Implementing Universal Jurisdiction Over Grave Breaches of the Geneva Conventions

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Abstract: As the most serious war crimes (grave breaches) should not be left unpunished, the 1949 Geneva Conventions contain an unusually worded obligation to either prosecute such a suspected war criminal or to hand him over to another country to be tried there (*aut judicare aut dedere* in stead of *aut dedere aut judicare*). Fifty years on, less than one in six of the parties to the Conventions have established universal jurisdiction over grave breaches which is necessary to prosecute a suspect if he was to be found in their country. An assessment and classification of the Conventions, national laws, prosecutions and practical obstacles.

> But if, what God forbid, these Conventions should ever have to be applied, they must be obeyed.
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> *M.W. Mouton,*
> *Diplomatic Conference, Geneva 16 July 1949*[1]

1. INTRODUCTION: PRESENCE OF SUSPECTED WAR CRIMINALS

Like other countries, the Netherlands is increasingly becoming aware of the presence in its territory of foreigners who are suspected of having committed war crimes in their country of origin. A recent Dutch government paper refers to 92 cases which for a large part (32 cases) concern crimes committed in the former Yugoslavia.[2] To give some figures from other countries: investigations have been launched in Belgium against 34 suspected war criminals; six of whom have been arrested.[3] In Germany 50 persons are suspected of having been involved in

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1. Final Record of the Diplomatic Conference of Geneva of 1949, Vol. II-B, at 31.
2. Kamerstukken II (Parliamentary Papers) 1998-1999, 26 262, No. 5, Lijst van vragen en antwoorden (List of Questions and Answers), at 5.
3. Gedr. St. Senaat 1-611/7, Parlementaire commissie van onderzoek betreffende de gebeurtenissen in Rwanda: Verslag (6 December 1997), at 665-674 (Printed Senate Documents 1-611/7, Parliamentary Committee of Inquiry into the Events in Rwanda: Report). *See* L. Reydams, *Universal Jurisdiction over Atrocities in Rwanda: Theory and Practice*, 4 European Journal of Crime Criminal Law

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war crimes committed in the former Yugoslavia.[4] Sixty "human rights violators" have been reported in the United States.[5] Finally, the annual report of Canada's War Crimes Program makes a useful distinction between 339 suspected so-called modern-day war criminals as opposed to 90 WW II related war criminals who are present in Canada and are currently being investigated.[6]

Whereas some countries have chosen to expel suspected foreign war criminals, others have brought a handful of them before their own courts. An example of the first is Canada which between May 1999 and May 2000 removed 37 suspected war criminals from its territory. Over the past few years it has removed at least 144 suspected modern-day war criminals, while approximately over 1000 trying to gain entry were suspected of having committed war crimes in their country of origin and were subsequently denied entry.[7] Germany is one of the countries which has actually brought suspected war criminals before its own courts.

During most of the trials against suspected war criminals it has been stressed that the countries concerned were obliged to prosecute. For instance, the Bavarian High Court (*Bayerische Oberste Landesgericht*) stated in the case against Novislav Djajić that

> [t]he Federal German Republic is, by accession effective since 3 March 1955 [...] to the IVth Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949 [...], obliged to punish grave breaches as described in Article 147 of the IVth Convention'.[8]

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and Criminal Justice 18, at 35 (1996). Recently Augustin Ndindiliyimana was arrested, *see Aanhouding voor volkerenmoord* (Arrest for Genocide), NRC Handelsblad, 2 February 2000, at 4. He was transferred to the ICTR on 22 April 2000, *see* ICTR/INFO-9-2-230EN (25 April 2000) (www.ictr.org *via* press releases). *See also infra* note 136.

4. S. Ulrich, *Bosnischer Serbe wegen Völkermords vor Gericht* (Bosnian Serb in court for genocide), Süddeutsche Zeitung, 2 September 1999, at 6.
5. Hearing on HR 3058 Before the Subcommittee on Immigration and Claims of the House Committee on the Judiciary, 106th Cong., 1st Sess. (17 February 2000).
6. Department of Justice & Department of Citizenship and Immigration, Canada's War Crimes Program 1999-2000, at 15, App. D. Since 1979 59 World War II related war criminals have been stripped of US citizenship, 47 have been deported and 300 possible war criminals living in the US are under investigation by the Office of Special Investigations, *see* K.R. Roane, *Retired Tailor Is Accused of Nazi Death Camp Role*, New York Times, 4 June 1998, at B5.
7. *Id.*, App. F, at 14: "581 individuals who applied to come to Canada were refused entry for war crimes related allegations"; House of Commons Hansard, 11 December 1997, at 1830 (Peter Adams – Parliamentary Secretary to Leader of the Government in the House of Commons); House of Commons Hansard, 17 November 1997, at 1450 (Lucienne Robillard – Minister of Citizenship and Immigration).
8. Bayerische Oberste Landesgericht, 23 May 1997 – 3 St 20/96, Neue Juristische Wochenschrift 392, at 393 (1998): "Die Bundesrepublik Deutschland ist durch den am 3.3.1955 wirksam gewordenen Beitritt [...] zum IV. Genfer Abkommen zum Schutz von Zivilpersonen in Kriegszeiten vom 12.8.1949 [...] zur Bestrafung schwerer Verletzungen im Sinn des Art. 147 des IV. Genfer Abkommens [...] verpflichtet."

