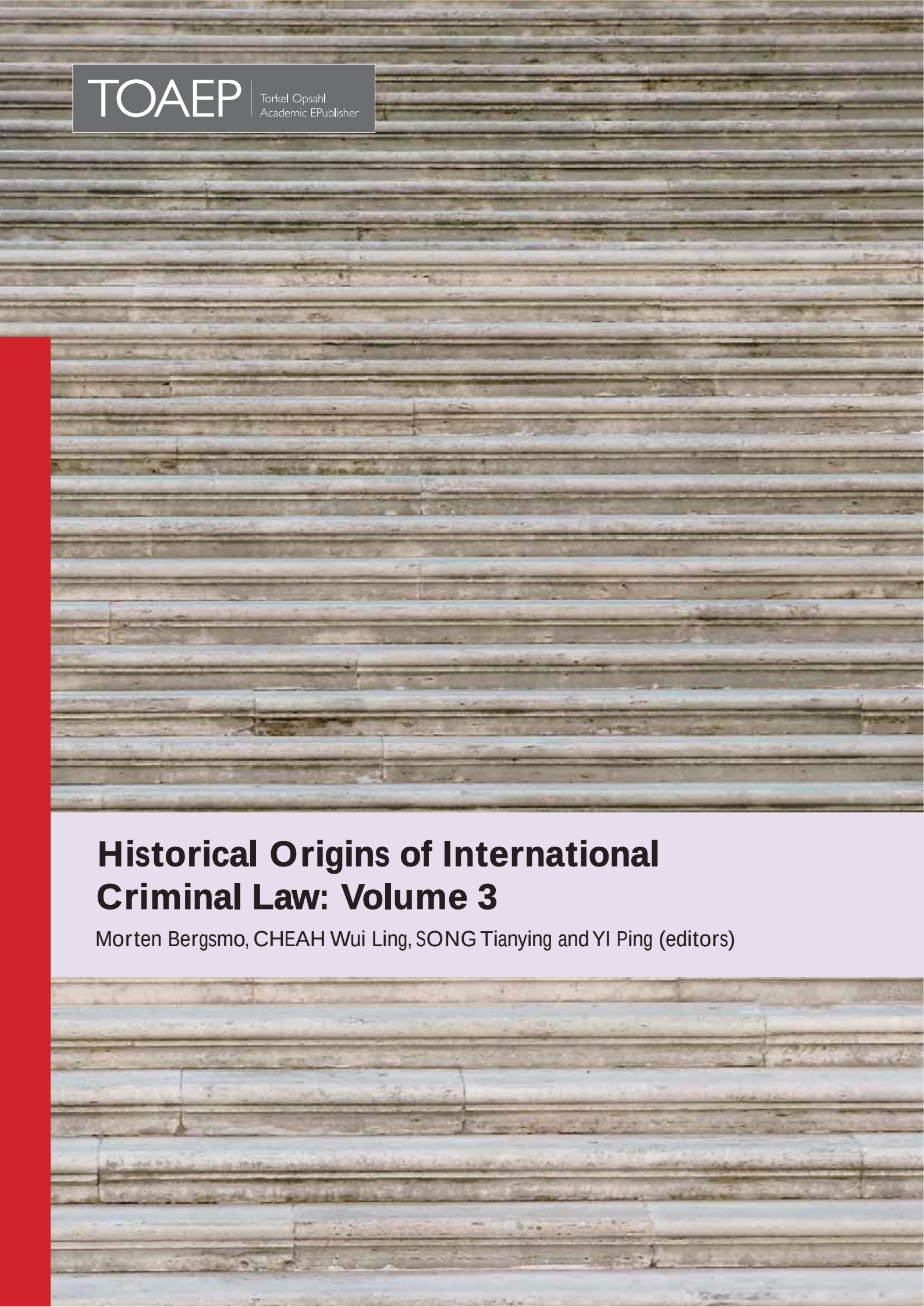

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10

The Grave Breaches Regime of the 1949 Geneva Conventions: Origins, Developments and Prospects

GUO Yang*

10.1. Introduction

Criminal punishment for violations of the laws of war dates to the earliest codifications of international humanitarian law, although treaty provisions before the 1949 Geneva Conventions made only little reference to individual criminal liability. The emergence of the 'grave breaches regime' in 1949 was a watershed in the development of international criminal law, although at the time there was a clear intention to contain it within the boundaries of international humanitarian law. It nonetheless represented a decisive step towards international justice following the drafting of the Charter of the International Military Tribunal ('IMT Charter') and the Nuremberg trials that took place in the aftermath of the Second World War.

The grave breaches regime consists of two categories of rules: substantial rules of definition of grave breaches prescribed by the four Geneva Conventions of 1949 and expanded by the Additional Protocol I of 1977; and procedural rules of their penal sanction provided by the Geneva

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Conventions.[1] The regime for the repression of grave breaches today is embedded within the system of modern international criminal law – constituting a bridge between international criminal law and international humanitarian law.

This chapter reviews the grave breaches regime from its inception in 1949, its development and expansion within the Geneva Convention system, as well as its development and enforcement through the jurisprudence of international courts and tribunals. It covers the sources and origins of the main elements that define the grave breaches regime – the definition of the grave breaches themselves, the basis and the modes of liability, the duty to enact legislation, the duty to prosecute or extradite and universal jurisdiction – and their place in the modern international justice system, in the light of the contemporary features of armed conflicts and demands of justice.

10.2. Origins and Historical Development of the Grave Breaches Regime

10.2.1. The Lieber Code

The codification of modern international humanitarian law started in the middle of the nineteenth century but the early treaties in this regard focused on states' obligations towards each other.[2] The punishment of individuals guilty of violations of the laws of war, as it was known at the time, remained in the domain of custom. However, penal sanctions for

[1] Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva 12 August 1949, Arts. 49–50 ('Geneva Convention I'); Convention (II) for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Geneva 12 August 1949, Arts. 50–51 ('Geneva Convention II'); Convention (III) Relative to the Treatment of Prisoners of War, Geneva, 12 August 1949, Arts. 129–30 ('Geneva Convention III'); Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949, Arts. 146–47 ('Geneva Convention IV'); and Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977 ('Additional Protocol I').

[2] See the Declaration Respecting Maritime Law, Paris, 16 April 1856; and the Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, Saint Petersburg, 29 November/11 December 1868, in Adam Roberts and Richard Guelff, *Documents on the Laws of War*, 3rd ed., Oxford University Press, Oxford, 2000, pp. 47–59. See also Convention for the Amelioration of the Condition of the Wounded in the Armies in the Field, Geneva, 22 August 1864.

violation of laws of war were established for civil war in a domestic code entitled General Orders No. 100, Instruction for the Government of Armies of the United States in the Field in 1863. This instruction, commonly known as the Lieber Code, was prepared by Francis Lieber with the approval of President Abraham Lincoln and was promulgated for the armies of the Northern states in the American Civil War.[3] The previous chapter by Patryk I. Labuda elaborates the background of the Lieber Code in greater detail.

The Lieber Code consisted of 157 articles and provided detailed rules on the entire range of land warfare, from the conduct of hostilities and the treatment of the civilians to the treatment of specific groups of persons such as prisoners of war, the wounded and so on.[4] Some of the problems addressed by the Lieber Code are still very much relevant to the situations of contemporary armed conflicts such as guerrilla warfare, the status of rebels, the applicability of the laws of war to internal armed conflicts and, what is especially important for the purpose of this chapter, the penal sanctions for violations of laws of war.[5] The Lieber Code gave a detailed elaboration on martial law in occupied territory. It not only prohibited action clearly contrary to the interest of the army such as desertion, treason and refusal to obey legitimate orders but also set up absolute prohibitions against cruelty (the infliction of suffering for the sake of suffering or for revenge), maiming or wounding except in fight, torture, murder, rape, use of poison, wanton violence, or wanton devastation of a district, and finally it forbade all crimes punishable by all penal codes (Articles 16, 22, 44, 47, 70, 71, 80). The violation of these prohibitions frequently demanded severe penal sanctions including the death penalty, which was to be guided by the principles of justice, honour and humanity (Article 4). In order to ensure the effectiveness of these rules, the Lieber Code granted military courts the competence to carry out martial law (Article 12). In short, the penal sanctions were highlighted by the Lieber Code for the sake of maintaining discipline and creating a perception of

[3] Frits Kalshoven and Liesbeth Zegveld, *Constraints on the Waging of War: An Introduction to International Humanitarian Law*, 4th ed., Cambridge University Press, Cambridge, 2011, pp. 8–9.

[4] Instructions for the Government of Armies of the United States in the Field, 24 April 1863 ('Lieber Code') (http://www.legal-tools.org/doc/842054/).

[5] Yves Sandoz, "The History of the Grave Breaches Regime", in *Journal of International Criminal Justice*, 2009, vol. 7, no. 4, p. 659.

integrity and legitimacy in the interests of the army.[6] Although an internal document for civil war, the Lieber Code served as a model and inspiration for later efforts in the codification of laws of war and can thus be considered a predecessor to the grave breaches regime.

10.2.2. From the Lieber Code to the First World War

As history indicates, new norms of international law on armed conflicts usually follow major humanitarian upheavals. The failure to apply the 1864 Geneva Convention during the 1870–71 Franco-Prussian War sparked efforts to strengthen the rules of international humanitarian law. In particular, Gustave Moynier, the president of the International Committee of the Red Cross, made two distinct suggestions: first, to unify the nature and scale of penalties for violations of the Geneva Convention; and second, of an even more revolutionary nature, to establish an international judicial organ to investigate breaches and decide questions of guilt. The international community accepted the first idea in the form of a model law developed by the Institut de droit international, but the second was rejected.[7]

The 1874 International Declaration concerning the Laws and Customs of War ('Brussels Declaration') aimed to set up comprehensive rules of armed conflicts modelled on the Lieber Code. But it did not enter into force because states were not prepared to accept it as a binding document. What is interesting for the purpose of the present chapter is that a delegate at the conference negotiating the Brussels Declaration suggested, as Monyier did, that states should co-ordinate their internal legislation to ensure the punishment of violations of laws of war, which, together with the model law, might be considered a first step towards a common definition of grave breaches. Due to the failure of the Brussels Declaration to become legally effective, the Institut de droit international adopted the Laws of War on Land in 1880, also known as the Oxford Manual.[8] This proposed the criminalisation of violations of the laws of war in states' do-

6 *Ibid*., p. 662.

7 Jean S. Pictet (ed.), *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field: Commentary*, International Committee of the Red Cross, Geneva, 1952, pp. 353–55. See also Sandoz, 2009, pp. 662–63, *supra* note 5.

8 Institut de Droit International, "Manuel des lois de la guerre sur terre" [Manual on the Laws of War on Land], 9 September 1880.

mestic law but without reference either to standardisation of rules of criminalisation or to international judicial mechanisms. No changes were made in this regard with the publication of the Manual on the Laws of Naval War in 1913.[9]

The Hague Conventions of 1899 and 1907 contained a lot of prohibitions but they did not require states to provide penal ordinances for the repression of violations. However, the revised 1906 Geneva Convention suggested that states adopt legislation necessary to prevent and punish the gravest violations of the Convention, namely pillage and the ill treatment of the wounded and sick of the armed forces, and abuse of the Red Cross flag or armlet. Several states did promulgate domestic law to punish those infractions. The injunction in the 1906 Geneva Convention not only responded to the original proposal made by Monyier and the delegates at Brussels Conference in co-ordinating states' domestic penal sanctions but also paved the way for a distinction between breaches and grave breaches by focusing on the gravest violations of the Convention.[10]

10.2.3. Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties and the Versailles Treaty

The large scale of atrocities committed during the First World War compelled the Allies to establish a Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties ('Commission on Responsibility') after the war. A significant portion of the Commission's work focused on the prosecution of war crimes and its precise mandate, in this regard, was to establish "the facts as to breaches of the laws and customs of war committed by the forces of the German Empire and their Allies on land, on sea, and in the air, in the course of the present [1914–1919] war".[11] Based on the factual information available to the Commission on Responsibility, a comprehensive list of violations of the laws and customs of war that merited criminal punishment was drafted, which addressed not only violations of "Geneva law, that is the rules protecting

[9] Institut de Droit International, "Manuel des lois de la guerre maritime" [Manual of the Laws of Naval War], 9 August 1913. See also Sandoz, 2009, pp. 663–64, *supra* note 5.

