

The absorption of grave breaches into war crimes law

Marko Divac Öberg*

Marko Divac Öberg is an Associate Legal Officer at the International Criminal Tribunal for the Former Yugoslavia

Abstract

This article compares the concepts, scopes of application and procedural regimes of war crimes and grave breaches, while considering what role remains for the latter in international criminal law. In addition to their original conception as international obligations to enact and enforce domestic crimes, grave breaches have taken on a new meaning as international crimes, similar to war crimes. Only in few regards does the scope of application of these new grave breaches surpass that of war crimes. The procedural regime of grave breaches differs in theory significantly from that of war crimes, though less so in practice. Although it is too early to discount grave breaches, they are likely to become confined to history.



Originally, war crimes and grave breaches were distinct concepts in international law. War crimes were certain acts and omissions carried out in times of war and criminalized in international law. Grave breaches were a limited set of particularly serious violations of the Geneva Conventions of 1949 that gave rise to special obligations of the States Parties for the enactment and enforcement of domestic criminal law. Over time, the line between the two concepts blurred and they began to compete with each other. In 1979, the eminent legal scholar G.I.A.D. Draper

* The author thanks Jonas Nilsson, Sandesh Sivakumaran and Alexander Zahar for their invaluable comments on successive drafts of this article. The opinions herein are the author's alone and do not necessarily correspond to those of the Tribunal, or the United Nations in general. For correspondence: marko.divac.oberg@nyu.edu.

wrote, “The trial of individuals for war crimes has been largely superseded by the modern system of the penal repression of “grave breaches””.¹ Thirty years later, the war crimes concept is the more dynamic of the two, to the point that one may wonder whether grave breaches will disappear from international law. The survival of grave breaches in law will depend in practice on whether they retain some advantage over war crimes. Possible advantages include a lesser burden of proof, a better procedural regime, greater recognition among states, or perception as a greater infamy. The fate of grave breaches will influence the shape of international criminal law. Meanwhile, it is useful for the legal practitioner to know the respective advantages and drawbacks of relying on one kind of rule or the other. By doing a comparative analysis of the grave breaches and war crimes regimes, this article will seek to fulfil that purpose while considering what role remains for grave breaches in international law. The first section examines how the ‘grave breach’ concept has gradually become increasingly similar to that of ‘war crime’. The second section outlines the present differences in their scopes of application. The third section contrasts their respective procedural regimes in contemporary international law.

The merging concepts of war crimes and grave breaches

While grave breaches and war crimes were originally of a fundamentally different nature, the passage of time has blurred the distinction between them.

The original difference between grave breaches and war crimes

It is difficult to define a ‘crime’, as its meaning varies in different legal systems. An acceptable summary definition is an act or omission that the law makes punishable.² A ‘breach’ is merely an act or omission that is contrary to a legal obligation. All crimes stem from breaches of the law, but not all breaches amount to crimes. While a crime necessarily entails consequences in criminal law, a breach may have legal consequences inside or outside criminal law. In international law, this difference applies to war crimes and grave breaches. War crimes, on the one hand, are acts and omissions that violate international humanitarian law and are criminalized in international criminal law.³ War crimes rose to prominence as

- 1 G.I.A.D. Draper, ‘The implementation and enforcement of the Geneva Conventions of 1949 and the two Additional Protocols of 1977’, *Collected Courses of the Hague Academy of International Law*, Vol. 164, 1979-III, p. 37.
- 2 Bryan A. Garner (ed.), *Black’s Law Dictionary*, Thomson West, St Paul, 2004, p. 399; G.I.A.D. Draper, ‘The modern pattern of war criminality’, in Yoram Dinstein and Mala Tabory (eds), *War Crimes in International Law*, Martinus Nijhoff, Dordrecht, 1996, p. 157.
- 3 Georges Abi-Saab, ‘The concept of “war crimes”’, in Sienho Yee and Wang Tieya (eds), *International Law in the Post-Cold War World*, Routledge, London, 2001, p. 112; Michael Cottier, ‘Article 8: War crimes – introduction/general remarks’, in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article*, Beck, Munich, 2008, p. 283; Gerhard Werle, *Principles of International Criminal Law*, T.M.C. Asser Press, The Hague, 2005, pp. 269, 280.

a result of the two world wars and the ensuing efforts to prosecute some of the people responsible for crimes committed then. Article 6 of the Charter of the Nuremberg International Military Tribunal of 8 August 1945 gave the Tribunal jurisdiction to try people who, acting in the interests of the European Axis countries, committed:

(b) War crimes: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labour 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.

This jurisdictional provision reflected the existence of substantive crimes of international law. Grave breaches followed in the Geneva Conventions of 1949. Article 147 of the Fourth Geneva Convention lists the following acts considered to be grave breaches of that convention:

wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.⁴

The Geneva Conventions did not provide for any international criminal liability for grave breaches. Rather, grave breaches constituted a category of violations of those conventions considered so serious that states agreed to enact domestic penal legislation, search for suspects, and judge them or hand them over to another state for trial.⁵ As for other – non-grave – breaches of the Geneva Conventions, the nature of their sanction in domestic law was left open to the States Parties.⁶ These ‘other breaches’ are not a third category besides war crimes

4 Articles 50/51/130 of the First, Second and Third Geneva Conventions of 12 August 1949 omit some of these acts.

5 See note 92 below; also *Final Record of the Diplomatic Conference of Geneva of 1949*, Federal Political Department, Berne, Vol. II-B, p. 115.

6 Common Article 49(3)/50(3)/129(3)/146(3) of the four Geneva Conventions; *Final Record*, above note 5, pp. 31–33, 133. This was left unchanged by Article 86(1) of Protocol I – see 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*, ICRC/Martinus Nijhoff, Geneva, 1987, paras 3539, 3542; Michael Bothe, Karl J. Partsch and Waldemar A. Solf, *New Rules for the Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949*, Martinus Nijhoff, The Hague, 1982, p. 524. See also Article 89 of Protocol I. However, the evolution of customary law has limited the option of suppressing through non-penal means ‘other breaches’ that amount to war crimes – see the text accompanying notes 92–108 below.

and grave breaches, they are merely the flipside of grave breaches within the Geneva Conventions. In general international law, they may amount to war crimes if they are serious enough.⁷

Not much clarity can be derived from the Geneva Conventions or their *travaux préparatoires* on the relationship between grave breaches and war crimes. The term ‘grave breach’ appeared for the first time in a proposal by the Dutch delegation.⁸ Despite Soviet-led efforts to use ‘crime’ instead, the term ‘grave breach’ was retained because the definition of ‘crime’ varied from one country to another, because war crimes were anyhow breaches of the laws of war, and because the 1949 Diplomatic Conference did not have a mandate to create international criminal law.⁹ According to the main promoter of the grave breaches provisions at the Geneva Conference, Captain Mouton of the Dutch delegation,¹⁰ ‘the aim was not to produce a penal code, but to make it obligatory for the Contracting Parties to include certain provisions in their own codes’.¹¹ The grave breaches provisions in the Geneva Conventions are indeed insufficiently detailed to work on their own as a criminal code, for they lack *mens rea* (although some grave breaches must be ‘wilful’), modes of liability (except commission and the ordering thereof), defences, penalties, rules of procedure, etc. Such indispensable parts of a proper criminal law were, in the absence of agreement among the delegations, ‘left to the judges who would apply the national laws’.¹² In 1977, Protocol I additional to the Geneva Conventions added some substance to the grave breaches regime, but the international treaty-based law on the topic still did not amount to an autonomous criminal code.¹³

In order to understand the original distinction between grave breaches and war crimes, it is necessary to conceive of international and domestic law as separate bodies of law. Whether a grave breach or a war crime is committed, in both cases a rule of international law is breached. However, whereas a grave breach should entail criminal consequences in domestic law, a war crime entails criminal consequences in international law. In more technical terms, grave breaches are violations of certain primary rules of international humanitarian law with penal consequences in domestic law, while war crimes consist of secondary rules of international

7 See note 47 below.

8 *Final Record*, above note 5, p. 85; Jean S. Pictet, *Commentary, IV, Geneva Convention relative to the Protection of Civilian Persons in Time of War*, ICRC, Geneva, 1958, pp. 585–587.