An obligation to prosecute foreign war criminals raises important questions with regard to the state-practice briefly referred to above. How does the obligation, for instance, relate to the practice of some countries not to prosecute but to expel suspected war criminals? How does it relate to the current situation in the Netherlands where it has proved difficult to expel suspected foreign war criminals? At least four of them have actually obtained Dutch nationality.[9] How does it relate to the presence in the Netherlands of almost a dozen Dutch mercenaries who have operated in the former Yugoslavia?[10]

Where there is an obligation to prosecute, how can the relatively large number of suspected war criminals present in several countries be reconciled with the fact that only a handful of criminal proceedings have been initiated over the last few years. What is the exact content of the obligation to prosecute which is included in the Geneva Conventions (§ 2)? What measures have to be taken to enable the prosecution of foreigners who are suspected of having committed war crimes abroad (§ 3)? What – in particular legal – obstacles hinder the initiation of criminal proceeding before a national court against foreign war criminals (§ 4)?

2. THE OBLIGATION TO PROSECUTE

Articles 49, 50, 129 and 146 of the four Geneva Conventions contain the obligation to prosecute certain war crimes. The second paragraphs of everyone of these articles read as follows:

> Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, 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.[11]

9. Kamerstukken II 1998-1999, 26 262 No. 5, *supra* note 2, at 7.
10. R. Siebelink, *Het bloedbad van Medak* (The Medak Massacre), Drents Groningse Dagbladen, 16 January 1997, at AE 17. *See* H. van Alphen, *Servië beschuldigt Nederlanders* (Serbia accuses Dutch nationals), Haagsche Courant, 15 April 1997, at 1, A3. One of the mercenaries (M. van Eekeren) relates his story *in* H. Ruigrok, *Interview met een huurling* (Interview with a mercenary), 32 Wordt Vervolgd 32 (1999/12).
11. Art. 49, second paragraph, (I) Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, 75 UNTS 31 (1950); Art. 50, second paragraph, (II) Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949, 75 UNTS 85 (1950); Art. 129, second paragraph, (III) Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949, 75 UNTS 135 (1950); Art. 146, second paragraph, (IV) Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949, 75 UNTS 287 (1950).

Three features of this obligation to either prosecute or hand a suspect over, deserve some closer attention. First of all, the obligation to prosecute does not extend to all war crimes. Secondly, the provision emphasises the obligation to prosecute. Finally, the obligation to prosecute as such implies the necessary jurisdiction to do so must be established.

2.1. The obligation covers grave breaches

The obligation to prosecute does not extend to all war crimes but is limited to a certain category referred to as grave breaches. The precise content of this category varies somewhat in the four conventions, but in every case includes wilful killing, torture or inhuman treatment, including biological experiments, and wilfully causing great suffering or serious injury to body or health.[12]

If war crimes do not amount to a grave breach, the Geneva Conventions do not impose an obligation to prosecute. Therefore, countries which fail to prosecute so-called modern-day war criminals do not necessarily violate this obligation to prosecute. Moreover, some crimes might be called war crimes which, technically speaking, are not. Violations of human rights as such, for instance, do not constitute a war crime. Although war crimes and grave breaches technically are not coterminous, the term 'war crimes' will hereafter be used as a synonym for grave breaches.

Moreover, the provisions which relate to the repression of grave breaches are only applicable during an international armed conflict.[13] This means that if an act, for example, constitutes torture, a party to the Geneva Conventions is only obligated to prosecute the suspect under the Conventions if the act was committed during an international armed conflict.

2.2. Prosecution is put first

The wording of the provision emphasises the obligation to prosecute. A full stop separates the obligation to prosecute from the alternative of handing over a suspect which, moreover, is offered merely as a possibility ("if it prefers"). A comparison with cognate obligations in other conventions illustrates this. An apt example is the provision in the UN Convention Against Torture of 1984,[14] which uses a formulation that also appears in a wide range of other Conventions con-

12. Art. 50 (I), 51 (II), 130 (III), 147 (IV), *id.*
13. Prosecutor v. Tadić, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-AR72, A.Ch., 2 October 1995, paras. 79-84.
14. 1984 UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 UNTS 24841, at 85 (1987); 23 ILM 1027 (1984).

cerned with crimes against international law.[15] Paragraph One of Article 7 is as follows:

> The State Party in the territory under whose jurisdiction a person alleged to have committed any offence referred to in article 4 [torture] is found shall [...] if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution.[16]

Whereas such a provision might be more open to an interpretation which says that the obligation to prosecute is secondary to the obligation to extradite, the formulation in the Geneva Conventions explicitly places the obligation to prosecute first. This refutes the argument that an obligation to prosecute would only emanate from a declined request to hand a suspect over.