[10] Pictet, 1952, pp. 355–56, see *supra* note 7; Sandoz, 2009, p. 665, see *supra* note 5.

[11] Carnegie Endowment for International Peace, *Violations of the Laws and Customs of War*. Report of Majority and Dissenting Reports of American and Japanese Members of the Commission on Responsibilities, Conference of Paris, 1919, Division of International Law, pamphlet no. 32.

victims of war such as civilians and prisoners of war, but also the Hague law, namely the rules on means and methods of warfare".[12] What is more interesting is that in its report the Commission on Responsibility made it clear that the official status of a person, even a head of state, did not exempt him from responsibility, and thus it developed the so-called concept of 'passive responsibility' for international criminal law, that is the failure to prevent violations when one is in position to do so, especially in a hierarchical chain of command. As for the question of jurisdiction over those war crimes, the Commission on Responsibility proposed trial of the criminals before national courts, with the exception of four categories of crimes to be placed before an *ad hoc* high tribunal. However, due to an objection by the American delegation, the penalties that materialised into Articles 228 and 229 of the Versailles Treaty did not set up international jurisdiction for violations of the laws and customs of war and the accused could only be brought before military tribunals of the related powers.[13] Due to the weakness of the Versailles Treaty, which was perceived as victor's justice, and thus brought no serious implementation of the penal articles from Germany and its allied states, the first major international effort to bring criminals to justice failed. But the United Nations War Crimes

[12] Sandoz, 2009, pp. 667–68, see *supra* note 5. The acts included in the list are: murder and massacres; systematic terrorism; putting a hostage to death; torture of civilians; deliberate starvation of civilians; rape; abduction of girls and women for the purpose of enforced prostitution; deportation of civilians; internment of civilians under inhuman conditions; forced labour of civilians in connection with military operations of the enemy; usurpation of sovereignty during military occupation; compulsory enlistment of soldiers among the inhabitants; attempt to denationalise the inhabitants of occupied territory; pillage; confiscation of property; exaction of illegitimate or of exorbitant contributions and requisitions; debasement of the currency, and issue of spurious currency; imposition of collective penalties; wanton devastation and destruction of property; deliberate bombardment of undefended places; wanton destruction of religious, charitable, educational and historic buildings and monuments; destruction of merchant ships and passenger vessels without warning and without provision for safety of passenger or crew; destruction of fishing boats and of relief ships; deliberate bombardment of hospitals; attack on and destruction of hospital ships; breach of other rules relating to the Red Cross; use of deleterious and asphyxiating gases; use of explosive or expanding bullets, and other inhuman appliances; direction to give no quarters; ill-treatment of wounded and prisoners of war; employment of prisoners of war on unauthorised works; misuse of flag of truce; and poisoning of wells.

[13] However, Article 227 of the Versailles Treaty required a special tribunal to be established for the trial of ex-Kaiser Wilhelm II for a supreme offence against international morality and the sanctity of treaties (crime of aggression), whose judges were appointed by the United States, Britain, France, Italy and Japan. Treaty of Peace between the Allied and Associated Powers and Germany, 28 June 1919, Arts. 227–28 ('Versailles Treaty').

Commission ('UNWCC') took Commission on Responsibility's list of crimes as a basis for its work after the Second World War, and the idea of an international criminal court and code continued to exercise influence in the quest for a means to curb international violence.[14] This supports the view that "there is little argument about the existence of war crimes under international law" from the time of the Commission on Responsibility onwards.[15]

10.2.4. The United Nations War Crimes Commission

In the Moscow Declaration of 1943 the Allies affirmed their determination to prosecute Nazis for war crimes and the UNWCC was established as a result. It consisted of three committees, the third of which focused on the legal concept of war crimes. The list of violations of laws and customs of war prepared by the Commission on Responsibility in 1919 was adopted as basis for the UNWCC's work.[16] The discussion within the UNWCC finally led to the codification of Article 6 of the IMT Charter, in which the war crimes were defined as

> violations of the laws or customs of war […] shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.[17]

Similar provisions were adopted for the International Military Tribunal for the Far East and modified for military tribunals run by the occupying regime as well as for subsequent prosecutions by German courts for several years. Hundreds of war criminals were tried and sentenced in these tribunals.[18] Compared to the list of war crimes drafted by the Commission on Responsibility, Article 6 of the IMT Charter is more concise but

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14 Pictet, 1952, p. 357, see *supra* note 7; Sandoz, 2009, pp. 665–71, see *supra* note 5.

15 William A. Schabas, *An Introduction to the International Criminal Law Court*, 4th ed., Cambridge University Press, Cambridge, 2011, p. 122.

16 *Ibid*., p. 5; Sandoz, 2009, p. 672, see *supra* note 5.

17 Charter of the International Military Tribunal (IMT), Art. 6, 8 August 1945 (https://www.legal-tools.org/doc/64ffdd/).

18 Schabas, 2011, p. 7, see *supra* note 15.

less detailed. But there is no substantial difference in essence, thus "highlighting a historical continuity in the development of war crimes that would also flow into the development of the grave breaches regime".[19]

10.2.5. The 1949 Geneva Conventions and Additional Protocol I of 1977

The events of the Second World War convinced the International Committee of the Red Cross ('ICRC') that any future convention on laws of war must include provisions on the repression of violations. At the request of the International Red Cross Conference and after consultations with government experts, the ICRC made a thorough study of the question of repression of violations of laws and customs of war, and in 1948 drafted four new articles on the penalties applicable to persons guilty of violations of the 1906 Geneva Convention. Under these articles, states were required to take legislative measures to ensure either criminal or disciplinary punishment of all kinds of violations, but the grave breaches of the Geneva Conventions would be punished as crimes pursuant to the principle of *aut dedere aut punier* (extradite or prosecute). The draft text was finally submitted to the 1949 Diplomatic Conference for the Establishment of International Conventions for the Protection of War Victims as a basis for discussion, and was adopted with minor changes.[20]

Thus articles entitled "Grave Breaches" were formally introduced into the four conventions: Geneva Convention I (Article 50), Geneva Convention II (Article 51), Geneva Convention III (Article 130) and Geneva Convention IV (Article 147). The acts of the grave breaches are listed as follows:

> wilful killing; torture or inhuman treatment; biological experiments; wilfully causing great suffering; causing serious injury to body or health; extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly; compelling a prisoner of war or a protected civilian to serve in the armed forces of the hostile Power; wilfully depriving a prisoner of war or a protected person of the rights or fair and regular trial prescribed

[19] Sandoz, 2009, p. 673, see *supra* note 5.

[20] Final Record of the Diplomatic Conference Convened by the Swiss Federal Council for the Establishment of International Conventions for the Protection of War Victims, Geneva, 21 April–12 August 1949. See also Pictet, 1952, pp. 357–60, see *supra* note 7.

> in the Conventions; unlawful deportation or transfer; unlawful confinement of a protected person; taking of hostages.[21]

It was maintained that this list should not be regarded as exhaustive.[22] The expressions 'grave crimes' or 'war crimes' were recommended to replace 'grave breaches', but this suggestion was refused because even though the listed acts were described as crimes in the penal laws of almost all countries, the word 'crimes' had different legal meanings in different countries and the Diplomatic Conference was not tasked to work out international penal law.[23]

Besides the introduction of a universal definition of the grave breaches, the 1949 Geneva Conventions further obliged state parties to enact effective penal sanctions, to search and try or extradite, and to exercise universal jurisdiction over those responsible for grave breaches.[24] These provisions are considered by Yves Sandoz to be "a decisive step towards international justice and the beginnings of a universal fight against impunity for war crimes".[25]

The Additional Protocol I of 1977 was supposed to supplement the 1949 Geneva Conventions for the war victims.[26] In terms of penal sanctions, Additional Protocol I added several grave breaches to the list set up earlier, especially by criminalising violations of the Hague Conventions on Laws and Customs of War on Land, some of which had been included in Article 6 of the IMT Charter. Additional Protocol I further clarified that grave breaches of the Geneva Conventions and the Protocol would be regarded as war crimes in Article 85(5). By deciding that grave breaches constitute war crimes, the drafters gave the former an additional meaning, providing them with criminal consequences in international law.[27]

According to Article 85(1) of Additional Protocol I, provisions on the repression of grave breaches of the Geneva Conventions should apply to the repression of grave breaches of the Protocol as well. Therefore, the

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21 Some of the grave breaches differ in other Conventions.

22 Pictet, 1952, p. 371, see *supra* note 7.

23 *Ibid.*, pp. 366, 371; Sandoz, 2009, p. 675, see *supra* note 5.

24 Geneva Convention I, Art. 49; Geneva Convention II, Art. 50; Geneva Convention III, Art. 129; Geneva Convention IV, Art. 146, see *supra* note 1.

25 Sandoz, 2009, p. 675, see *supra* note 5.

26 Additional Protocol I, Art 1, para. 3, see *supra* note 1.

27 Marko Divac Öberg, "The Absorption of Grave Breaches into War Crimes Law", in *International Review of the Red Cross*, 2009, vol. 91, no. 873, p. 167.

grave breaches/war crimes defined by Additional Protocol I are subject to universal jurisdiction among the state parties as the grave breaches defined by the Geneva Conventions.[28] Compared to the list prepared by the Commission on Responsibility and Article 6 of the IMT Charter, the conception of grave breaches shows continuity and development of these two earlier documents. The adopted article was considered to be an important step towards an improved application of humanitarian law.[29]

That being said, we should bear in mind that there exist two qualifications on the grave breaches regime provided by the Geneva Conventions and Additional Protocol I. The first is that the grave breaches have to be committed against persons or property protected by the Conventions and the Protocol, which is narrowly defined by the former and expanded a little by the latter.[30] Second, grave breaches are applicable only to international armed conflicts, namely armed conflicts between states as defined by the common Article 2 to the Geneva Conventions or armed conflicts of national liberation as defined by Article 1(4) of Additional Protocol I. Thus no treaty provisions on penal sanctions were established for violations of common Article 3 to the Geneva Conventions and Additional Protocol II of 1977, both of which apply to non-international armed conflict.[31]

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[28] Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Martinus Nijhoff, Geneva, 1987, para. 3467, p. 992. Additional Protocol I, Art. 85(1) reads: "The provisions of the Conventions relating to the repression of breaches and grave breaches, supplemented by this Section, shall apply to the repression of breaches and grave breaches of this Protocol". As of March 2015, there are 174 states parties to the Protocol.

[29] *Ibid*, para. 3465, p. 991.

[30] José Francisco Rezek, "Protection of the Victims of Armed Conflicts: I. Wounded, Sick and Shipwrecked Persons", in United Nations Educational, Social and Cultural Organization and Henry Dunant Institute (eds.), *International Dimensions of Humanitarian Law*, Martinus Nijhoff, Dordrecht, 1987, pp. 153–203; Claude Pilloud, "Protection of the Victims of Armed Conflicts: II Prisoners of War", *idem.*, pp. 167–85; Oji Umozurike, "Protection of the Victims of Armed Conflicts: III Civilian Population", *idem.*, pp. 187–203.

[31] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977 ('Additional Protocol II'); Sandoz, 2009, pp. 675–77, see *supra* note 5.