9 *Final Record*, above note 5, Vol. II-A, pp. 100, 157, 177–178, 184, 349, 527, 645, 647, 673–674, 716, 718, 822; Vol. II-B, pp. 31–33, 85–87, 115–117, 132–133, 355–360, 363. See also Jean S. Pictet, *Commentary, I, Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, ICRC, Geneva, 1952, p. 371.

10 *Final Record*, above note 5, p. 107; Pictet, above note 9, p. 360; Pictet, above note 8, p. 587.

11 *Final Record*, above note 5, p. 87. See also Abi-Saab, above note 3, p. 117.

12 *Final Record*, above note 5, p. 115.

13 According to the Philippines delegate, the proposal to adopt ‘a draft code and procedure applicable to crimes committed in breach of the Geneva Conventions of 1949 and their Additional Protocols [...] had met with fierce opposition from the great powers’ – see *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts, Geneva, 1974–1977*, Vol. IX, pp. 48–49, CDDH/I/SR.45, paras 19, 23.

criminal law that attach criminal sanctions to breaches of primary rules of international humanitarian law. However, this distinction became blurred as the meaning of 'grave breaches' began to evolve.

Convergence of the concepts of war crimes and grave breaches

There has been a fair deal of conceptual confusion between grave breaches and war crimes. One source of this may be that both constitute breaches of international humanitarian law and lead to the individual criminal liability of their perpetrators. Indeed, the grave breaches provisions were inspired both by Article 5 of the Genocide Convention,¹⁴ dealing with breaches, and Article 6(b) of the Nuremberg Statute,¹⁵ dealing with crimes. This confusion spread to international treaties. Grave breaches are construed as a particular type of war crime in both Article 1(a) of the 1968 UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, and Article 1(2) of the 1974 European Convention on the same topic.

In the mid-1970s, the relationship between war crimes and grave breaches was hotly debated at the Diplomatic Conference on the draft Additional Protocols, following a proposal to describe grave breaches as war crimes.¹⁶ Some states considered grave breaches to be a category of war crimes,¹⁷ while others emphasized the differences between the two.¹⁸ Several delegations pointed out that if grave breaches were to be considered war crimes, they would need to be more precisely defined.¹⁹ In the end, Article 85(5) of Protocol I came to provide that 'grave breaches of [the Geneva Conventions and Protocol I] shall be regarded as war crimes'. By deciding that grave breaches constituted war crimes, the drafters gave the former a new additional meaning, providing them with criminal consequences in international law.²⁰

14 *Final Record*, above note 5, pp. 85, 115.

15 Based on a textual comparison between this provision and Articles 50(1)/51(1)/130(1)/147(1) of the four Geneva Conventions.

16 *Official Records*, above note 13, Vol. X, p. 127, CDDH/234/Rev.1, para 77; Sandoz *et al.*, above note 6, paras 3521–3522.

17 *Ibid.*, Vol. VI, p. 283, CDDH/SR.44, para 18 (United Kingdom); Vol. VI, p. 293, CDDH/SR.44, para 81, and Vol. IX, p. 317, CDDH/I/SR.64, para 69 (Poland); Vol. VI, p. 294, CDDH/SR.44, paras 88, 90, and Vol. IX, p. 282, CDDH/I/SR.61, para 85 (East Germany); Vol. VI, pp. 298–299, CDDH/SR.44 (Canada); Vol. VI, pp. 305–306, CDDH/SR.44, and Vol. IX, pp. 313–314, CDDH/I/SR.64, para 49 (Yugoslavia).

18 *Ibid.*, Vol. VI, p. 293, CDDH/SR.44, para 85, and Vol. IX, pp. 269–270, CDDH/I/SR.61, paras 4–5 (Indonesia); Vol. VI, p. 295, CDDH/SR.44, para 92 (Egypt); Vol. IX, p. 279, CDDH/I/SR.61, para 62 (Switzerland); Vol. IX, p. 280, CDDH/I/SR.61, para 69 (Netherlands); Vol. IX, p. 307, CDDH/I/SR.64, para 10 (Austria).

19 *Ibid.*, Vol. VI, p. 292, CDDH/SR.44, para 77 (Italy); Vol. VI, p. 295, CDDH/SR.44, para 97, and p. 301 (France); Vol. VI, p. 297, CDDH/SR.44, and Vol. IX, pp. 309–310, CDDH/I/SR.64, paras 27–28 (Australia); Vol. IX, p. 19, CDDH/I/SR.43, para 18; Vol. IX, p. 25, CDDH/I/SR.43, para 49 (USA); Vol. IX, p. 46, CDDH/I/SR.45, para 11 (West Germany); Vol. IX, p. 280, CDDH/I/SR.61, para 67 (United Kingdom); Vol. IX, p. 316, CDDH/I/SR.64, para 66 (Finland); but see also Vol. VI, p. 300, CDDH/SR.44 (Egypt).

20 *Ibid.*, Vol. IX, p. 46, CDDH/I/SR.45, para 11.

In 1993, the Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY) included grave breaches in Article 2, separating them from war crimes, which were covered in Article 3. This confirmed, in an instrument of international criminal law, that grave breaches had become international crimes. Yet the Statute did not provide crucial content such as *mens rea* requirements and defences, leaving these areas to be filled in by the case-law.

At the preparatory meetings for the Rome Conference on the International Criminal Court (ICC) it was widely accepted by 1996 ‘that the definition of violations of laws and customs applicable in armed conflict should encompass both grave breaches of the 1949 Geneva Conventions and other serious violations of the laws and customs of war.’²¹ Several state representatives suggested war crimes provisions that would combine grave breaches and war crimes.²² However, as the grave breaches provisions of the 1949 generation were easily identified and widely accepted, they were dealt with separately, quickly and painlessly, allowing the delegates to concentrate on other often more controversial crimes.²³ Indeed, the discussion focused on war crimes in Article 8(2)(b) rather than on grave breaches in Article 8(2)(a).²⁴ While the inclusion of the concept of war crimes in the ICC’s jurisdiction was not controversial, specific war crimes and their definitions were.²⁵ The grave breaches provisions hailing from Protocol I were included in the section on war crimes rather than that on grave breaches – an oddity that was noticed and questioned at the conference.²⁶ This choice stemmed from the difference between the almost universal ratification of the Geneva Conventions and the smaller number of states that had accepted Protocol I.²⁷ The Rome Conference thus showed that the grave breaches provisions of the 1949 generation, those of the 1977

21 ‘Preparatory Committee on Establishment of International Criminal Court discusses inclusion of war crimes in list of “core crimes”’, Press Release L/2764, 26 March 1996. Similarly, ‘Report of the Ad Hoc Committee on the Establishment of an International Criminal Court’, A/50/22, 6 September 1995, para 73; ‘Report of the Preparatory Committee on the Establishment of an International Criminal Court’, A/51/22, 13 September 1996, para 76.

