sidhwa on page 16, bottom, of his separate opinion, well founded opinions were given and assessments were made to the effect that the Tribunal would contribute to the restoration and maintenance of the peace. To return to the UN Charter, article 24, paragraph 2 states that the Security Council has specific powers for the discharge of its duties and these are laid down in Chapters VI, VII, VIII and XII. As seen above the specific powers attributed to the Security Council by article 41 of the UN Charter consist of coercive measures towards states. The examples given in this article are within the political setup of the UN organization: economic and diplomatic measures. The question is whether (i) criminal law fits in the political setup of the UN, combined with (ii) the fact that this concerns individuals, not states and (iii) the exception to the non-intervention clause of 2, paragraph 7 UN Charter, articles 42-51, apply to actions by air, sea or land forces, military actions therefore aiming to stop the physical conflict and restore the peace. In my view article 41 UN Charter does not allow the intervention of the national judiciary. Drawing the parallel with the abovementioned ICJ case can only lead to the conclusion that the Security Council does not have the power to intervene in the national legal order by establishing a tribunal which adjudicates individuals. In short, the Security Council can take decisions to intervene physically, but not judicially. The specific guarantees of criminal law, where individuals need protection from the state in their role of suspect of a crime, protect in fact all citizens of a state against unauthorized behavior.
of that state. Bringing criminal law to the international level implies bringing all guarantees of this specific kind of law to the international level too. However, if the structure of the international community and/or an international organization prohibit the full application of the criminal law guarantees the decision cannot but be to abandon the plan. Not only for the suspect, but also for the credibility of, in casu, the tribunal. The Appeals Chamber, searching for an equivalent of the national legislature, finds the Security Council competent to create an international tribunal if it is acting pursuant to an authority found within its constitution, the United Nations Charter. From the above it can be concluded that, according to the system of the UN Charter and the setup of the international community, the Security Council does not have this authority. My comment to the second interpretation of the Appeals Chamber is that the parallel between a national legislature and the Security Council as a body having limited power to take binding decisions does not apply, as within the system of the UN Charter the Security Council's power to take binding decisions does not amount to the intervention of the national legal order by trying individuals in criminal cases.

As to the third interpretation the Appeals Chamber finds that "This appears to be the most sensible and most likely meaning of the term [established by law] in the context of international law. For a tribunal such as this one to be established according to the rule of law, it must be established in accordance with the proper international standards; it must provide all the guarantees of fairness, justice and even-handedness, in full conformity with internationally recognized human rights instruments." I agree, therefore, in conformity with the ICCPR, ECHR and the ACHR, which demand an establishment by law. As said, at the international level, law is an agreement between equal, sovereign states and to establish an international tribunal in conformity with international human rights instruments, it should have been established by a treaty.

With the establishment of the ICTY, and the ICTR for that matter, the time element may have played a role. As can be seen from the establishment of the ICC, a treaty may have taken years. I believe that the ICTY and ICTR are tribunals, which provide the suspects the guarantees of a fair trial and are an example to the world that the violation of human rights to this extent is taken very serious by the international community, but these tribunals were not established within the constitutional powers endorsed to the Security Council by the UN Charter as measures under chapter VII, nor were they established by law.
Another point the defense in the Tadić case on jurisdiction made before the Appeals Chamber was the unjustified primacy of the Tribunal over competent domestic courts. Tadić was imprisoned in the Federal Republic of Germany and his case was under investigation there when the ICTY under article 9, paragraph 2 of its Statute requested the Federal Republic of Germany to defer to the competence of the ICTY, which it did. As Tadić was not on trial yet, according to the Appeals Chamber, he cannot challenge the jurisdiction of the ICTY based on the fact that he was on trial elsewhere. In my view, even if he would have been, according to article 9 of the ICTY Statute, the Tribunal could have made the request for deference as it can be done "At any stage of the procedure ..." [emphasis added]. On the other hand, according to paragraph 1 of the same article the ICTY and national courts have concurrent jurisdiction. As the ICTY has to make a request for deference and the national court is not obliged to defer, the conclusion from both paragraphs of article 9 can only be that the ICTY does not have primacy over national courts. Furthermore, as said above in my conclusion on the second interpretation of the Appeals Chamber, the Security Council cannot intervene judicially in the national legal order. The primacy therefore, I would say, lies indeed with the national courts. Both the Federal Republic of Germany and Bosnia-Herzegovina, however, agreed to refer the case to the ICTY and as they did, as the Trial Chamber put it "...the accused cannot claim the rights that have been specifically waived by the States concerned. To allow the accused to do so would be to allow him to select the forum of his choice, contrary to the principles relating to coercive criminal jurisdiction." At the national level, I would add. Especially, according to the Appeals Chamber, as the crimes allegedly committed "do not affect the interests of one State alone but shock the conscience of mankind." Furthermore, the Tribunal was established by the Security Council, an organ "empowered and mandated, by definition, to deal with trans-boundary matters or matters, which though domestic in nature, may affect international peace and security " and the concept of state sovereignty, where the claim i.a. was based on, should not be raised successfully against human rights. Furthermore, adoption of the United Nations Charter, achieved that states, when entering the United Nations, surrender some of their