10.2.6. From *Ad Hoc* Criminal Tribunals to a Permanent International Criminal Court

Horrified by ethnic cleansing during a series of armed conflicts caused by the disintegration of Yugoslavia in 1991, the international community established the International Criminal Tribunal for the former Yugoslavia ('ICTY') in 1993 through UN Security Council resolution 827.[32] A year later, in response to the tragedy caused by ethnic conflict in Rwanda, the Security Council adopted resolution 955 to create another international *ad hoc* body, the International Criminal Tribunal for Rwanda ('ICTR') with jurisdiction over genocide and other violations of international humanitarian law.[33] The criminal jurisdiction of the two *ad hoc* tribunals covers "serious violation of international humanitarian law", which, in these cases, includes war crimes, crime against humanity and genocide.[34] As for war crimes, Article 2 of the ICTY Statute addresses grave breaches of the Geneva Conventions, which replicates the relevant provisions of the Geneva Conventions, while Article 3 deals with violations of the laws and customs of war, which uses the language of the 1907 Hague Regulations concerning the Laws and Customs of War on Land.[35] What is more inter-

[32] United Nations Security Council resolution 827, adopted on 25 May 1993, S/RES/827 (https://www.legal-tools.org/doc/dc079b/). Statute of the International Criminal Tribunal for the Former Yugoslavia, 25 May 1993 ('ICTY Statute') (updated September 2009) (https://www.legal-tools.org/doc/b4f63b/).

[33] Statute of the International Criminal Tribunal for Rwanda, 8 November 1994 ('ICTR Statute') (https://www.legal-tools.org/doc/8732d6/).

[34] Kalshoven and Zegveld, 2011, p. 241, see *supra* note 3.

[35] ICTY Statute, see *supra* note 32. Article 2 reads:

> The International Tribunal shall have the power to prosecute persons committing or ordering to be committed grave breaches of the Geneva Conventions of 12 August 1949, namely the following acts against persons or property protected under the provisions of the relevant Geneva Convention:
>
> (a) wilful killing;
> (b) torture or inhuman treatment, including biological experiments;
> (c) wilfully causing great suffering or serious injury to body or health;
> (d) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
> (e) compelling a prisoner of war or a civilian to serve in the forces of a hostile power;
> (f) wilfully depriving a prisoner of war or a civilian of the rights of fair and regular trial;
> (g) unlawful deportation or transfer or unlawful confinement of a civilian;
> (h) taking civilians as hostages.

Article 3 reads:

esting is that Article 3 was interpreted by the ICTY as including serious violations of common Article 3 of the Geneva Conventions due to customary law.[36]

As the crisis in Rwanda was seen as internal conflict from the outset, Article 4 of ICTR Statute explicitly makes serious violations of common Article 3 to the Geneva Conventions and Additional Protocol II of 1977 punishable crimes.[37] The recognition of war crimes in internal conflict by these two tribunals was considered historic since it bridged part of the gap left by the Geneva Conventions and Additional Protocol I. As a result, the decisions have contributed significantly to diminishing the rel-

The International Tribunal shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, but not be limited to:

(a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering;

(b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity;

(c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings;

(d) seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science;

(e) plunder of public or private property.

36 Sandoz, 2009, p. 678, see *supra* note 5.

37 ICTR Statute, see *supra* note 33. Article 4 reads:

The International Tribunal for Rwanda shall have the power to prosecute persons committing or ordering to be committed serious violations of Article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977. These violations shall include, but shall not be limited to:

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

(b) Collective punishments;

(c) Taking of hostages;

(d) Acts of terrorism;

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

(f) Pillage;

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

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

evance of the distinction between international armed conflicts and non-international armed conflicts for the punishment of violations.[38]

Following the establishment of the ICTY and ICTR, several mixed tribunals were set up, which combined international and domestic elements. The Extraordinary Chambers in the Courts of Cambodia ('ECCC') was established in 2004 by agreement between the UN and the government of Cambodia to try senior Khmer Rouge leaders for genocide, crimes against humanity, grave breaches of the Geneva Conventions, destruction of cultural property during armed conflicts as well as domestic crimes of homicide and torture. The inclusion of grave breaches implies that the ECCC could deal with crimes that occurred during the armed conflict between Cambodia and Vietnam which lasted for decades. The Special Court for Sierra Leone was established in 2002 by agreement between the UN and the government of Sierra Leone. Besides other international and domestic crimes, its Statute also grants the Court jurisdiction over violations of the common Article 3 of the Geneva Conventions and Additional Protocol II.[39]

Taking the advantage of the favourable political momentum created by the ICTY and the ICTR, the UN decided to pursue its work towards the establishment a permanent international criminal court, taking two draft statutes drawn up by the International Law Commission in the 1950s as a basis. The UN General Assembly convened an *ad hoc* committee for further discussions on the issue, which met twice in 1995, followed by a preparatory committee. After two years the preparatory committee finally produced a consolidated statute text which was submitted for consideration by the Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court in 1998 in Rome. On 17 July 1998 the conference, after heated debate, adopted the Rome Statute of International Criminal Court ('ICC Statute').[40] The ICC Statute entered into force on 1 July 2002 upon ratification by 60 states. On 11 March

[38] Kalshoven and Zegveld, 2011, p. 243, see *supra* note 3.

[39] Statute of the Special Court for Sierra Leone, 16 January 2002 (https://www.legal-tools.org/doc/aa0e20/). Kalshoven and Zegveld, 2011, p. 258–60, see *supra* note 3.

[40] Rome Statute of the International Criminal Court, 17 July 1998, in force on 1 July 2002, United Nations, Treaty Series, vol. 2187, No. 38544 ('ICC Statute').

2003 the International Criminal Court ('ICC') was established in The Hague, the Netherlands.[41]

According to Article 5 of its Statute, the ICC has jurisdiction over the crime of genocide, crimes against humanity, war crimes and the crime of aggression.[42] The list of war crimes identified in the ICC Statute is extensive and much more detailed than any of the previous instruments. As it stands, Article 8 divides war crimes into four categories, two of them addressing international armed conflicts and the other two non-international armed conflicts. The first category in Article 8(2)(a) incorporates grave breaches of the Geneva Conventions, but the use of the formula 'namely' indicates that the list of grave breaches in the Statute is exhaustive. The second category in Article 8(2)(b) covers other serious violations of the laws and customs applicable in international armed conflict. This sub-paragraph consists of 25 items of acts principally based on 1907 Hague Regulations on Laws and Customs of War on Land and Additional Protocol I. As with Article 8(2)(a) this list is probably exclusive since it is also qualified by the formula 'namely'. It is also worth noting that weapons of mass destruction, such as chemical weapons or nuclear weapons, are not included as result of political compromise, an outcome that was considered a great disappointment by some states. Article 8(2)(c) and 8(2)(e) address war crimes under armed conflict not of an international character. Article 8(2)(c) integrates serious violations of common Article 3 of the Geneva Conventions and Article 8(2)(e) is largely drawn from Additional Protocol II. These provisions represent a great success for negotiations at the Rome Conference and are considered a progressive development over the antecedents for their expressed coverage of non-international armed conflicts.[43]

41 See also Schabas, 2011, pp. 15–21, see *supra* note 15; Kalshoven and Zegveld, 2011, p. 246, see *supra* note 3.

42 ICC Statute, Art. 5, see *supra* note 40.

43 Leila Nadya Sadat, *The International Criminal Court and the Transformation of International Law: Justice for the New Millennium*, Transnational Publishers, Ardsley, NY, 2002, pp. 160–65. See also Schabas, 2011, p. 115, *supra* note 15.

10.3. Analysis of the Content of the Grave Breaches Regime

10.3.1. Grave Breaches Provided by the Geneva Conventions

The grave breaches established by the 1949 Geneva Conventions include wilful killing; torture or inhuman treatment; biological experiments; wilfully causing great suffering; causing serious injury to body or health; extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly; compelling a prisoner of war or a protected civilian to serve in the armed forces of a hostile power; wilfully depriving a prisoner of war or a protected person of the rights or fair and regular trial prescribed in the Conventions; unlawful deportation or transfer; unlawful confinement of a protected person; and the taking of hostages. Wilful killing constitutes a grave breach when protected persons are deliberately killed by someone who has an obligation to respect their 'protected' status, and there is no need for more than one person to be killed to satisfy this breach.[44] This breach also covers cases where death occurs through omission, where the omission has been wilful and with an intention to cause death.[45]

For the purpose of the Geneva Conventions, torture must be given its legal meaning here, namely the inflicting of severe pain or suffering on a person to obtain confession or information. Inhuman treatment is not specifically defined in the Geneva Conventions. The purpose of this prohibition is to preserve human dignity of the protected persons. It includes causing serious mental harm or physical injury, as well as attack on human dignity. Measures such as cutting protected persons off from the outside world, especially from their families, or grave injury to their human dignity could be considered inhuman treatment.[46] These two types of actions have been made the subject of a subsequent specific international treaty, the Convention against Torture and Other Cruel, Inhuman or De-

[44] Julian J.E. Schutte, "The System of Repression of Breaches of Additional Protocol I", in Astrid J.M. Delissen and Gerard J. Tanja (eds.), *Humanitarian Law of Armed Conflict: Challenges Ahead: Essays in Honour of Frits Kalshoven*, Martinus Nijhoff, Dordrecht, 1991, p. 185.

[45] Jean S. Pictet (ed.), *Commentary, IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, International Committee of the Red Cross, Geneva, 1958, p. 597.

[46] *Ibid*., p. 598.

grading Treatment or Punishment ('Torture Convention') of 10 December 1984.[47] What should be noted here is that both are subject to universal criminal jurisdiction under the Geneva Conventions, while the Torture Convention makes a distinction between torture and other cruel or inhuman treatment in that the latter actions are not made subject to universal jurisdiction and extraditable offences.[48] Biological experiments, highlighted by the Geneva Conventions as a particular form of torture or inhuman treatment, do not prohibit the use of new methods of treatment by medical doctors justified by medical reasons and based on concern to improve the person's state of health.[49] This type of action is further elaborated in Article 11 of Additional Protocol I.

"Wilfully causing great suffering" is differentiated from torture or biological experiments in that it covers acts and omissions that affect the body or health of protected persons which can be inflicted as punishment, in revenge or for other motives. "Serious injury to body or health" is a concept quite normally encountered in criminal law and usually uses the length of time the victim cannot work as a criterion of seriousness.[50] "Unlawful deportation or transfer" should be interpreted in conjunction with Articles 45 and 49 of Geneva Convention IV. The unfortunate experiences of the Second World War made this prohibition necessary. Most national laws punish "unlawful confinement" as unlawful deprivation of liberty. However, taking into consideration of the extended powers granted to the occupying powers, the unlawful nature of confinement could therefore be very difficult to prove.[51]

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47 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted on 10 December 1984, entry into force on 26 June 1987. Article 1 reads:

> For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

48 Schutte, 1991, pp. 183–84, see *supra* note 44.

49 Pictet, 1958, p. 598, see *supra* note 45.

50 *Ibid*., p. 599.

51 *Ibid.* See also Schutte, 1991, p. 180, *supra* note 44.