22 Press Release, above note 21; ‘Report of the Preparatory Committee’, above note 21, para 80.

23 ‘Report of the Ad Hoc Committee’, above note 21, paras 73, 75; ‘Report of the Preparatory Committee’, above note 21, paras 80–81; comments of the Egyptian delegate in Press Release, above note 21; United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Committee of the Whole, ‘Summary Record of the 5th Meeting’, A/CONF.183/C.1/SR.5, 20 November 1998, para 71.

24 United Nations, above note 23, ‘5th Meeting’, 20 November 1998, A/CONF.183/C.1/SR.5, paras 75–76; Herman von Hebel and Darryl Robinson, ‘Crimes within the Jurisdiction of the Court’, in Roy S. Lee (ed), *The International Criminal Court: The Making of the Rome Statute – Issues, Negotiations, Results*, Kluwer, The Hague, 1999, pp. 103–109.

25 United Nations, above note 23, ‘3rd Meeting’, A/CONF.183/C.1/SR.3, 20 November 1998, paras 8–9, 11; von Hebel and Robinson, above note 24, pp. 109ff.

26 ‘Draft consolidated text’, A/AC.249/1997/WG.1/CRP.2, 20 February 1997, note 2; United Nations (note 23 above), ‘4th Meeting’, A/CONF.183/C.1/SR.4, para 44, and ‘5th Meeting’, A/CONF.183/C.1/SR.5, paras 31, 91.

27 ‘Report of the Ad Hoc Committee’, above note 21, para 73; ‘Report of the Preparatory Committee’, above note 21, para 81; Cottier, above note 3, p. 288; Charles Garraway, ‘War crimes’, in Elizabeth Wilmshurst and Susan Breau (eds), *Perspectives on the ICRC Study on Customary International Humanitarian Law*, Cambridge University Press, New York, 2007, p. 388.

generation, and provisions relating to other war crimes enjoyed quite different levels of acceptance among states.

The ICC Statute, adopted in 1998, listed grave breaches as a category of war crimes under Article 8(2)(a). This confirmed, in an instrument of international criminal law, that grave breaches had become subsumed under war crimes. The transformation led to some strange results. Article 8(2)(a) defines criminal acts using wording that was not drafted for that purpose, since the grave breaches provisions were only guidelines for domestic criminal legislation.²⁸ Moreover, due to the different origins of the grave breaches provisions in Article 8(2)(a) and the war crimes provisions in the rest of Article 8, there is plenty of overlap between Articles 8(2)(a) and 8(2)(b).²⁹ Yet there is no logical or legal reason to separate the crimes in these articles, since the same rules in the ICC Statute apply to both types of crimes.³⁰ In any event, the ICC Statute provided the ICC with jurisdiction over a long list of war crimes drawn from customary law, including grave breaches. This illustrates how in recent years the concept of grave breaches has appeared in instruments of international criminal law rather than in international humanitarian law.³¹

In contemporary international law, there are therefore two kinds of grave breaches. The original grave breaches provisions are jurisdictional and procedural. They govern how domestic legislative and law enforcement bodies should ensure that justice is done for certain breaches of international law. We will call these 'procedural grave breaches'. The new grave breaches are substantive norms, and constitute a category of war crimes. They define behaviour that is considered to be criminal in international law. We will call these 'substantive grave breaches'.

Do grave breaches have any autonomous scope of application compared with war crimes?

If a grave breach and a similar war crime have different scopes of application, there may be situations in which only one or the other applies. This could perpetuate their dual existence in international law. Procedural grave breaches are hemmed in by their conventional thresholds of applicability. All procedural grave breaches now have equivalent (though not always identical) substantive grave breaches in

28 Michael Bothe, 'War crimes', in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds), *The Rome Statute of the International Criminal Court*, Oxford University Press, New York, 2002, pp. 391–392; Cottier, above note 3, p. 288; United Nations, above note 23, '4th Meeting', A/CONF.183/C.1/SR.4, para 49.

29 Bothe, above note 28, p. 396.

30 Knut Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court*, Cambridge University Press, Cambridge, 2002, p. 128.

31 Horst Fischer, 'Grave breaches of the 1949 Geneva Conventions', in Gabrielle Kirk McDonald and Olivia Swaak-Goldman (eds), *Substantive and Procedural Aspects of International Criminal Law: The Experience of International and National Courts*, Kluwer, The Hague, 2000, pp. 69–70. His conclusions are equally valid today – see the example of the Extraordinary Chambers in the Courts of Cambodia at note 111 below.

customary law.³² The scope of the latter still depends on their treaty-based origins. Other war crimes are found exclusively in customary law.³³ This section will examine in general terms the respective scopes of substantive grave breaches and war crimes, reviewing their applicability to different types of armed conflict, their material, personal, geographical and temporal scopes, modes of liability and circumstances eliminating criminal liability. It will not cover procedural grave breaches, which are to be defined in domestic law and therefore lack content in international law beyond some general guidelines.

Types of armed conflict

It has been suggested that war crimes can only be committed during hostilities, while grave breaches can also be committed in their aftermath.³⁴ However, under the ICC Statute both substantive grave breaches and war crimes apply in international armed conflict, broadly defined to include occupation.³⁵ On the other hand, in contemporary international law, war crimes can be committed in both international and non-international armed conflict,³⁶ while grave breaches only apply to international armed conflict.³⁷ Article 1(4) of Protocol I extended the notion of international armed conflict to include wars of national liberation, thereby extending the scope of the 1977 generation of grave breaches. At the ICTY, substantive grave breaches have disappeared from indictments because they could generally be replaced by a war crime charge carrying a lesser burden of proof, in particular dispensing with the need to first establish the existence of an

32 Articles 50/51/130/147 of the four Geneva Conventions; Articles 11(4), 85(3) and (4) of Protocol I; Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Cambridge University Press, Cambridge, 2005, pp. 574–580, 586, 588–590. The author is aware of criticisms of the study, but to examine its data and methodology would be beyond the scope of this article.

33 Not to be confused with the often treaty-based nature of the *primary* rules of international humanitarian law, the violation of which may constitute a war crime. The statutes of international courts and tribunals define their jurisdiction over war crimes, not the war crimes themselves.

34 e.g. Ghislaine Doucet, 'La qualification des infractions graves au droit international humanitaire', in Frits Kalshoven and Yves Sandoz (eds), *Implementation of International Humanitarian Law*, Martinus Nijhoff, Dordrecht, 1989, p. 83.

35 Dörmann, above note 30, pp. 17–18, 128. See also Fischer, above note 31, pp. 81–83.

36 Article 8(2) of the ICC Statute; ICTY, *The Prosecutor v. Duško Tadić aka. 'Dule'*, Case No. IT-94-1-A, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Appeals Chamber), 2 October 1995, para 89; see also Christopher Greenwood, 'International humanitarian law and the *Tadić* case', *European Journal of International Law*, Vol. 7, 1996, pp. 280–281.