63 Decision at Trial, § 41.
64 Appeals Chamber on Jurisdiction, § 57.
65 Appeals Chamber on Jurisdiction, § 58.
Therefore, the ICTY has primacy over competent domestic courts. In the next paragraph we will see that according to the ICC Statute a different view is possible. The final point made by the defense was the jus de non evocando, the right not to be judged by an alien judge or, as the defense puts it, the right of the defendant to be tried by his national courts under his national laws. This principle can be used e.g. when extradition of a national is requested by a foreign state, but refused by the national's own state because of possible breaches of the fair trial principle, the possibility of torture or application of the death penalty. According to the Trial Chamber this principle can also be used to prevent a person being tried by a special tribunal, set up for a particular purpose or situation instead of a regular court. The ICTY, however, being established by the Security Council under chapter VII of the United Nations Charter should not be considered to be such a court and the claim is dismissed. I do not agree, as the ICTY is exactly that: according to the preamble of its Statute this tribunal is “the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991”. Article 1 of the ICTY Statute states the same when determining the Tribunal's competence.

In my view, several situations of civil wars and internal conflicts have proved the necessity of national communities to try their own people either by way of tribunals or through reconciliation or truth commissions. This is a very important aspect for restoring trust, healing of the community and building true peace. That this is a long and difficult road is proved by South-Africa, Sierra Leone, Cambodia, Guatemala, El Salvador, Serbia and Montenegro, South Korea, Uganda, Nigeria, Nepal, Haiti, East-Timor and more. In my view the arguments of the defense on the jurisdiction of the ICTY are justified. In the next paragraph I will compare the abovementioned arguments of the defense with the ICC Statute to find out whether a different conclusion is reached.

6.3 International Criminal Court

The arguments on the jurisdiction of the ICTY that I looked at above were:

1 The ICTY was not established by law, but by a Security Council resolution.

---

66 As we have seen in the chapter on sovereignty, partial transfer of sovereignty leads to the question how much sovereignty can be transferred and still remain sovereign. A second objection I have here, is that the Charter itself considers the UN to be an organization of equal, sovereign states. It is not supranational.
As to the first point we can be short. The ICC Statute is a treaty negotiated and concluded by sovereign states and when signed and ratified binds these states. As in international law this is the way law is created, the ICC is therefore established by (international) law. Under article 13 of the ICC Statute, sub b, the Security Council, acting under chapter VII of the United Nations Charter, can refer a situation in which one or more crimes mentioned in article 5 of the ICC Statute appear to have been committed, to the prosecutor of the ICC. Although one can ponder it this would be a provisional or a preventive measure, as it is still a measure after the fact, at least the tribunal the situation is referred to complies with human rights treaties as to its establishment. According to article 16 the Security Council may request the ICC to stop any investigation or prosecution or not commence it when a resolution to that effect is adopted under chapter VII of the United Nations Charter. Which is, in my view, a strange subordination of the ICC to the Security Council. Here, an international criminal court is subordinated to an organ of a political organization, the United Nations, in which organ not only just 15 member states are represented, the five permanent members of this organ have a veto and three of them (US (signed 31.12.2000), Russia (signed 13.09.2000) and China (not signed)) have not ratified the ICC Statute.

As to the second point, under article 17, paragraph 1, sub a of the ICC Statute a case is inadmissible when it is being investigated or prosecuted by a state which has jurisdiction over it. In Tadić case the ICC would not have requested to transfer the case to it, because it would have to declare the case inadmissible. Unless, the Federal Republic of Germany would prove to be unwilling or unable genuinely to carry out the investigation of prosecution (second part of article 17, paragraph 1, sub a).