"Compelling to serve in hostile forces" is also punished as illegal recruitment or coercion under national law. But it seems unsatisfactory for the purpose of the Geneva Conventions since the authorities' involvement in the action puts rather a different complexion on the case.[52] This provision should be interpreted with Article 50 of Geneva Convention III and Article 40 of Geneva Convention IV, which provide the kinds of work to which the protected persons may be subject. And the "forces" in this provision should also be considered to cover not only armed forces but also other institutions empowered to use force or violence.[53]

"Wilfully depriving rights of a fair and regular trial" should also be interpreted with other articles in the Geneva Conventions specifying the conditions for the trial of protected persons, namely Articles 84, 99, 105 and 106 of Geneva Convention III and Articles 66, 70, 71, 72 and 73 of Geneva Convention IV. As for prisoners of war, the rights of a fair and regular trial include the right to be tried by a military court or at least by a court which offers essential guarantees of independence and impartiality. As for interned civilians, they enjoy similar judicial guarantees as prisoner of war and their rights to legal assistance and sufficient opportunity to prepare their defence are elaborated in more detail in Geneva Convention IV than in Geneva Convention III. Thus this breach can be split into different offences, such as making a protected person appear before an exceptional court, without notifying the protecting power, without defending counsel and so on.[54]

"Taking hostage" is also a crime recognised and punished by most penal codes. Its legal description has been further elaborated by the International Convention against the Taking of Hostages of 18 December 1979.[55] The threat either to prolong the hostage's detention or to put him

[52] Pictet, 1958, p. 600, see *supra* note 45.

[53] Schutte, 1991, p. 182, see *supra* note 44.

[54] *Ibid*., pp. 181–82. See also Pictet, 1958, p. 600, *supra* note 45.

[55] Geneva Convention IV, art. 1 reads:

> Any person who seizes or detains and threatens to kill, to injure or to continue to detain another person (hereinafter referred to as the "hostage") in order to compel a third party, namely, a State, an international intergovernmental organization, a natural or juridical person, or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage commits the offence of taking of hostages ("hostage-taking") within the meaning of this Convention.

to death is considered a feature of this breach, which makes it a special intent crime.[56]

The expression "extensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly" was inspired by Article 6(2)(b) of the IMT Charter and finds its predecessor in Article 23(g) of the Hague Regulations concerning the Laws and Customs of War on Land. It is considered a surprising integration of Hague law into the Geneva Conventions. The only suitable reference in the Geneva Conventions is Article 53 of Convention IV which prohibits destruction by an occupying power of property except under absolute military necessity. As for appropriation, the only related reference seems to be Article 32(2) of Geneva Convention IV which prohibits pillage against protected persons.[57]

Thus, according to the related articles, this grave breach covers a number of different offences. 1) Destruction: Geneva Convention IV forbids the destruction of civilian hospitals and their property or damage to ambulances or medical aircraft. Furthermore, an occupying power may not destroy in an occupied territory real or personal property except where such destruction is rendered absolutely necessary by military operations. 2) Appropriation. In order to appropriate property, an enemy must have occupied the territory. It should be noted that the requisitioning of civilian hospitals and their material and the requisitioning of foodstuffs are subject in occupied territory to a series of restrictive conditions. To constitute a grave breach, such destruction and appropriation must be extensive and an isolated incident would not be sufficient. Even though most national penal codes punish the unlawful destruction and appropriation of property and most military penal codes punish pillage, the destruction and appropriation mentioned here are dependent on the necessities of war. It seems, therefore, that the appropriation and destruction mentioned in Geneva Convention IV must be treated as a special offence.[58]

As noted, this conduct constitutes grave breaches only if it has been directed against persons or objects protected by the Geneva Conventions.

International Convention against the Taking of Hostages, 18 December 1979, UN doc. A/34/46.

56 Pictet, 1958, p. 600, see *supra* note 45.

57 Schutte, 1991, p. 180–81, see *supra* note 44.

58 Pictet, 1958, p. 600, see *supra* note 45.

Geneva Convention I defines protected persons as the wounded and sick of any of the categories provided in Article 13 and medical personnel referred to in Articles 24 and 26. Articles 19 and 35 define the protected objects. Geneva Convention II defines protected persons as the wounded, sick and shipwrecked of any of the categories listed in Article 13 as well as personnel referred to in Articles 36 and 37. The protected objects are hospital ships mentioned in Articles 22, 24, 25 and 27. To be qualified as protected persons or objects, all must have fallen into the hands of enemy.[59] Protected persons under Geneva Convention III are persons listed in Article 4 when they fall into the hands of the enemy. In Geneva Convention IV interned civilians and civilians in occupied territory qualify as protected persons, subject to the nationality requirements under Article 4.

Additional Protocol I also has the category of protected persons. Article 44 expands the categories of persons entitled to prisoners of war status. Persons listed in Article 45 should also be treated as prisoners of war before their status has been finally determined. Stateless persons and refugees are also protected persons within the meaning of Parts I and III of Geneva Convention IV by virtue of Article 73. Another category of protected persons covers wounded, sick and shipwrecked civilians not entitled to the treatment of prisoners of war as well as those find themselves shipwrecked in waters other than the sea. All these persons are considered protected persons only if they belong to the adversary party and refrain from hostilities. The description of medical or religious personnel and medical units or medical transport is also broader in Additional Protocol I than that in Geneva Conventions I and II. For example, under the Protocol they include the medical and religious personnel attached to civil defence organisations.[60]

10.3.2. Grave Breaches Provided by Additional Protocol I

10.3.2.1. Article 85(3)

As for the list of grave breaches, the first outstanding expansion made by Additional Protocol I is the integration of Hague law in Article 85(3), which defines certain serious violations of the provisions on the general

[59] Geneva Convention I, Art. 35 and Geneva Convention II, Art. 37, see *supra* note 1.

[60] Schutte, 1991, pp. 186–87, see *supra* note 44; Sandoz *et al*., 1987, paras. 3647–70, p. 991, see *supra* note 28.

protection of civilians against effects of hostilities and concerning means and methods of warfare as grave breaches.[61] The opening sentence of Article 85(3) refers to the fourth paragraph of Article 11. This latter article aims to clarify and develop the protection of protected persons against medical procedures not indicated by their state of health, and particularly against unlawful medical experiments. The breach defined in that provision has its own constitutive elements different from those laid down in this paragraph and it also departs from the corresponding provisions of the Geneva Conventions in that it qualifies as grave breaches certain activities directed against persons in the power of a party other than the party to which they belong, irrespective of their status, that is whether they are a protected person or not. The conduct described in Article 11 of Additional Protocol I may be considered "inhuman treatment" or "wilfully causing serious injury to body or health".[62]

There are some common constitutive elements applicable to all the sub-paragraphs Article 85(3).

- Wilfully: the accused must have acted consciously and with intent, that is, with his mind on the act and its consequences, and willing them. The requirement of consequences implies that attempts to commit these acts cannot amount to grave breaches. It is not necessary for the intent to be directed at producing the specific consequences and it is sufficient that the conduct be performed wilfully in the sense that the per-

[61] Additional Protocol I, Art. 85(3) reads:

In addition to the grave breaches defined in Article 11, the following acts shall be regarded as grave breaches of this Protocol, when committed wilfully, in violation of the relevant provisions of this Protocol, and causing death or serious injury to body or health:

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

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

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

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

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

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

[62] Schutte, 1991, p. 189, see *supra* note 44.

petrator knows the character of the item under attack. But conducts referred to under sub-paragraphs (b) and (c) require knowledge of results of excessive losses or damages. This encompasses the concepts of "wrongful intent" or "recklessness", in other words the attitude of an agent who, without being certain of a particular result, accepts the possibility of it happening. On the other hand, ordinary negligence or lack of foresight is not covered, that is when a man acts without having his mind on the act or its consequences although failing to take the necessary precautions, particularly failing to seek precise information, constitutes culpable negligence punishable at least by disciplinary sanctions.[63]

- In violation of the relevant provisions: this element requires that the conduct described shall be interpreted with specific provisions of Parts III and IV.
- Causing death or serious injury to body or health: for all the conducts described by the sub-paragraph to be qualified as grave breaches, certain consequences are required. "The effect must be such that, even if it does not cause death, it will affect people in a long-lasting or crucial manner, either as regards their physical integrity or their physical and mental health."[64]

Grave breach under Article 85(3)(a) is related to Article 51(2) of Additional Protocol I that prohibits making the civilian population or individual civilians the object of attack. The concept of "attack" is defined by Article 49 as acts of violence performed either in offence or defence.[65] Article 85(3)(b) concerns "indiscriminate attacks" defined and prohibited by Article 51(4) and 51(5), which are attacks not directed against civilians but affecting them incidentally.[66] In this regard, it should be noted that even though indiscriminate attacks are prohibited, only those causing excessive incidental damages to civilians or civilian objects constitute grave breaches. The criteria for judging whether the loss is excessive are to weigh up "the concrete and direct military advantage anticipated" and "incidental losses" expected, which are set out by Article 57(2)(a)(iii).[67] It

63 *Ibid*, pp. 189–90; Sandoz *et al*., 1987, para. 3474, p. 994, see *supra* note 28.

64 Sandoz *et al*., 1987, para. 3474, p. 995, see *supra* note 28.

65 *Ibid*., para. 3475, p. 995.

66 *Ibid*., para. 3477, p. 995.

67 *Ibid*., paras. 3478, 3431, pp. 995–96.

would be impossible to judge *in abstracto* under what circumstances the losses are excessive and they can only be assessed on a case-by-case basis. There should also be sufficient evidence to show that the perpetrator understood or accepted the calculated risk of causing excessive losses beforehand.[68]

Article 85(3)(c) is related to Article 56 of Additional Protocol I, which grants special protection to works and installation containing dangerous force, such as dams, dykes and nuclear electrical generating stations. The special protection granted to them makes them immune from attack even if they are military objectives if the attack may cause the release of dangerous forces and severe losses among civilian population. The special protection even applies to other military objectives located at or in the vicinity of them if the attack against those military objectives may cause the release of dangerous forces from the works or installation and severe losses among civilians population. The special protection ceases only those works or installations or military objective located at or in the vicinity of them are used in regular, significant and direct support of military operations and the attack is the only feasible way to terminate that support. In order for this provision to make sense, those works and installations must first be military objectives since attacks against those works or installations of civilian nature have already been covered by Article 85(3)(a). The other constitutive elements are similar to those in Article 85(3)(b). Thus one may conclude that this provision does not add anything substantial to sub-paragraph (b).[69]

The norms underlying Article 85(3)(d) are Articles 59 (non-defended localities) and 60 (demilitarised zones) of Additional Protocol I. The former may be established by unilateral declaration or agreement among parties to the conflict while the latter can only be established by agreement. Non-defended localities should not be made the object of attack and parties to a conflict should not extend their military operations to demilitarised zones if those are against the agreement establishing the zone. For grave breach to be established under this provision, the perpe-

[68] Schutte, 1991, p. 189, see *supra* note 44.

[69] *Ibid*., p. 191; Sandoz *et al*., 1987, paras. 3482–86, pp. 996–97, see *supra* note 28.

trator should have known such localities or zones had this particular status and had not lost it.[70]

Article 85(3)(e) relates to Article 41 on safeguarding an enemy *hors de combat*. A person who is in the powers of an adversary party and clearly expresses his intention to surrender or has been rendered unconscious or incapacitated by wounds or sickness is considered *hors de combat* provided he abstains from hostilities. It is prohibited to attack such persons. There would be a breach of the rule if the perpetrator knew or should have known the person he was attacking was *hors de combat*. But for it to be a grave breach the perpetrator must have actual knowledge that the person is *hors de combat*.[71] Usually, the persons are those whose status of "protected persons" has not been determined under Geneva Conventions III and IV or Article 45 of Additional Protocol I. Once their protected status is decided they will be under the protection of Article 85(2) of Additional Protocol I.[72]

Article 85(3)(f) relates to perfidious use of emblems or protective signs recognised by the Geneva Conventions and Additional Protocol I. These emblems and signs include a red cross, red crescent, oblique red bands on a white ground (for hospital and safety zones), blue triangle on an orange ground (for civil defence), three bright orange circles (for works or installations containing dangerous forces), and signs agreed upon between parties to the conflict such as for non-defended localities and demilitarised zones.