37 Neither the four Geneva Conventions nor Additional Protocol II of 1977 contain provisions relating to grave breaches in non-international armed conflict; Article 8 of the ICC Statute; Dörmann, above note 30, p. 18; *Tadić*, above note 36, paras 79–84 (but see Section IV of the separate opinion of Judge Abi-Saab); Henckaerts and Doswald-Beck, above note 32, p. 574; Sonja Boelaert-Suominen, 'Grave breaches, universal jurisdiction and international armed conflict: Is customary law moving towards a uniform enforcement mechanism for all armed conflicts?', *Journal of Conflict and Security Law*, Vol. 5, 2000, pp. 63–103; Fischer, above note 31, pp. 78–80; Greenwood, above note 36, pp. 275–276; Marco Sassoli, 'La première décision de la chambre d'appel du tribunal pénal international pour l'ex-Yougoslavie: *Tadić* (compétence)', *Revue Générale de Droit International Public*, Vol. 100, 1996, pp. 122–124.

international armed conflict.³⁸ Also, unlike grave breaches, war crimes have come to apply to conflicts between organized armed groups.³⁹ Thus while grave breaches only apply to international armed conflict, war crimes extend further to non-international armed conflict, which in today's world covers the majority of armed conflicts. In this regard, it is thus always possible to charge an accused with a war crime rather than a substantive grave breach.

Material scope

Acts and omissions

Grave breaches cover a relatively limited set of violations of international humanitarian law, set out in the Geneva Conventions and expanded in Protocol I.⁴⁰ Some authors have argued that only violations of international humanitarian law amounting to grave breaches constitute war crimes.⁴¹ This view wrongly bases individual criminal responsibility on jurisdictional provisions.⁴² Yves Sandoz has argued that Article 85(5) of Protocol I shows that, *a contrario*, non-grave ('other') breaches are not war crimes.⁴³ However, while Article 85(5) provides that grave breaches are war crimes, it does not say what else is or is not a war crime. It is consistent with Article 85(5) to say that acts or omissions may qualify as war crimes even if they do not qualify as grave breaches. Indeed, this is the case, as reflected in Article 8 of the ICC Statute. G.I.A.D. Draper has argued that the fact that the Geneva Conventions allow for suppression of non-grave breaches implies that criminal sanctions may be used for this purpose, should the state so choose.⁴⁴ Of course, this does not necessarily mean that there are any such war crimes in international law, since the 'other breaches' provisions merely allow States Parties to enact domestic sanctions as they see fit.⁴⁵ Some authors have argued that the notion of war crimes is broader than that of grave breaches, although not so broad as to encompass all violations of international humanitarian law.⁴⁶ It is now clear

38 Guénaél Mettraux, *International Crimes and the Ad Hoc Tribunals*, Oxford University Press, Oxford, 2005, p. 59; John R.W.D. Jones, *The Practice of the International Criminal Tribunals for the Former Yugoslavia and Rwanda*, Transnational Publishers, Irvington-on-Hudson, 2000, p. 55. On 22 September 2008, the ICTY Prosecution submitted an amended indictment in the *Radovan Karadžić* case, which removed the count of grave breaches.

39 Article 8(2)(f) of the ICC Statute.

40 Articles 50/51/130/147 of the four Geneva Conventions; Articles 11(4), 85(3) and (4) of Protocol I.

41 Doucet, above note 34, p. 83; see references cited in Greenwood, above note 36, note 47.

42 Greenwood, above note 36, pp. 279–280.

43 Yves Sandoz, 'Penal aspects of international humanitarian law', in M. Cherif Bassiouni (ed), *International Criminal Law*, Transnational Publishers, Ardsley, 1999, p. 408.

44 Draper, above note 2, p. 164.

45 Henckaerts and Doswald-Beck, above note 32, p. 571; Garraway, above note 27, pp. 385–386, 389–390.

46 Cottier, above note 3, p. 283; Draper, above note 2, p. 156; Fischer, above note 31, p. 71; Bert V.A. Roling, 'Aspects of the criminal responsibility for violations of the laws of war', in Antonio Cassese (ed), *The New Humanitarian Law of Armed Conflict*, Editoriale Scientifica, Naples, 1979, pp. 212–213; Emmanuel J. Roucouas, 'Les infractions graves au droit humanitaire', *Revue hellénique de droit international*, Vol. 31, 1978, p. 132.

that all serious violations of international humanitarian law amount to war crimes, which is therefore a broader category than grave breaches.⁴⁷ What is meant by ‘serious violations’? The expression appears in Articles 89–90 of Protocol I, and Article 90(2)(C)(i) appears to conceive of grave breaches as a sub-category of serious violations.⁴⁸ According to the ICTY Appeals Chamber, for a violation to be ‘serious’,

it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim. Thus, for instance, the fact of a combatant simply appropriating a loaf of bread in an occupied village would not amount to a ‘serious violation of international humanitarian law’.⁴⁹

This makes the material scope of war crimes fuzzier than the treaty-law definitions of grave breaches, which amounts to an advantage of the latter over the former.⁵⁰ However, not much remains of this advantage today, following the clarification of the material scope of war crimes in the jurisprudence of the ICTY, the long list of war crimes in Article 8(2)(b) of the ICC Statute, and the Elements of Crimes.

A comparison of the ICC Statute’s Article 8(2)(a), on grave breaches, and Article 8(2)(b), on other war crimes, shows that there are factual situations to which both a grave breach and a war crime provision could apply. For instance, the grave breach of wilfully killing a prisoner of war in Article 8(2)(a)(i) is similar to the war crime of killing a combatant who has surrendered in Article 8(2)(b)(vi).⁵¹ However, there are many factual situations constituting grave breaches that would not correspond to the definition of any other war crimes in the ICC Statute. For instance, the grave breach of taking hostages under Article 8(2)(a)(viii) is quite different from any war crime listed in Article 8(2)(b). The ICC Prosecution has filed charges based on the grave breaches of wilful killing and inhuman treatment, which were a better match for the alleged facts than any of the other war crimes provisions in the ICC Statute.⁵² Consequently, as far as the *actus reus* of crimes is concerned, substantive grave breaches retain their relevance in comparison with other war crimes.

47 Henckaerts and Doswald-Beck, above note 32, p. 568 (Rule 156); *Tadić*, above note 36, para 94; Dörmann, above note 30, p. 128. Abi-Saab, above note 3, p. 112, contests the existence of a general rule incriminating all serious violations of international humanitarian law.

48 Sandoz *et al.*, above note 6, para 3621.

49 *Tadić*, above note 36, para 94. See also Henckaerts and Doswald-Beck, above note 32, pp. 569–570.

50 Abi-Saab, above note 3, p. 114. See also Meron, *The Humanization of International Law*, Martinus Nijhoff, Leiden, 2006, p. 117.

51 For more examples, see Bothe, above note 28, p. 396.

52 ICC, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Case No. ICC-01/04-01/07, amended document containing the charges pursuant to Article 61(3)(a) of the Statute, 26 June 2008, Annex 1A.