As to point 3, according to article 1 of the ICC Statute the ICC shall be complementary to national criminal jurisdictions. From article 17 of the ICC Statute it can be concluded that the ICC gives primacy to national courts. The ICC can only try cases if the state concerned is unwilling or unable to prosecute, tries to shield the person concerned from criminal responsibility, causes unjustified delay in the proceedings inconsistent with the intent to bring the person concerned to justice, when the proceedings are not being conducted independently or impartially or when a total or substantial collapse or
unavailability of the national judicial system occurs. According to article 18, paragraph 2 the prosecutor shall defer a situation to the state's investigation at the request of the state concerned, unless the pre-trial chamber, on the application of the prosecutor under article 15, paragraph 3, decides to authorize the investigation.

As to point 4, according to article 5 of the ICC Statute, paragraph 1 the jurisdiction of the ICC shall be limited to the most serious crimes of concern to the international community as a whole, which are genocide, crimes against humanity, war crimes and the crime of aggression. As seen above, the ICC Statute gives primacy to national courts for all the crimes within its jurisdiction, which are the most serious crimes that shock mankind. No primacy therefore based on a particular intensity of violation.

6.4 Conclusion

The criticism of the defense lawyers in the Tadić case as to the jurisdiction of the ICTY seems justified when the decisions of the Appeal Chamber of the ICTY are compared with the ICC Statute. For the most serious crimes as genocide, war crimes and crimes against humanity the ICC functions as a court of last resort. The primacy to adjudicate their nationals for these crimes lies with national courts.
Conclusions

From the above research into the possibility of the application of the Geneva Conventions to non-international conflicts I can draw three conclusions.

Over time the strict separation between the law of peace and the law of war has disappeared and the law of peace during times of conflict gained in importance. Human rights law, applicable during both peace and war, has made a strong development and the instruments protecting individuals in war time have become a lex specialis of human rights law. The overlap between the Geneva Conventions and human rights law is found in the right to life and the right to physical integrity. In my opinion there is enough basis to assume that these norms are peremptory norms. Therefore, not the law of armed conflict, but these underlying values are *jus cogens* norms. If the law of armed conflict would become *jus cogens*, the Geneva Conventions will be applicable to non-international conflicts as no derogation is possible from peremptory norms of international law. Not even based on sovereignty.

I considered the three characteristics of Ferdinandusse which in his view may cause a limitation of the freedom of implementation of states for international law of a humanitarian character and found that their underlying, binding element is respect for human dignity. In my opinion, when states acknowledge that human dignity is of such importance that it sets international law of a humanitarian character apart from general international law such that it has direct effect into their national legal order, states have no choice but to apply these international norms to their internal conflicts as well. The Geneva Conventions will be applicable to non-international conflicts as soon as humanitarian law has direct effect.

Due to globalization and an increasing interdependence of states decision making has shifted from the national to the international level. Therefore, the position a state takes as to the relation between international law and its national law becomes of more relevance. Considering that this position is a political decision and considering the possibility for citizens to influenced it, I find sovereignty should remain fully and indivisible with states. Attempts to infringe on the sovereign position of states leads to vagueness, inequalities
and violations of human rights. If applicability of the Geneva Conventions to non-international conflicts is considered a necessity the system of sovereignty of states should be used and this issue should be placed on the national and international political agenda. The neutrality of the ICRC will not be affected when pleading a cause in line of its task: the promoter and custodian of international humanitarian law.
Literature

Besson 2006

Cann 2004

David 1999

David 2002

Dunant 1862

Ferdinandusse 2006

Greenwood 2004

Greenwood 2004

Hadden & Harvey 1999

Heintze 2004

Human Rights Committee 2001
Human Rights Committee, General Comment no. 29: States of Emergency (article 4), 31 August 2001, CCPR/C/21/Rev.1/Add.11.
Kelsen 1960

Kolb 1998

Kwiecien 2004

Manz 2006

McShane 2005

Mehta 2006

Minear 1999

Nieto-Navia 2003

Nowak 1993

Schindler 1979

Shaw 2003
Vlemminx 2002

Warner 1999

Wolfrum 2004

Zappalà 2003