Articles 54 and 45 of Geneva Conventions I and II prohibit abuse of the Red Cross, red crescent and red lion and sun emblems but do not qualify their perfidious use as a grave breach. However, the perfidious use of internationally recognised emblems had been embodied in the Hague Regulations concerning the Laws and Customs of War on Land in Article 23(f). Additional Protocol I inherited this provision and further defined in Article 37 the term of perfidy as acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord protection under international humanitarian law, with intent to betray that confidence. But it should be noted that only perfidy for the purpose of

[70] Schutte, 1991, p. 191, see *supra* note 44; Sandoz *et al*., 1987, paras. 3487–90, p. 997, see *supra* note 28.

[71] Sandoz *et al*., 1987, paras. 3491–92, p. 998, see *supra* note 28.

[72] Schutte, 1991, p. 192, see *supra* note 44.

killing, injury or capture of an adversary is prohibited. And for it to be a grave breach it must also result in the consequences defined in the opening sentence.[73]

It is argued that distinctive signals, signs, emblems or uniforms of the United Nations or of neutral or other states not party to the conflict, or other internationally recognised protective emblems, signs or signals including the flag of truce and the protective emblem of cultural property shall be added to the list of the protected emblems or signs.[74]

Finally, there seem to be some differences between "launching an attack" used in Article 85(3)(b) and (c) and "making someone or something the object of attack" used in other sub-paragraphs, in terms of the scope of perpetrators covered. The former appears to target the commander who orders the attack or those having authority to determine the objectives of the attack while the latter allows for a wider interpretation to include everyone taking part in hostilities.[75]

10.3.2.2. Article 85(4)

The provisions in Article 85(4) differ from those in Article 85(3) in that they do not require particular consequences as constitutive elements and they are also less connected to specific rules of the Geneva Conventions and Additional Protocol I. As for content, Article 85(3) deals with activities on the battlefield and is related to Hague law, but Article 85(4) is mainly concerned with persons in the power of the enemy under Geneva law, except for Article 85(4)(d). And some of the breaches described by Article 85(4) follow inevitably from policy decision of the party to the conflicts, rather than purely individual initiatives.[76] The provision reads:

> [T]he following shall be regarded as grave breaches of this Protocol, when committed wilfully and in violation of the Conventions or the Protocol:
>
> (a) the transfer by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of

[73] Sandoz *et al*., 1987, paras. 3495, 3499, p. 998–99, see *supra* note 28.

[74] *Ibid.*, paras. 3496–498, pp. 998–99. Additional Protocol I, Arts. 37 and 38, see *supra* note 1.

[75] Schutte, 1991, p. 190, see *supra* note 44.

[76] Sandoz *et al*., 1987, paras. 3500–1, p. 999, see *supra* note 28.

> the occupied territory within or outside this territory, in violation of Article 49 of the Fourth Convention;
>
> (b) unjustifiable delay in the repatriation of prisoners of war or civilians;
>
> (c) practices of 'apartheid' and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination;
>
> (d) making the clearly-recognized historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples and to which special protection has been given by special arrangement, for example, within the framework of a competent international organization, the object of attack, causing as a result extensive destruction thereof, where there is no evidence of the violation by the adverse Party of Article 53, sub-paragraph (b), and when such historic monuments, works of art and places of worship are not located in the immediate proximity of military objectives;
>
> (e) depriving a person protected by the Conventions or referred to in paragraph 2 of this Article of the rights of fair and regular trial.

The conduct described in Article 85(4)(a) is largely covered by grave breaches defined in Article 147 of Geneva Convention IV, whose underlying norm is Article 49 of Geneva Convention IV. Thus the provision in this sub-paragraph dealing with transfer or deportation of the population in occupied territory is just a repetition of the grave breach defined by Geneva Convention IV. The new element in this sub-paragraph is the transfer by the occupying power of its population into the occupied territory, which is prohibited by Article 49 of Geneva Convention IV but not considered a grave breach because of the population concerned are not "protected persons" under the Convention.[77] It may be inspired by the settlement policies of the Israeli government with respect the occupied territory since the Six-Day War of 1967.[78]

Article 85(4)(b) is considered to be inspired by experiences of delays in the repatriation of prisoners of war after the armed conflicts between India and Pakistan in 1971. According to Articles 109 and 118 of

[77] *Ibid*., paras. 3502–4, p. 1000.

[78] Schutte, 1991, p. 193, see *supra* note 44.

Geneva Convention III the seriously wounded or sick prisoners of war should be repatriated during hostilities and all the prisoners of war should be repatriated without delay after the cessation of active hostilities except in case of criminal proceedings and serving sentences. According to Article 35 of Geneva Convention IV civilians in enemy territory are entitled to leave the territory unless their departure is contrary to the national interest of the state. Thus parties to the conflict have an obligation to repatriate prisoners of war but they do not have the same obligation towards protected civilians. In this regard, Article 85(4)(b) seems to have no substantive meaning for civilians.[79]

Article 85(4)(c) is considered a departure from other grave breaches in terms of drafting format. First, it does not link to any specific rules or norms within the Geneva Conventions or Additional Protocol I since the term "apartheid" has never been used and the practice of apartheid never defined. Second, it does not relate the status of protected persons to the victim of the practices concerned.[80] Thus, in order to maintain its legal relevance to the grave breaches regime, this provision should be understood to refer to "torture or inhuman treatment against protected persons", which are already grave breaches of the Geneva Conventions and this provision just aims at emphasising the shocking motive of apartheid practice.[81] It should also be noted that this Article 85(4)(c) only condemns the practice of apartheid and not its policy. The latter is subject exclusively to crimes against humanity.[82]

Article 85(4)(d) is linked with Article 53 of Additional Protocol I on the protection of cultural property. By introducing additional constitutive elements, this sub-paragraph limits cultural property to those "clearly recognised", under special protection by special arrangement, not used in support of a military effort and not located in the immediate proximity of the military objective. For an attack against those properties to be qualified as grave breach, it must result in extensive destruction as well. Taking into consideration these elements, some of which are subject to further clarification such as clearly recognised and special protection, one might

79 Sandoz *et al*., 1987, paras. 3505–9, pp.1000–1, see *supra* note 28; Schutte, 1991, p. 193, see *supra* note 44.

80 Schutte, 1991, pp. 193–94, see *supra* note 44.

81 *Ibid.*, p. 194; Sandoz *et al*., 1987, paras. 3514–15, p. 1002, see *supra* note 28.

82 Sandoz *et al*., 1987, paras. 3512, p.1002, see *supra* note 28.

wonder if it really adds much substance to the grave breach of "the extensive and destruction of protected property" covered by Geneva Convention IV and completed by Article 85(3)(b).[83]

Article 85(3)(e) is largely covered by similar grave breaches under the Geneva Conventions but its added value is to ensure judicial guarantees in Article 75 of Additional Protocol I are embodied into those of the Conventions since Article 75 contains a more elaborate interpretation of the notion of "fair trial" than the relevant provisions of Geneva Conventions III and IV.[84] If one or more of those guarantees in the proceedings are not observed, the procedural process in its entirety can be considered unfair and irregular.[85]

10.3.3. Customary Status of Grave Breaches

There can be no doubt that the definitions of the grave breaches, as contained in the Geneva Conventions, are part of customary international law. This is due to the universal ratification of the Geneva Conventions and state practice concerning grave breaches. This argument is further supported by the inclusion of the grave breaches defined by the Geneva Conventions in the ICTY Statute and the ICC Statute. The report of the UN Secretary-General concerning the establishment of the ICTY clearly states that the application of the principle *nullum crimen sine lege* requires that the ICTY should apply the rules of customary international humanitarian law.[86] In addition, when the ICC Statute was being negotiated there was a general agreement among states that the crimes identified in the Statute were to reflect existing customary law and not create new law.[87] Grave breaches as defined by the Geneva Conventions have therefore become customary international law.[88] However, the same might not be said

[83] Schutte, 1991, p. 195, see *supra* note 44.

[84] Sandoz *et al*., 1987, para. 3519, p. 1003, see *supra* note 28.

[85] Schutte, 1991, pp. 195–96, see *supra* note 44.

[86] UN Secretary-General, Report Submitted Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), 3 May 1993, UN doc. S/25704.

[87] Philippe Kirsch, "Foreword", in Knut Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary*, Cambridge University Press, Cambridge, 2003, p. xiii.

[88] Jean-Marie Henckaerts, "The Grave Breaches Regime as Customary International Law", in *Journal of International Criminal Justice*, 2009, vol. 7, no. 4, pp. 689–91.

about all the grave breaches provided by Additional Protocol I except those integrated by the ICC Statute.[89]

10.3.4. Analysis of Procedural Rules

According to the related provisions of the Geneva Conventions, the states parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches, and should be under obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and should bring such persons, regardless of their nationality, before their own courts. They may also, if they prefer, and in accordance with the provisions of their own legislation, hand such persons over for trial to another high contracting party concerned, provided such a high contracting party has made out a *prima facie* case.[90] Therefore, states parties are obliged to take the following procedural measures to tackle grave breaches.

10.3.4.1. Enacting Effective Penal Sanctions

The obligation to enact effective penal sanctions finds its origin in the 1929 Geneva Convention relative to the Treatment of Prisoners of War but has been made more imperative by the 1949 Geneva Conventions.[91] It first requires states to criminalise all the acts listed by the graves breaches provisions in their domestic law. Even though the Geneva Conventions generally apply in situations of armed conflict, the obligation of the legislation is seemingly to be undertaken in peacetime before a situation of armed conflict arises. Article 80 of Additional Protocol I also requires states to take all necessary measures for the execution of their obligations without delay. As mentioned by the International Court of Justice on a similar obligation in the case of *Belgium v. Senegal*, this obligation of leg-

89 *Ibid*., pp. 691–92.

90 Geneva Convention I, Art. 49; Geneva Convention II, Art. 50; Geneva Convention III, Art. 129; Geneva Convention IV, Art. 146, see *supra* note 1.

91 Geneva Convention Relative to the Treatment of Prisoners of War, Art. 29, 27 July 1929, just requires states to make legislative proposals if their domestic penal code is insufficient. But the 1949 Geneva Conventions provide that states "undertake" to make penal sanctions.

islation has to be implemented as soon as a state is bound by the Convention and it has in particular a preventative and deterrent character.[92]

Second, the penal sanction set up by domestic legislation should be "effective". In order for it to be effective the legislation should specify the nature and extent of the penalty for each infraction, "taking into account the principle of due proportion between the severity of the punishment and the gravity of the offence".[93] Due to their seriousness, imprisonment is recognised as key to punishing grave breaches and other serious violations of international humanitarian law.[94] For the sake of effectiveness, it is especially important to equally apply those sanctions to all the perpetrators, irrespective of the party to which they belong in order to avoid the criticism of victor's justice.

The modalities of liability established by the provisions are commission or ordering. Other modalities, justifications, excuses and defence are all left to states' national criminal law.[95] In this regard, states may need to take into consideration developments of international criminal law on war crimes, which are addressed below.

As for the practical format of legislation, some states prefer to apply their existing military or ordinary criminal law to the grave breaches since their domestic laws have already covered those breaches and provide adequate sanctions. Those provisions are thus superfluous and it is not necessary to introduce new crimes. However, even though most of the grave breaches are already criminal acts under domestic law this is not true for all of them, such as perfidious use of the Red Cross emblem, and the sanctions for them under domestic law may not be adequate.[96] Furthermore, allowing states to rely simply on their ordinary domestic criminal law would make the obligation meaningless, which is an interpretation against the purpose and object of the treaty and thus a violation of treaty

92 International Court of Justice, Questions relating to the Obligation to Prosecute or Extradition, *Belgium v. Senegal*, Judgment, ICJ Reports 2012, para. 75.