Mental state

Some grave breaches of the 1949 generation require that perpetration be ‘wilful’,⁵³ which is a less established legal term than ‘intent’, ‘criminal negligence’, etc. Protocol I applied the ‘wilful’ requirement to all new grave breaches.⁵⁴ At the Additional Protocols conference, the topic of *mens rea* for grave breaches was barely addressed.⁵⁵ This was in line with the original idea of leaving that matter to the domestic law of each state party to the Geneva Conventions.⁵⁶ The International Committee of the Red Cross (ICRC) has nevertheless posited that the term ‘wilful’ covers intentional and reckless conduct, but excludes negligence.⁵⁷ Certainly, with the adoption of Article 85(5) of Protocol I and the creation of substantive grave breaches, these had to have a *mens rea* in international law. Authors have disagreed on the interpretation of ‘wilful’.⁵⁸ The ICTY Appeals Chamber has adopted the above-mentioned position of the ICRC.⁵⁹

In customary international law, war crimes generally require intentional or reckless conduct.⁶⁰ Article 30 of the ICC Statute, which applies both to the grave breaches provisions in Article 8(2)(a) and the other war crimes provisions in Article 8(2)(b), requires intent, defined broadly to include awareness that a consequence will occur in the ordinary course of events, and knowledge, meaning ‘awareness that a circumstance exists or a consequence will occur in the ordinary course of events’. Notwithstanding the different terminology, this is hardly distinguishable from intent and recklessness.⁶¹ Under Article 30(1), this general rule of *mens rea* defers to specific rules contained elsewhere. Some grave breaches provisions do indeed provide otherwise, requiring that conduct be ‘wilful’. At the ICC preparatory conference, there was a debate about whether ‘wilful’ had a broader meaning than the *mens rea* set forth in Article 30 of the ICC Statute, but the question remains for the case-law to answer.⁶² This variation in terminology should not translate into real differences between the *mens rea* of war crimes and that of substantive grave breaches, as there is no clear textual or logical reason why they should be different. It is preferable not to create distinctions where none are needed.

53 Articles 50/51/130/147 of the four Geneva Conventions.

54 Articles 11(4), 85(3) and (4) of Protocol I.

55 *Official Records*, above note 13, Vol. IX, p. 282, CDDH/I/SR.61, para 80.

56 See above note 12.

57 Sandoz *et al.*, above note 6, paras 493(a), 3474.

58 Bothe, above note 28, p. 392; Antonio Cassese, *International Criminal Law*, Oxford University Press, New York, 2008, pp. 57–58, 92; Oren Gross, ‘The grave breaches system and the armed conflict in the former Yugoslavia’, *Michigan Journal of International Law*, Vol. 16, 1994–1995, p. 799; Mettraux, above note 38, p. 72; Gabriella Venturini, ‘War crimes in international armed conflicts’, in Mauro Politi and Giuseppe Nesi (eds), *The Rome Statute of the International Criminal Court: A Challenge to Impunity*, Ashgate, Aldershot, 2001, p. 103; Werle, above note 3, p. 298.

59 ICTY, ‘*Čelebići case*’, Case No. IT-96-21-A, Judgement (Appeals Chamber), 20 February 2001, para 422.

60 Henckaerts and Doswald-Beck, above note 32, p. 574.

61 Cassese, above note 58, pp. 62, 73; but see Werle, above note 3, pp. 104–105, 114. The ICC case-law will clarify whether the ICC Statute departs from customary law on this matter.

62 Dörmann, above note 30, p. 39.

At the ICC, there is an additional mental element to be proven for grave breaches compared with war crimes – the perpetrator’s awareness of the factual circumstances that established the protected status of the victim or property.⁶³ Due to this additional mental element, substantive grave breaches carry a heavier burden of proof than other war crimes. Thus there is little reason to rely on substantive grave breaches rather than other war crimes as far as *mens rea* is concerned.

Personal scope

All states throughout the world are today party to the four Geneva Conventions, while 26 states are not party to Protocol I.⁶⁴ All states are UN members and as such bound by the ICTY and ICTR Statutes, adopted by the UN Security Council.⁶⁵ At 1 June 2008, 108 states were party to the ICC Statute.⁶⁶ Customary international criminal law and the jurisdictional provisions of the ICC Statute overlap to a great extent, even though the latter are occasionally narrower than the corresponding substantive rules.⁶⁷ Nevertheless, states that are not bound by the ICC Statute may contend that certain of its jurisdictional provisions do not reflect war crimes under customary law, in particular those inspired by Protocol I if they are not party to that convention either. Whether or not that argument would be correct in law, this is a practical reason to prefer relying on grave breaches of the 1949 generation, which are now an undisputed part of international law, rather than other less-established grave breaches or war crimes.

In terms of victims, all grave breaches are limited by the definitions of ‘protected persons’ and ‘protected property’ of their respective conventions.⁶⁸ Protocol I expanded the content of these categories, but stopped short of including the state party’s own nationals among the protected persons.⁶⁹ The ICTY, on the other hand, has allowed protected status for victims who owe allegiance to, and are under the control of, an adverse party to the conflict, even if they share the same

63 *Ibid.*, pp. 17, 29, 128.

64 ICRC, *The ICRC: promoter and guardian of international humanitarian law*, available at <http://www.icrc.org/ihl.nsf> (visited 8 April 2009).

65 United Nations, *Member States*, available at <http://www.un.org/members/list.shtml>, visited 8 April 2009; UN Security Council Resolution 827 (1993) on establishment of a tribunal (Former Yugoslavia), S/RES/827 (1993), 25 May 1993; UN Security Council Resolution on establishment of an international tribunal and adoption of the statute of the tribunal (Rwanda), S/RES/955 (1994), 8 November 1994; Article 25 of the UN Charter.

66 International Criminal Court, *The States Parties to the Rome Statute*, available at <http://www.icc-cpi.int/Menu/ASP/states+parties> (visited 8 April 2009).

67 Henckaerts and Doswald-Beck, above note 32, pp. 574–590; Articles 8(2)(a) and (b) of the ICC Statute; Bothe, above note 28, pp. 387, 396.

68 Articles 13/13/4/4 of the four Geneva Conventions define ‘protected persons’ in general – there are no general provisions defining ‘protected property’; *Tadić*, above note 36, para 81; Mettraux, above note 38, pp. 54–55, 64–71; 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*, Martinus Nijhoff, Dordrecht, 1991, pp. 179–180; Werle, above note 3, pp. 299–300.

69 Articles 11(4) and 85(2) of Protocol I. See also Sandoz *et al.*, above note 6, paras 493(d), 3468–3470; Bothe *et al.*, above note 6, pp. 513–514; Fischer, above note 31, pp. 74–75; Roucounas, above note 46, pp. 86–95; Schutte, above note 68, pp. 186–187, 189, 192.

nationality as the perpetrators.⁷⁰ Whether the ICC will follow this broad interpretation remains for the case-law to decide.⁷¹ The grave breaches provisions in the ICC Statute maintain the varying personal scopes of the original grave breaches provisions.⁷² This translates into an additional element to be proven at the ICC for grave breaches compared with war crimes, namely that the injured person or property was protected under the Geneva Conventions.⁷³ In contemporary customary international law, the range of potential victims of war crimes is therefore broader than for substantive grave breaches.⁷⁴ Hence, where victims are concerned, it is always possible to charge an accused with a war crime rather than a substantive grave breach.

In terms of perpetrators, any physical person can carry out a war crime or a grave breach.⁷⁵ It is clear from the Geneva Conventions that a grave breach can only be perpetrated by someone from the other side in an armed conflict.⁷⁶ While there are no explicit provisions to confirm that the same holds true for war crimes in customary law, this must be the case, since international humanitarian law regulates the behaviour between opposing parties.⁷⁷ At the Additional Protocols conference, some concern was expressed that the possible perpetrators should be identified.⁷⁸ At the Rome Conference on the establishment of the ICC the issue was debated, but the idea of listing the potential perpetrators was abandoned.⁷⁹ Hence there are no differences between war crimes and grave breaches in terms of perpetrators.