93 Pictet, 1952, p. 364, see *supra* note 7.

94 ICRC, Preventing and Repressing International Crimes: Towards an "Integrated" Approach Based on Domestic Practice: Report of the Third Universal Meeting of National Committees of the Implementation of International Humanitarian Law, vol. 1, ICRC, Geneva, 2014, pp. 61–66.

95 Pictet, 1952, p. 364, see *supra* note 7.

96 Christine van den Wyngaert, "The Suppression of War Crimes under Additional Protocol I", in Delissen and Tanja, 1991, p. 200, see *supra* note 44.

law. In practice, international tribunals such as the ICTY and ICTR could still try a person who had been tried before a national court for serious violation of international humanitarian law if those violations were categorised as ordinary crimes before the national court.[97] This reaffirmed that the special elements of grave breaches could not be fully captured by a domestic equivalent crime.[98]

Another option chosen by states aims at criminalising all serious violations by providing a general reference to the relevant international law including international humanitarian law. Thus all breaches or serious violations of international humanitarian law were made punishable by a simple reference to relevant treaties or customary law and no national implementing legislation was needed, even when the related law was amended or modified. This option is simple and economic. But the disadvantage is that generic criminalisation may violate the principle of legality required by criminal law and it leaves too much room for judicial interpretation.[99]

A third option adopted by states is to enact specific legislation, which usually integrates the full list of grave breaches from the treaty into a stand-alone act or specific part within the domestic law framework and lays down the range of penalties or redefines the description of conduct constituting grave breaches. Common law countries usually follow this approach.[100] This approach is very much in line with the principle of legality as every criminal activity and its punishment are clearly defined and predictable. Some scholars consider that only specific national legislation can satisfy these obligations within different traditions of criminal law, and the stand-alone code would seem to best meet the principle of legality and at the same time adequately underlines the exceptional nature and gravity of grave breaches.[101] But it creates a large workload for states

97 ICTY Statute, Art. 10(2)(a), see *supra* note 32; ICTR Statute, Art. 9(2)(a), see *supra* note 33.

98 Knut Dörmann and Robin Geiß, "The Implementation of Grave Breaches into Domestic Legal Orders", in *Journal of International Criminal Justice*, 2009, vol. 7, no. 4, pp. 708–10.

99 ICRC, 2014, p. 33, see *supra* note 94. For example, Article 9 of the Chinese Criminal Law (1997) requires that it applies to those crimes provided by international treaties to which China is a party. See also Dörmann and Geiß, 2009, pp. 711–10, see *supra* note 98.

100 ICRC, 2014, pp. 33–35, see *supra* note 94.

101 Dörmann and Geiß, 2009, pp. 708, 717, see *supra* note 98.

and may lack the flexibility to accommodate new developments of the law.

A fourth option for states is a mixture of the two approaches outlined above through general criminalisation supplemented by specific provisions on certain crimes. This option is considered a quite balanced approach that allows respect for the principle of legality and specificity without the necessity of enacting a whole new legislation whenever a state becomes party to a treaty.[102]

10.3.4.2. Establishing Universal Jurisdiction and the Obligation *Aut Judicare Aut Dedere*

Universal jurisdiction is defined as "criminal jurisdiction based solely on the nature of the crime, without regard to where the crime was committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim, or any other connection to the state exercising such jurisdiction".[103] Universal jurisdiction can be a mandatory or permissive provision of treaty or customary law. The 1949 Geneva Conventions represent landmarks in the development of international law as the first treaty-based recognition of universal jurisdiction over war crimes applicable to all states.[104]

Related articles of the four Geneva Conventions oblige states parties to search for and bring suspects of grave breaches before their own courts regardless of their nationality,[105] which has been interpreted as a requirement of universal jurisdiction over grave breaches.[106] Even though the treaty provisions only provide for the irrelevance of a suspect's nationality, the irrelevance of the place of commission of the offence can be implied. Because if it is not the case, it would mean states can only have jurisdiction over grave breaches allegedly committed on their own territories, the explicit mention of the irrelevance of nationality will be made

[102] ICRC, 2014, p. 36, see *supra* note 94.

[103] Stephen Macedo (ed.), *The Princeton Principles on Universal Jurisdiction*, Program in Law and Public Affairs, Princeton University, Princeton, NJ, 2001.

[104] Roger O'Keefe, "The Grave Breaches Regime and Universal Jurisdiction", in *Journal of International Criminal Justice*, 2009, vol. 7, no. 4, pp. 811–10.

[105] Geneva Convention I, Art. 49; Geneva Convention II, Art. 50; Geneva Convention III, Art. 129; Convention IV, Art. 146, see *supra* note 1.

[106] Sandoz *et al*., 1987, para. 3403, see *supra* note 28.

redundant for a state that already can punish any offence occurring in its own territory regardless of the nationality of the perpetrator. Based on these observations, it is understandable that the nationality of victims needs not be mentioned. Finally, it should be emphasised again that the obligation is imposed on all states parties and not just to those that are parties to armed conflicts. Thus putting all these factors together, the obligation to exercise criminal jurisdiction imposed by the grave breaches regime is not dependent on any prescriptive nexus of nationality, territoriality, passive personality or the protective principle, and thus those provisions create an obligation to exercise universal criminal jurisdiction over grave breaches. This interpretation is supported by the *travaux préparatoires* and state practice in implementing the Geneva Conventions.[107] In practice, states should vest their courts with jurisdiction over grave breaches on the basis of universal jurisdiction and, if the opportunity arises, exercise this jurisdiction by search, investigation and prosecution.[108] As the commentary of the Geneva Conventions indicates, this obligation implies activities on the states once they are aware that a suspect is present in their territory.[109] In this regard, states are bound to carry out search, investigation, pre-trial detention, prosecution and trial.[110]

The next provision specifies that states may also, if they prefer, and in accordance with the provisions of their own legislation, hand such persons over for trial to another high contracting party concerned, provided such a high contracting party has made a *prima facie* case. This permissive provision, combined with the mandatory universal jurisdiction, is known as an obligation *aut judicare aut dedere*. It can be noted that the *judicare* element is separate and independent from the *dedere* element under the grave breaches regime, and that states have free choice in adjudication or extradition. In this regard, the interest of states of passive personality (victim states) does not prevail over that of states of active personality (states of perpetrators). And there is no exception to the principle of free choice even when the state of custody orders the grave breach.[111]

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[107] O'Keefe, 2009, pp. 813–15, see *supra* note 104.

[108] *Ibid*., pp. 816–17.

[109] Pictet, 1952, pp. 365–66, see *supra* note 7. See also Claus Kreß, "Reflections on the *Iudicare* Limb of the Grave Breaches Regime", in *Journal of International Criminal* Justice, 2009, vol. 7, no. 4, p. 800.

[110] Kreß, 2009, pp. 800–1, see *supra* note 109.

[111] *Ibid*., pp. 797–99.

As for the handing over of the accused to an international tribunal, the Geneva Conventions are not considered to pose any obstacles to it.[112] But a state's right of free choice under the grave breaches regime might be qualified by priority competence of an international criminal court provided by treaties to which the custodial state is a party.[113]

10.3.4.3. Procedural Rules and Customary Law

The procedural rules of legislation, trial or extradition and universal jurisdiction are also customary rules. According to customary law, states have obligations to investigate and prosecute those alleged to have committed war crimes.[114] It is thus a corollary that states need to first put a proper legislative framework in place. So the obligation of legislation could even be taken as an integral part of the customary law obligation to repress war crimes. According to the International Law Commission's Report, the obligation *aut dedere aut judicare* for certain categories of crimes is a duty not only from a treaty law perspective but also from generally binding customary norms. It is generally agreed that those categories of crimes should include serious violations of international humanitarian law such as war crimes or grave breaches. State practice also supports the customary law status of this obligation.[115] As for universal jurisdiction, it has long been recognised that states have the right to vest universal jurisdiction over war crimes. But the Geneva Conventions go further to make it obligatory to vest universal jurisdiction over grave breaches. Based on existing state practices, especially the universal acceptance of the Geneva Conventions, the rule of universal jurisdiction over grave breaches also reflects customary law.[116] Finally, all these procedural rules are not just technical but fundamental to the "respect for the human person and elementary considerations of humanity", the criterion suggested by the International Court of Justice for customary international law.[117]

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[112] Pictet, 1952, see *supra* note 7.

[113] Kreß, 2009, pp. 799–800, see *supra* note 109.

[114] Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005, rule 158.

[115] Henckaerts, 2009, pp. 696–98, see *supra* note 88.

[116] *Ibid*., pp. 698–99.

[117] *Ibid*., p. 693–700.

10.4. Grave Breaches and War Crimes under International Criminal Law

War crimes are defined as serious violations of customary or treaty rules of international humanitarian law which entail, under customary or conventional law, individual criminal responsibility of the person breaching the rules.[118] War crimes have been punished at domestic level probably since the beginning of criminal law and, moreover, they were the first to be prosecuted pursuant to international law.[119] With the adoption of the ICC Statute in 1998, we now have the most substantial codifications in history of war crimes under the international criminal law, which is supposed to reflect customary international law.[120] This section compares the list of war crimes conducted under Article 8 of the ICC Statute with those of grave breaches under the Geneva Conventions and Additional Protocol I, and elaborates on the dynamic relations between international humanitarian law and international criminal justice. Article 8 of the ICC Statute lists war crimes in four categories, two of which, Article 8(2)(a) and 8(2)(b), address war crimes under international armed conflict, while the other two, Article 8(2)(c) and 8(2)(e), deal with non-international armed conflict.

10.4.1. War Crimes in International Armed Conflict

10.4.1.1. Grave Breaches of the Geneva Conventions

The first category of war crimes under Article 8(2)(a) comprises "grave breaches of the Geneva Conventions of 12 August 1949". This subparagraph integrates the same grave breaches from the Geneva Conventions and thus they are subject to the same conditions and interpretations for their application. For example, they apply to international armed conflict and only concern protected persons as defined in the respective Geneva Conventions.[121]

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[118] Antonio Cassese, *International Criminal Law*, Oxford University Press, Oxford, 2003, p. 47.

[119] Schabas, 2011, p. 110, see *supra* note 15.

[120] Kirsch, 2003, p. xiii, see *supra* note 87.

[121] Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, 2nd ed., C.H. Beck, Hart, Nomos, Baden-Baden, 2008, pp. 300–1; Schabas, 2011, pp. 119–21, see *supra* note 15.

The laws of armed conflict "are not static, but by continual adaptation follow the needs of a changing world".[122] This adaptation has been to a large part realised through the jurisprudence of tribunals and courts. Some 45 years after their adoption the grave breaches were first applied by the ICTY, which adopted a dynamic approach to their interpretation and application. First, the ICTY's Appeals Chamber confirmed for the first time that grave breaches were limited to international armed conflict.[123] However, the ICTY expanded their reach through an extension of the concept of an "international conflict for the purpose of determining individual criminal responsibility".[124] The ICTY established an innovative test of "overall control" to determine the relation between an intervening foreign state and non-state groups such as armed forces, militias or paramilitary units, which may turn a *prima facie* internal armed conflict into an international one. As the ICTY stated, the overall control criteria may be satisfied if the state "has a role in organising, coordinating or planning the military actions of the military group, in addition to financing, training and equipping or providing operational support of that group".[125] This interpretation was hugely significant in its effects of broadening the scope of application of grave breaches to include situations which might be considered a civil war and the test has since been followed by the ICTY and "a new path has been charted for international criminal jurisdictions".[126] We need to wait to see whether the ICC follows this test, while some scholars have suggested that it should do so.[127]

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[122] International Criminal Tribunal for the former Yugoslavia ('ICTY'), *Prosecutor v. Kunarac et al.*, Appeals Chamber, Judgment, IT-96-23 and IT-96-23/I-A, 12 June 2002, para. 67 (https://www.legal-tools.org/doc/029a09/).