Geographical scope

According to the ICTY Appeals Chamber, the application of international humanitarian law extends to 'the whole territory of the warring States'.⁸⁰ This determines in principle the area in which war crimes may occur. The geographical scope of application of the Geneva Conventions covers, as can be seen for instance

70 ICTY, *The Prosecutor v. Duško Tadić aka 'Dule'*, Case No. IT-94-1-A, Judgement (Appeals Chamber), 15 July 1999, paras 163–169. See also Fischer, above note 31, pp. 84–87; Jean-François Quéguiner, 'Dix ans après la création du tribunal pénal international pour l'ex-Yougoslavie: évaluation de l'apport de sa jurisprudence au droit international humanitaire', *International Review of the Red Cross*, Vol. 85, No. 850, 2003, pp. 299–303; Marco Sassoli and Laura M. Olson, 'The judgment of the ICTY Appeals Chamber in the *Tadić* case', *International Review of the Red Cross*, Vol. 82, No. 839, 2000, pp. 743–744.

71 Dörmann, above note 30, pp. 28–29.

72 *Ibid.*, pp. 17, 29–33; Bothe, above note 28, p. 391.

73 Dörmann, above note 30, pp. 17, 128.

74 Henckaerts and Doswald-Beck, above note 32, p. 574 ff.; Mettraux, above note 38, pp. 54–55.

75 Cassese, above note 58, pp. 53–54; Eric David, *Principes de droit des conflits armés*, Bruylant, Brussels, 2002, pp. 660–662; Dörmann, above note 30, pp. 34–37; Fischer, above note 31, pp. 88–89; Mettraux, above note 38, pp. 42, 272–278; Werle, above note 3, p. 296.

76 See note 70 above; Bothe *et al.*, above note 6, p. 115.

77 Henckaerts and Doswald-Beck, above note 32, p. 573; David, above note 75, pp. 674–676. See also Mettraux, above note 38, pp. 55, 275.

78 *Official Records*, above note 13, Vol. VI, p. 283, CDDH/SR.44, para 20.

79 'Report of the Preparatory Committee', above note 21, paras 53, 57; Dörmann, above note 30, p. 34.

80 *Tadić*, above note 36, para 70.

from Article 6(2) of the Fourth Geneva Convention and Article 3(b) of Protocol I, ‘the territory of Parties to the conflict’. This indicates in principle the geographical scope in which grave breaches may occur. While both war crimes and grave breaches can nevertheless, in certain circumstances, take place outside the territories of the opposing sides,⁸¹ it is sufficient for our purposes to conclude that there is no difference between war crimes and grave breaches in terms of their geographical scope.

Temporal scope

As regards the time of the violation, the Geneva Conventions and Protocol I thereto apply from the outset of a conflict or occupation as defined in these instruments until – depending on the rule concerned – the general close of military operations, termination of the occupation, or the final release, repatriation or re-establishment of protected persons in the hands of the enemy.⁸² Beyond this time, grave breaches are by definition excluded. As for war crimes, according to the ICTY Appeals Chamber international humanitarian law applies ‘from the initiation of [...] armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached’.⁸³ This summary pronouncement should not be interpreted as differing in any significant way from the general rule laid down in the Geneva Conventions and Protocol I.⁸⁴ In other words, there are no general differences between war crimes and grave breaches in terms of their temporal application.

The situation is different as regards the time of applicability of the respective rules. Certain war crimes and grave breaches provisions may apply to the same acts insofar as both rules were in existence at the time the acts occurred. If they were not, that could create a significant difference between them. Indeed, the law of grave breaches and war crimes has not evolved in parallel. War crimes preceded grave breaches. The concept of war crime was introduced into multilateral international law in Article 228 of the 1919 Treaty of Versailles, but without a definition of these crimes.⁸⁵ In 1946, Article 5 of the Charter of the International Military Tribunal for the Far East took essentially the same approach, while Article 6 of the Charter of the Nuremberg International Military Tribunal provided a non-limitative list of war crimes but without further definition. Despite certain

81 See David, above note 75, pp. 230–231; Robert Kolb, *Ius in bello: le droit international des conflits armés*, Helbing & Lichtenhahn, Basel, 2003, p. 106.

82 Article 5 of the First and Third, and Article 6 of the Fourth Geneva Convention; Articles 3 and 75(6) of Protocol I. Article 6(3) of the Fourth Geneva Convention does not affect the applicability of the grave breaches regime – see note 35 above.

83 *Tadić*, above note 36, para 70.

84 David, above note 75, p. 236.

85 The article provided for criminal liability for persons who ‘committed acts in violation of the laws and customs of war’.

precursors,⁸⁶ the grave breaches provisions in the Geneva Conventions of 1949 were a novel idea.⁸⁷ They were supplemented in 1977 by Protocol I, and substantive grave breaches were created by virtue of Article 85(5) thereof. In 1993, Article 3 of the ICTY Statute featured a non-limitative list of war crimes that differed in part from that of Article 6 of the Nuremberg Charter. In 1998, the jurisdictional provisions of Article 8 of the ICC Statute reflected the minimum extent of the underlying customary crimes at the time.⁸⁸ Another major step was taken in 2005 with the publication of the ICRC's study on customary international humanitarian law, which also contained a section on war crimes in customary law.⁸⁹ Although theoretically it only laid out pre-existing law, in practice it greatly facilitated the practitioner's access to customary international criminal law. However, the study did not attempt to establish when these crimes appeared in customary law. All of this shows that certain acts or omissions committed at certain moments could qualify as war crimes but not grave breaches, or vice versa, due to the fact that only one of the two rules had evolved at that time. Above all, it shows the difficulty in establishing, for many points in time, whether a war crime or substantive grave breach existed in applicable law, given how hard it is to pinpoint when a customary rule comes into existence. In practice, the temporal scope is therefore unlikely to be a determining factor in deciding whether to charge an accused with a war crime or a substantive grave breach.

Modes of liability

The Geneva Conventions only provide for liability for the commission or ordering of procedural grave breaches.⁹⁰ Attempts were made to supplement these modes of liability in Protocol I.⁹¹ Article 86 ended up introducing liability for failure to act when under a duty to do so, and superior liability for a failure to take all feasible measures to prevent or repress a breach committed by a subordinate if the superior knew or should have known about the breach. Modes of liability for war crimes, as developed by the *ad hoc* Tribunals (the International Criminal Tribunal for the former Yugoslavia, and the International Criminal Tribunal for Rwanda) and further expanded upon in Article 25 of the ICC Statute, are much more comprehensive. At least since the ICC Statute, substantive grave breaches have the same modes of liability as other war crimes, as Article 25 applies equally to both. The current trend in international criminal law is therefore to make no distinctions between substantive grave breaches and other war crimes with regard to modes of liability.

86 See Sandoz, above note 43, pp. 393–401.

87 Pictet, above note 9, p. 351; Draper, above note 2, especially p. 164.

88 See Bothe, above note 28, p. 381; Meron, above note 50, p. 149.

89 Henckaerts and Doswald-Beck, above note 32, pp. 568–621.

90 Articles 49/50/129/146 of the four Geneva Conventions.

91 *Official Records*, above note 13, Vol. III, p. 320, CDDH/I/304; Vol. IX, p. 51, CDDH/I/SR.45, para 35; and Vol. IX, p. 57, CDDH/I/SR.46, para 9.

Circumstances eliminating criminal liability

Circumstances eliminating criminal liability include justifications, excuses, amnesties, pardons, statutes of limitation, immunities, and the rule *non bis in idem*. There are no primary sources of international law suggesting any differences between grave breaches and war crimes in this regard, and there is no logical reason why there should be any. Notably, Articles 29 and 31–33 of the ICC Statute make no such distinctions. Consequently, there is no difference in international criminal law between grave breaches and war crimes when it comes to circumstances eliminating criminal liability.

As far as scope is concerned, there are thus few reasons to rely on grave breaches rather than war crimes. Substantive grave breaches cover some conduct not covered by other war crimes, but this is only relevant insofar as there are other differences in their respective legal regimes. Such differences do exist, but they favour war crimes. Only for substantive grave breaches must it be proven that the perpetrator knew that the victim belonged to an adverse party and that the injured person or property was protected under the Geneva Conventions. Grave breaches are also limited to international armed conflict, while many war crimes apply in other types of armed conflict as well. Substantive grave breaches of the 1949 generation have only one clear advantage, namely that the relevant provisions are accepted by, and clearly binding upon, all states. However, this has nothing to do with their origin as grave breaches, since several grave breaches of the 1977 generation remain highly controversial, while the qualification of many acts as war crimes is well accepted today. Procedural grave breaches are in many ways less fully formed in contemporary international law than substantive grave breaches and other war crimes, but this is because they are a mere skeleton to be fleshed out in domestic criminal law. Their procedural regime is, in comparison, well defined.

Does the procedural regime of grave breaches justify their maintenance?

The grave breaches procedural regime includes three basic obligations: (1) enact penal legislation; (2) search for suspects; and (3) judge them or hand them over for trial elsewhere.⁹² Does the procedural regime applicable to war crimes fall significantly short of this? In order to answer this question, we will examine in turn the respective rules on legislation, investigation and adjudication of grave breaches and war crimes.

92 Articles 49/50/129/146 of the four Geneva Conventions. On the use of the expression 'hand over' rather than 'extradite', see *Final Record*, above note 5, pp. 116–117. Additional Protocol I did not significantly change the procedural grave breaches regime of the Geneva Conventions, as evidenced in particular in the Protocol's Article 88.

Legislate

Under common Article 49/50/129/146 of the four Geneva Conventions, 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 of the present Convention’.⁹³ In contrast, there is a conspicuous absence in the ICC Statute of any provision obliging States Parties to enact domestic war crimes legislation corresponding to Article 8(2) of the Statute. However, if a state wishes to maintain jurisdiction over ‘its’ cases, it must avoid being deemed ‘unwilling or unable genuinely to carry out the investigation or prosecution’ by the ICC under Articles 17 and 18. To do so, it must incorporate the war crimes jurisdictional provisions of Article 8(2) in its own domestic legislation and make sure that it is able to effectively investigate and prosecute on this basis.⁹⁴ As a matter of law, there is a significant difference between the obligation to legislate for grave breaches and the option to do so for war crimes, although the state must at least provide active nationality and territorial jurisdiction for war crimes.⁹⁵ In practice, the perceived threat to the sovereignty of a state that the ICC might take over ‘its’ criminal cases appears to motivate states to enact war crimes legislation pursuant to the ICC Statute more fully than they were ever willing to enact grave breaches legislation pursuant to the Geneva Conventions and Protocol I thereto.⁹⁶ A state party to the ICC Statute would also need to include in its domestic legislation all the modes of liability contained in Article 25, which go well beyond the Geneva Conventions. Although Articles 17 and 18 do not explicitly require ‘effective penal sanctions’, this must be considered an implicit requirement in light of the object and purpose of the ICC Statute.⁹⁷ In practice, what prevents grave breaches from

93 A state’s criminal legislation could meet the requirements of the grave breaches provisions *ab initio*. See Michael Bothe, ‘The role of national law in the implementation of international humanitarian law’, in Christophe Swinarski (ed), *Studies and Essays on International Humanitarian Law and Red Cross Principles*, ICRC/Martinus Nijhoff, Geneva/The Hague, 1984, pp. 302–303, 305.

94 Darryl Robinson, ‘The Rome Statute and its impact on national law’, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds), *The Rome Statute of the International Criminal Court*, Oxford University Press, New York, 2002, pp. 1860–1866; Flavia Lattanzi, ‘The International Criminal Court and national jurisdictions’, in Mauro Politi and Giuseppe Nesi (eds), *The Rome Statute of the International Criminal Court: A Challenge to Impunity*, Ashgate, Aldershot, 2001, pp. 180–181.

95 See note 102 below; also Garraway, above note 27, p. 391.

96 See e.g. ICC Legal Tools National Implementation Legislation Database, at <http://www.icc-cpi.int/Menus/ICC/Legal%20Texts%20and%20Tools/Legal%20Tools%20Directory/09%20%20National%20implementing%20legislation/>; ICRC Database on the National Implementation of International Humanitarian Law, at <http://www.icrc.org/ihl-nat>; Boelaert-Suominen, above note 37, pp. 89–93; Richard van Elst, ‘Implementing universal jurisdiction over grave breaches of the Geneva Conventions’, *Leiden Journal of International Law*, Vol. 13, 2000, pp. 825–836, 840, 852. See also Bothe, above note 93, pp. 307–310.

97 In particular, see the affirmation in the preamble to the ICC Statute ‘that the most serious crimes of concern to the international community as a whole must not go unpunished’; see also Article 31 of the Vienna Convention on the Law of Treaties, 23 May 1969.

becoming redundant as far as criminal legislation is concerned is that significantly fewer states are party to the ICC Statute than to the Geneva Conventions and Protocol I.⁹⁸ Furthermore, some grave breaches of the 1977 generation are not, or not fully, included in the ICC's jurisdiction, so the corresponding legislative obligations in Protocol I remain relevant.⁹⁹ These discrepancies are likely to diminish over time as more states become party to the ICC Statute and the ICC's jurisdiction is expanded through revisions of its Statute.

Search and investigate

With regard to grave breaches, common Article 49/50/129/146 of the four Geneva Conventions provides that States Parties 'shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches'.¹⁰⁰ With regard to war crimes, States party to the ICC Statute have, as seen above, a strong incentive to effectively investigate and prosecute.¹⁰¹ In contemporary customary international law, 'States must investigate war crimes allegedly committed by their nationals or armed forces, or on their territory, and, if appropriate, prosecute the suspects. They must also investigate other war crimes over which they have jurisdiction and, if appropriate, prosecute the suspects.'¹⁰² Thus while customary law requires a criminal investigation into war crimes, the Geneva Conventions require a search for grave breaches suspects. This difference makes some sense in light of the different scopes of the two obligations. For war crimes, the obligation is potentially limited to active nationality and territorial jurisdiction (unless the state's law gives its courts jurisdiction on other bases too). The state exercising such jurisdiction will generally be an appropriate state for opening criminal investigations. By contrast, the procedural grave breaches regime extends the obligation to search to any state party, at least if and when the suspect is on its territory.¹⁰³ Not every state can, or should, open a criminal investigation, but it can keep a lookout for the suspect if he or she enters its territory. In this area, grave breaches therefore carry a broader but less demanding obligation than war crimes.