[123] ICTY, *Prosecutor v. Duško Tadić at al.*, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-A, 2 October 1995 (https://www.legal-tools.org/doc/866e17/). However, some scholars are of the opinion that this confirmation defied recent trends in state practice illustrating a change in customary international law. See Natalie Wagner, "The Development of the Grave Breaches Regime and of Individual Criminal Responsibility by the International Criminal Tribunal for the former Yugoslavia", in *International Review of the Red Cross*, 2003, vol. 85, no. 850, p. 358.

[124] Ken Roberts, "The Contribution of the ICTY to the Grave Breaches Regime", in *Journal of International Criminal Justice*, 2009, vol. 7, no. 4, p. 747.

[125] ICTY, *Prosecutor v. Duško Tadić*, Appeals Chamber, Judgment, 15 July 1999, IT-94-1-A, para. 137 (https://www.legal-tools.org/doc/8efc3a/).

[126] Roberts, 2009, p. 749, see *supra* note 124.

[127] Triffterer, 2008, p. 302, see *supra* note 121; Dörmann, 2003, p. 24, see *supra* note 87.

Second, the ICTY also required that the prosecutor prove the accused's knowledge of the facts pertinent to the internationality of the conflict,[128] which has been absorbed as constituting an element of war crimes under the ICTY Statute.[129] The requirement of the nexus between the alleged crimes and the armed conflict was also established by the ICTY and has been absorbed as constituting an element of "in the context of and […] associated with an international armed conflict" for the war crimes under the ICTY Statute.[130]

In addition, the ICTY also expanded the concept of "protected persons" through a purposive interpretation of the scope of protection under Article 4 of Geneva Convention IV. It argued that Article 4 does not make its applicability dependent on formal bonds and purely legal relations indicated by nationality. Rather, it hinges on the substantial relations evidenced by allegiance and effective and satisfactory diplomatic representation or protection since Article 4, if interpreted in the light of its object and purpose, is directed to the protection of civilians to the maximum extent possible.[131] Thus nationals may still have protected person status if they cannot rely on the protection of the state of which they are citizens because they belong to national minorities.[132] This innovation corresponds to the realities of modern conflict that are more likely to be interethnic than between states.[133] It also seems to have been accepted by the ICC since the Elements of Crimes require the perpetrator only to know the fact that the victim belonged to the adversary party to the conflict, rather than the nationality of the victim.[134]

As for the conducts listed as grave breaches, the ICTY has also had the chance to flesh out some individual grave breaches. For example, the ICTY brought life to the grave breach of unlawful confinement of a civilian by interpreting the interaction between different articles of Geneva Convention IV, such as Articles 5, 42 and 43. Thus the detention or confinement of civilians is unlawful either 1) when a civilian has been de-

128 Roberts, 2009, p. 749, see *supra* note 124.

129 Dörmann, 2003, p. 17, see *supra* note 87.

130 Roberts, 2009, p. 750–52, see *supra* note 124; Dörmann, 2003, p.17, see supra *note* 87.

131 Roberts, 2009, p. 753–54, *ibid*; Wagner, 2003, p. 360, see *supra* note 123.

132 Schabas, 2011, p. 121, see *supra* note 15; Triffterer, 2008, p. 302, see *supra* note 121.

133 Roberts, 2009, p. 754, see *supra* note 124; Wagner, 2003, p. 361, see *supra* note 123.

134 ICC Statute, Elements of Crimes, Art. 8(2)(a)(i), para. 3, n. 33, see *supra* note 40; Triffterer, 2008, p. 302, see *supra* note 121.

tained in contravention of Article 42 of Geneva Convention IV, that is, they are detained without reasonable grounds to believe that the security of the detaining power makes it absolutely necessary, or 2) where the procedural safeguards required by Article 43 of Geneva Convention IV are not complied with in respect of detained civilians, even where their initial detention may have been justified.[135] It is also suggested that the ICC follow this interpretation.[136]

Another example of the ICTY's contribution to grave breaches relates to torture. The ICTY has breathed new life into this grave breach. Taking the definition of torture under the Torture Convention as guidance, the ICTY developed a definition of torture for the purpose of international humanitarian law by adjudicating that 1) the prohibited purpose of torture should not be exhaustive since an "exhaustive categorization would merely create opportunity for the evasion of the letter of the prohibition", and 2) the public official requirement found in Article 1 of the Torture Convention is not a requirement under customary international law in relation to the individual criminal responsibility for torture outside of the framework of the Torture Convention.[137] This development seems to have been followed by the ICC Statute as well.[138]

A conclusion may therefore be drawn that the judicial practice on war crimes under international criminal law has developed and will continue to develop the content of the grave breaches contained in the 1949 Geneva Conventions.

10.4.1.2. Other Serious Violations of Customs and Laws of War

The 1907 Hague Regulations and the grave breaches and other prohibitory or protective provisions of Additional Protocol I are the major sources of the 26 types of conduct that form the second category of war crimes defined by Article 8(2)(b) of the ICC Statute as "other serious violations of the laws and customs applicable in international armed conflict within the established framework of international law".[139] This prompts two

[135] Roberts, 2009, p. 759–60, see *supra* note 124.

[136] Triffterer, 2008, p. 321, see *supra* note 121.

[137] Roberts, 2009, p. 754–58, see *supra* note 124.

[138] Triffterer, 2008, p. 306–7, see *supra* note 121; Dörmann, 2003, pp. 44, 61, see *supra* note 87.

[139] Schabas, 2011, p. 122, see *supra* note 15; Triffterer, 2008, p. 323, see *supra* note 121.

questions: Are there any grave breaches defined by Additional Protocol I missing from this provision? Are there any new war crimes established on the basis of other provisions of Additional Protocol I?

Three grave breaches established by Additional Protocol I are clearly missing from this category of war crimes in the ICC Statute: launching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive losses to civilians or civilian objects in Article 85(3)(c); unjustified delay in the repatriation of prisoners of war or civilians in Article 85(4)(b); and apartheid and other inhuman and degrading practices in Article 85(4)(c).[140]

With regard to the practice of apartheid or other inhuman and degrading practices, it might amount to war crimes as an outrage on personal dignity, as well as humiliating and degrading treatment under Article 8(2)(b)(xxi).[141] And it could also be charged as a crime against humanity under Article 7 of the ICC Statute. But the threshold for the latter charge is quite high since it requires that the crime be committed as "part of a widespread or systematic attack directed against a civilian population".

The grave breach of an attack against works and installations containing dangerous forces could be covered by Article 8(2)(b)(iv) on excessive incidental damages.[142] It is hard to find a similar alternative offence in the ICC Statute for grave breaches of unjustified delay of repatriation of prisoners of war or civilians. It has been argued that this breach may constitute a war crime under customary international law,[143] but would not be subject to the jurisdiction of the ICC. The reason for these differences may be the less unanimous acceptance of Additional Protocol I in comparison with the Geneva Conventions and that some states may have concerns on some of the norms contained by the Protocol.[144]

War crimes under Article 8(2)(b) that are based on or related to articles of Additional Protocol I other than those of grave breaches include: directing attacks against civilian objects (ii), launching attacks causing excessive damage to the environment (iv), killing or wounding treacher-

[140] Sandoz, 2009, p. 679, see *supra* note 5.

[141] Henckaerts and Doswald-Beck, 2005, pp. 588–89, see *supra* note 114.

[142] *Ibid.*, p. 590.

[143] *Ibid.*, p. 588.

[144] Schabas, 2011, p. 122, see *supra* note 15; Triffterer, 2008, p. 288, see *supra* note 121.

ously (xi), declaring no quarter (xii), using human shields (xxiii), starvation of civilians (xxv), and conscripting or enlisting child soldiers (xxvi).

The war crime of directing attacks against civilian objects is based on Article 52(1) of Additional Protocol I, which provides that "civilian objects shall not be the object of attack or reprisals". This war crime is also considered a reflection of customary law.[145] The definitions of civilian objects and military objectives in Article 52 are also the same under customary law. It is argued that the customary status of reprisal against civilian objects is not firmly established. Thus reprisal against civilians remains a treaty prohibition binding only states parties.[146]

The war crime of treacherous killing or wounding is based on Article 23 of the Hague Regulations and is linked to Article 37 of Additional Protocol I, which defines perfidy. The elements of this war crime make it clear that it should be understood as prohibiting the killing or wounding an adversary by resort to perfidy defined by Article 37 of Additional Protocol I.[147] This crime is also a customary crime.[148] On the other hand, perfidious use of the distinctive emblems is a grave breach under Article 85(3)(f) of Additional Protocol I.

The war crime of declaring no quarter is based on Article 23(d) of the Hague Regulations and is linked to Article 40 of Additional Protocol I, which prohibits ordering "that there shall be no survivors, to threaten an adversary therewith or to conduct hostilities on this basis". The elements for this crime indicate that it covers both the declaration and the order of no quarter. But it is not clear whether a threat of no quarter is also covered. There was some opposition to including "to conduct hostilities on the basis of no quarter" into this crime during negotiations over the ICC Statute. Article 40 of Additional Protocol I is considered to reflect customary rules but the related war crime is just "declaring that no quarter will be given".[149] However, this restrictive view will not overly limit the ICC's jurisdiction since the conduct of hostilities on the basis of no quarter may amount to a war crime of killing persons *hors de combat.*[150]

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145 Henckaerts and Doswald–Beck, 2005, p. 581, see *supra* note 114.

146 Triffterer, 2008, pp. 329–30, see *supra* note 121.

147 *Ibid.*, p. 384–85.

148 Henckaerts and Doswald-Beck, 2005, p. 575, see *supra* note 114.

149 *Ibid.*, pp. 161, 575.

150 Triffterer, 2008, pp. 392–93, see *supra* note 121.

The war crime of using human shields is based on Article 51(7) of Additional Protocol I, which prohibits the use of civilians to shield points, areas or military objectives. Articles 23 and 28 of Geneva Convention IV and Article 12 of Additional Protocol I prohibit the use of prisoners of war and medical units for the same purpose. This prohibition and its violation as a war crime are considered customary law.[151] According to the elements of the crime, the use of human shields implies positive action from the party to take advantage of the location of the protected persons or an intentional co-location of military objectives and protected persons to shield military objectives or operations.[152] This prompts the question of "voluntary human shields", namely persons who have freely chosen to place themselves near military objectives in the hope that their presence will delay or prevent an attack.[153] In this regard, it should be made clear that there is no 'use' in voluntary human shields from the party, thus no charge could be raised under this provision. It is further argued that voluntary shield civilians maintain their civilian status since their action does not amount to direct participation in hostilities, and thus they are still protected from direct attack.[154] However, due to the voluntary nature of taking the risk of being close to a military objective, to the conflict, the threshold of incident damages of the proportionality test may be enhanced.[155]

The war crime of starvation of civilians is based on Article 54 of Additional Protocol I, which prohibits use of "starvation of civilians as a method of warfare" and "to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population". The last part of the crime of "impeding relief supplies" is based on Articles of 23, 55 and 59 of Geneva Convention IV. This provision was considered a new rule at the time of the adoption of Additional Protocol I but since then has been made customary rule through state practice.[156] And conduct under

[151] Henckaerts and Doswald-Beck, 2005, pp. 337, 584, see *supra* note 114.

[152] *Ibid.*, p. 340; Triffterer, 2008, p. 454, see *supra* note 121.

[153] Triffterer, 2008, p. 455, see *supra* note 121.

[154] Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, International Committee of the Red Cross, Geneva, 2009, pp. 56–57.

[155] *Ibid.*, p. 57; Triffterer, 2008, p. 456, see *supra* note 121.