Judge or hand over

Common Article 49/50/129/146 of the four Geneva Conventions provides that states parties 'shall bring [persons alleged to have committed, or to have ordered to

98 See notes 64 and 66 above.

99 The grave breaches in Articles 85(3)(c) and 85(4)(b) and (c) of Protocol I are omitted in the ICC Statute. See Knut Dörmann, 'War crimes under the Rome Statute of the International Criminal Court, with a special focus on the negotiations on the Elements of Crimes', *Max Planck Yearbook of United Nations Law*, Vol. 7, 2003, pp. 345, 348; von Hebel and Robinson, above note 24, pp. 104, 124.

100 See also Article 88(1) of Protocol I.

101 See note 94 above.

102 Henckaerts and Doswald-Beck, above note 32, p. 607 (Rule 158); see also p. 618 (Rule 161). For a discussion of the meaning of 'appropriate', see Garraway, above note 27, p. 392.

103 Pictet, above note 8, p. 593. This applies equally to all four Geneva Conventions.

be committed, grave breaches], regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a *prima facie* case.¹⁰⁴ The state detaining a grave breaches suspect thus has a limited choice between either trying the suspect or handing him or her over to another state for the purpose of trial (*aut dedere aut judicare*). This system requires States Parties to incorporate universal jurisdiction over grave breaches in their domestic law.¹⁰⁵ In contemporary customary international law, 'States have the right to vest universal jurisdiction in their national courts over war crimes'.¹⁰⁶ If a state has jurisdiction over a war crimes suspect, it must prosecute him or her.¹⁰⁷ Thus from the perspective of domestic criminal jurisdiction, grave breaches carry mandatory universal jurisdiction, while other war crimes carry permissive universal jurisdiction. This is a significant difference in theory, as a state must prosecute or hand over a person accused of a grave breach, while the state would be legally entitled under international law not to assert jurisdiction over war crime suspects other than on the basis of territoriality or active nationality. In practice, however, states have often failed to give themselves the necessary bases for jurisdiction over procedural grave breaches. Where an international court has jurisdiction, this difference between grave breaches and war crimes disappears.¹⁰⁸

Conclusion

These procedural differences between war crimes and grave breaches might in theory maintain the importance of the latter in international law. However, the procedural grave breaches system of the Geneva Conventions and Protocol I was

104 See also Article 88(2) of Protocol I.

105 *Tadić*, above note 36, paras 79–80; van Elst, above note 96, pp. 819–822. The obligation to judge or hand over also applies to neutral states – *Final Record*, above note 5, p. 116; van Elst, above note 96, p. 823; Meron, above note 50, p. 127; but see also Roling, above note 46, p. 202; Roucouas, above note 46, p. 67.

106 Henckaerts and Doswald-Beck, above note 32, p. 604 (Rule 157).

107 *Ibid.*, pp. 607–608 (Rule 158). The preamble to the ICC Statute recalls that 'it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes'.

108 The grave breaches regime, as originally conceived, did not exclude that extradition could be directed to an international rather than a national court – Pictet, above note 8, p. 593; M. Cherif Bassiouni, 'Repression of breaches of the Geneva Conventions under the Draft Additional Protocol to the Geneva Conventions of August 12, 1949', *Rutgers Law Journal*, Vol. 8, 1977, pp. 196–197; Antonio Cassese, 'On the current trend towards criminal prosecution and punishment of breaches of international humanitarian law', *European Journal of International Law*, Vol. 9, 1998, p. 7; van Elst, above note 96, pp. 844–845; Gross, above note 58, p. 794; Meron, above note 50, pp. 117–118; but see also Draper, above note 1, pp. 38, 42. When an international court has jurisdiction, its procedural regime replaces that of grave breaches – *Tadić*, above note 36, para 81; Gross, above note 58, p. 794; Mettraux, above note 38, p. 55; Venturini, above note 58, p. 97.

barely put into practice until the 1990s, owing to huge practical, legal and/or political difficulties regarding handover and prosecution.¹⁰⁹ At the same time, there was also scant war crimes litigation beyond the aftermath of the Second World War.

Things changed with the adoption of the ICTY Statute in 1993. Grave breaches came to serve as a major building block of international criminal law at a time when people were grasping at straws to put this body of law together. Once grave breaches had fulfilled this purpose, they were abandoned in ICTY practice. However, substantive grave breaches are not defunct before international or mixed courts. The ICC Prosecution has recently filed charges that include counts based on grave breaches provisions in the ICC Statute.¹¹⁰ Investigating judges of the Extraordinary Chambers in the Courts of Cambodia have recently charged Kaing Guek Eav ('Duch') with grave breaches rather than war crimes.¹¹¹

The ground swell initiated by the ICTY also revived the original intent of the grave breaches regime. For the first time, national courts heard cases based on grave breaches. Other charges brought before domestic courts were based on war crimes, which generally have a more practical legal regime. However, the idea that these courts could hear such cases with little or no link to the alleged crimes originated from the doctrine of universal jurisdiction over grave breaches.

Today, grave breaches provisions, at least those of the 1949 generation, remains privileged as tried and true black-letter law, compared with the nebulous customary law origins of war crimes. At the same time, this has arrested the development of the grave breaches laid down in the Geneva Conventions and Protocol I, whereas the more dynamic war crimes have evolved and adapted to new realities. With time, war crimes will no doubt become as well accepted in law as grave breaches. They will benefit from clear definitions, yet retain the advantage of adapting to the evolution of international customary law. Any comparative advantage of grave breaches will fade away. The real value of grave breaches may

109 Cassese, above note 108, pp. 5–7; Draper, above note 2, pp. 159–161, 168; Draper, above note 1, pp. 39–42, 51; van Elst, above note 96, pp. 841, 850–853; Christine Van den Wyngaert, 'The suppression of war crimes under Additional Protocol I', in Astrid J.M. Delissen and Gerard J. Tanja (eds), *Humanitarian Law of Armed Conflict: Challenges Ahead*, Martinus Nijhoff, Dordrecht, 1991, pp. 202–205. See also note 96 above.

110 See note 52 above.

111 *Kaing Guek Eav*, OCJ, *Closing order indicting Kaing Guek Eav alias Duch*, 8 August 2008, p. 44, available at http://www.cambodiatribunal.org/CTM/Closing_order_indicting_Kaing_Guek_Eav_ENG.pdf?phpMyAdmin=8319ad34ce0db941ff04d8c788f6365e&phpMyAdmin=ou7lpwtyV9avP1XmRZP6FzDQzg3 (visited 21 April 2009). This choice was probably due to the fact that the founding instruments give the Extraordinary Chambers clear jurisdiction over grave breaches but generally not over other war crimes (see Article 9 of the 'Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea' and Articles 2, 6 and 7 of the Law on the Establishment of the Extraordinary Chambers), which itself is probably due to Cambodia's greater acceptance of grave breaches of the 1949 generation.

therefore be historical, as a stepping stone towards broader and better conceived rules governing war crimes. Grave breaches are becoming part of this war crimes regime, in the shape of substantive grave breaches. They will leave a lasting mark, which eventually the observer may only recognize if he or she knows what to look for.