[156] Henckaerts and Doswald-Beck, 2005, p. 581, see *supra* note 114.

this crime may constitute other war crimes, such as an attack against civilian objects, destruction of objects of the adversary and so on.[157]

The war crime of conscripting or enlisting child soldiers or using children under the age of 15 to participate actively in hostilities is based on Article 77(2) of Additional Protocol I, which provides that "the Parties to the conflict shall take all feasible measures in order that children who have not attained the age of fifteen years do not take a direct part in hostilities and, in particular, they shall refrain from recruiting them into their armed forces". The wording "participate actively" is considered broader than "take direct part in" since the former covers the latter as well as other active participation in military activities linked to combat.[158] The terms 'conscription' and 'enlist' were used to replace recruitment as some states have concerns that recruitment might include recruitment campaigns addressed to children under the age of 15, and the adjective "national" was added to "armed forces" in order to meet the concerns of several Arab states that feared the term might cover young Palestinians joining the *intifada* revolt.[159] This crime is considered a customary crime as well.[160]

Finally, for conduct under Article 85(3) to amount to grave breaches they must cause death or serious injury to body or health. This is not the case for war crimes under the ICC Statute except Article 8(2)(b)(x).

10.4.1.3. Mode of Liability

The grave breaches regime under the Geneva Conventions limits individual criminal responsibility to the author of the crime and to persons who ordered the crime. Other forms of responsibility were left to the judge who would apply national law. However, customary international humanitarian law has evolved since then and it is now generally recognised that individuals are not only criminally responsible for committing or ordering a grave breach or serious violation of humanitarian law but also for assisting in, facilitating or aiding or abetting, planning or instigating such crimes,[161] which is codified in Article 25 of the ICC Statute.

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[157] Triffterer, 2008, pp. 470–71, see *supra* note 121.

[158] *Ibid.*, p. 471.

[159] *Ibid.*, p. 473; Schabas, 2011, p. 122, see *supra* note 15.

[160] Henckaerts and Doswald-Beck, 2005, p. 580, see *supra* note 114.

[161] *Ibid.*, p. 554.

10.4.2. War Crimes in Non-International Armed Conflicts

As already noted, there is no grave breaches regime under treaty law for armed conflict not of an international nature. There is only one provision in the 1949 Geneva Conventions, known as common Article 3, which refers to non-international armed conflict. Additional Protocol II to the Geneva Conventions expanded common Article 3 but does not extend the grave breaches regime to serious violations of its provisions.[162] Thus during the negotiation of the ICC Statute, the inclusion of war crimes for non-international armed conflict was difficult to achieve. But given the fact that armed conflict of a non-international character is more frequent today and that it is difficult to prove the international nature of much armed conflict, it became mandatory for most delegations that at least some acts should constitute war crimes in non-international armed conflict.[163]

In the final analysis, the ICC Statute classified war crimes in non-international armed conflict into two categories, namely serious violation of common Article 3 of the Geneva Conventions in Article 8(2)(c) and other serious violations of the laws and customs applicable in armed conflict not of an international character in Article 8(2)(f).

10.4.2.1. Serious Violations of Common Article 3 of the Geneva Conventions

The International Court of Justice considered common Article 3 as a minimum yardstick in cases of civil strife.[164] The ICTY and ICTR also explicitly confirmed that under customary international law violations of common Article 3 entail individual criminal responsibility. Other international or mixed tribunals and some domestic legislation have also followed suit.[165]

As the chapeau of Article 8(2)(c) indicates, its war crimes address "serious violations of Common Article 3". It is considered that any violation of the provisions always constitutes serious violations and would thus

[162] Schabas, 2011, p. 131, see *supra* note 15.

[163] Triffterer, 2008, p. 476, see *supra* note 121.

[164] International Court of Justice, *Nicaragua v. United States of America*, 27 June 1986, ICJ Report 14.

[165] Triffterer, 2008, pp. 485–86, see *supra* note 121; Schabas, 2011, p. 132, see *supra* note 15.

fall into the material jurisdiction of this paragraph.[166] As for persons protected under this provision, Article 8(2)(c) simply reiterates the groups of individuals mentioned in common Article 3, namely "persons taking no active part in hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause".[167] It should be noted that the list following the word "including" is not exhaustive. According to the Elements of Crimes, it refers to person or persons who were either *hors de combat*, or were civilians, medical personnel or religious personnel taking no active part in the hostilities. The notion of "taking no active part in the hostilities" is considered to have the same meaning as that of not "taking direct part in hostilities".[168] The notion "namely" used in the chapeau indicates that the list of acts in (i)–(iv) is exhaustive, and thus a serious violation of other paragraphs of common Article 3 is not a crime under the ICC Statute.[169] The punishable acts under this provision include murder, mutilation, cruel treatment and torture, outrages upon personal dignity, taking hostages and summary executions. They represent a common denominator of core human rights.[170]

10.4.2.2. Other Serious Violations of the Laws and Customs Applicable in Armed Conflict not of an International Character, Article 8(2)(e)

The crimes under Article 8(2)(e) of the ICC Statute are largely based on Additional Protocol II or borrowed from those provisions for international armed conflict. It addresses the war crimes of attacking civilians: 1) attacking objects or persons using the distinctive emblems; 2) attacking personnel or objects involved in humanitarian assistance or peacekeeping mission; 3) attacking protected objects; 4) pillaging; 5) rape, sexual slavery, enforced prostitute, forced pregnancy, enforced sterilisation and sexual violence; 6) using, conscripting and enlisting children; 7) displacing civilians; 8) treacherously killing or wounding; 9) denying quarter; 10) mutilation, medical or scientific experiments; 11) destroying or seizing

166 Triffterer, 2008, pp. 486, see *supra* note 121.
167 *Ibid*., p. 487.
168 *Ibid*., p. 488.
169 *Ibid*.
170 Schabas, 2011, p. 132, see *supra* note 15.

the enemy's property; 12) employing poison or poisoned weapons; 13) employing prohibited gases, liquid, material or devices; 14) employing prohibited bullets. The wording and elements of most of the above crimes are similar to those related provisions of Article 8(2)(b) for international armed conflicts with some minor changes due to the specificities of non-international armed conflicts. But the following differences are worth noting.

The war crime of attacking civilians under Article 8(2)(e)(i) is based on Article 13(2) of Additional Protocol II and it has the same wording and elements as Article 8(2)(b)(i) for international armed conflict.[171] It should be noted that unlike war crimes under international armed conflicts, attacks against civilian objects are not classified as war crimes under this section. The reason is that Additional Protocol II does not have a provision prohibiting attacks against civilian objects, and thus prohibition of attacks against civilian objects would not be considered a customary rule.[172]

Even though the wording of Article 8(2)(e)(vi) of sexual or gender crimes is largely identical to that of Article 8(2)(b)(xxii), the former highlights its basis in common Article 3 while the latter in the grave breaches of the Geneva Conventions. This difference is quite understandable due to distinct rules applicable to international armed conflict and non-international armed conflict. Also given the specificities of internal armed conflict, the war crime of using child soldiers applies to all armed forces rather than just national armed forces.[173]

10.5. Conclusion

In the wake of the Second World War states established a grave breaches regime in the 1949 Geneva Conventions that signalled a veritable revolution for the concept of war crimes. Although war crimes were prosecuted and punished at Nuremberg and before, the grave breaches regime was the first treaty codifying war crimes. It represented a determination that

[171] In this regard, in non-international armed conflicts, besides members of state armed forces, only those civilians who do not take direct part in hostilities are taken to be civilians for the purpose of conduct of hostilities. Melzer, 2009, pp. 31–36, see *supra* note 154.

[172] Triffterer, 2008, pp. 494, see *supra* note 121. But the ICRC's Customary Study argues that this prohibition constitutes a customary rule.

[173] *Ibid.*, pp. 495–96.

from then on war criminals should be sought everywhere, called to answer to national courts and punished in accordance with pre-existing law.[174]

However, after its inception more than 60 years ago, the grave breaches regime remained, for most of the time, totally inoperative. The reasons for this are partly technical, born of the legal complexities and uncertainties in the regime, which only furnishes keywords to designate a criminal act, thereby leaving a range of indispensable criminal concepts under a cloud of obscurity. But the more substantial reason for its non-operation lies in international politics and the hard facts of military situations. The fear on the part of states of retribution against nationals detained by adversaries prevented them from prosecuting enemies in their custody for war crimes, and the universal jurisdiction vested on third states was generally subject to allegiances to competing superpowers.[175]

With the end of Cold War, the international community breathed life into the grave breaches regime through various international criminal courts and tribunals, which also stimulated domestic legislation on war crimes. Not only have these tribunals clarified the concepts of grave breaches but they also developed convincing solutions for textual limitation of them, such as the concept of international armed conflict and protected persons. What is more, those tribunals confirmed and developed war crimes for non-international armed conflicts on the basis of common Article 3 of the Geneva Conventions and Additional Protocol II, thus fixing the most serious deficiency of the regime, which limited its application only to international armed conflicts.[176]

Today, the grave breaches have been embedded within international criminal law as indicated by the ICC Statute, but as a separate category of war crimes from those violations of laws and customs of war, even though the latter were practically all covered in the Geneva Conventions and Additional Protocol I. This segregation stems from the historical tendency of states in the development of war crimes to simply add layer upon layer of new law without repealing earlier overlapping or redundant equivalents.

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[174] James G. Stewart, "The Future of the Grave Breaches Regime", in *Journal of International Criminal Justice*, 2009, vol. 7, no. 4, p. 856

[175] *Ibid.*, pp. 856–57.

[176] *Ibid.*, p. 859; see also Dieter Fleck, "Shortcomings of the Grave Breaches Regime", in *Journal of International Criminal Justice*, 2009, vol. 7, no. 4, pp. 833–54.

But this division between grave breaches and other war crimes might lead to a dramatic decline in the use of grave breaches due to its complex technicalities and political sensitivities in proving an internationalised armed conflict. Thus other war crimes are perceived as better alternatives.[177]

Can the grave breaches regime still maintain its autonomous status compared with other war crimes? Even though grave breaches share a lot of commonalities with other war crimes under international criminal law with regard to types of armed conflict, acts and omissions and personal scope (types of perpetrators), and the latter further completes the former with *mens rea* and modes of liabilities,[178] a total abandonment of the grave breaches regime seems both undesirable and improbable. First, as shown above, certain grave breaches have no equivalent in other categories of war crimes. Second, even though a perceived threat to state sovereignty that the ICC might take over its criminal cases has motivated states to enact war crimes legislation according to the ICC Statute, the fact that significantly fewer states are party to the ICC than to the Geneva Conventions and Additional Protocol I actually prevents the grave breaches regime from being redundant.[179] Finally, the procedural obligations of legislation, search and investigation and, more importantly, the mandatory universal jurisdiction provided by treaty law have given the grave breaches regime a unique character to sustain its usefulness as a domestic tool against impunity for war crimes.

For all these reasons, the grave breaches regime seems destined to endure, but as part of an increasingly complex mosaic of law governing war crimes.[180] The laws of armed conflict "are not static, but by continual adaptation follow the needs of a changing world". We could positively anticipate that war crimes will be further clarified and unified by the jurisprudence of international tribunals, especially that of the ICC, in the future. This could reinforce the grave breaches regime.

[177] Stewart, 2009, pp. 860–63, see *supra* note 174.

[178] Öberg, 2009, pp. 170–78, see *supra* note 27.

[179] As of 16 March 2015, the Geneva Conventions have 196 states parties; Additional Protocol I has 174; and the ICC Statute has 123. See also *ibid*., p. 180.

[180] Stewart, 2009, p. 870, see *supra* note 174.

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Historical Origins of International Criminal Law: Volume 3

Morten Bergsmo, CHEAH Wui Ling, SONG Tianying and YI Ping (editors)

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