The unequivocal obligation to prosecute in the Geneva Conventions deserves credit, though its clarity on this point was probably why the same formulation has not been adopted in any subsequent Convention, as those involved in drafting such Conventions preferred a 'more flexible' provision.

According to the Commentary to the Conventions the formula either to prosecute or to hand over was based on the Grotian maxim *aut dedere aut punire*.[17] Even though this maxim, since the time of Grotius, has been reworded as *aut dedere aut judicare*, it still suggests that extradition has priority once a suspected war criminal has been found.[18] In order to correctly reflect the position I propose to call the obligation as it is worded in the Geneva Conventions *aut judicare aut dedere* because the obligation to initiate criminal proceedings comes first and exists independently of the question whether or not a request for extradition has been received.

2.3. The obligation to prosecute implies jurisdiction

It has been argued that the Geneva Conventions do not bind contracting parties to establish the jurisdictional basis necessary to bring those responsible for grave breaches before their courts. When hearings were held before a US Congress Committee on a Bill which would result in the War Crimes Act 1996, one of the expert-witnesses stated that "[t]here is no reason why mere seeking requires the

15. Art. 7 of the Convention for the Suppression of Unlawful Seizure of Aircraft, 859/860 UNTS I 12 325 (1973), at 105; Art. 8, first paragraph, of the International Convention Against the Taking of Hostages, 18 ILM 1456 (1979); Art. 12 of the International Convention Against the Recruitment, Use, Financing and Training of Mercenaries, 29 ILM 91 (1990).
16. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *supra* note 14.
17. J.S. Pictet (Ed.), Commentary IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War 585 (1958).
18. *Compare* M.Ch. Bassiouni & E.M. Wise, Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law 4-5 (1995).

exercise of criminal jurisdiction. Nor do the Conventions otherwise require the exercise of criminal jurisdiction."[19]

Interestingly though, this issue was raised by the Russian delegate at the Diplomatic Conference where the Conventions were concluded. Annoyed by yet another Russian amendment which did not take into account anything raised at the preceding debates, the UK delegate pointed out a revealing note which until that time had been kept out of the official records of the conference. The note contradicts the opinion that the Conventions avoid criminal jurisdiction.

The UK delegate had presented a "note of explanation" when the paragraph that expressed the obligation to prosecute or hand over was under discussion. It was felt "quite unnecessary" to specify the obligation on a High Contracting Party to establish jurisdiction since this followed from the obligation to bring those responsible before its courts. The relevant part of the explanatory note reads:

> If the High Contracting Parties carry out their obligations, under the first paragraph of this Article, to enact any legislation necessary to provide effective penal sanctions for persons committing [...], grave breaches of the Convention, it necessarily follows that they will be able to bring before their Courts any such persons. [...] it is obvious that the Courts of such a State will have jurisdiction to try any person committing such an offence. It is, therefore, quite unnecessary to specify the source from which the jurisdiction of the Court arises in the second paragraph [...][20]

This excerpt can be regarded as persuasive evidence that the Geneva Conventions *do* place a positive obligation on High Contracting to establish the necessary jurisdictional basis to enable them to bring those responsible before their courts. Almost all other Conventions regarding crimes against international law include a separate provision in order to provide the basis on which criminal proceedings may be initiated, next to the obligation *aut judicare aut dedere*.[21]

Since the obligation to prosecute covers all those responsible for grave breaches "regardless of their nationality," the basis of jurisdiction must be universal jurisdiction, as will be demonstrated in the next section.

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19. A.P. Rubin, *Formal Statement on HR 2587*, at 4, reproduced as Appendix 3 to Hearing on HR 2587 Before the Subcommittee On Immigration and Claims of the House Committee on the Judiciary, 104th Cong., 2nd Sess. (12 June 1996), at 56.
20. Final Record, Vol. II-B, at 364 (22nd Plenary Meeting, 1 August 1949, Gutteridge, United Kingdom).
21. *Compare* Art. 4(2) of the Convention for the Suppression of Unlawful Seizure of Aircraft; Art. 5(2) of the International Convention Against the Taking of Hostages; Art. 9(2) of the International Convention Against the Recruitment, Use, Financing and Training of Mercenaries; all *supra* note 15.

3. THE OBLIGATION TO ESTABLISH UNIVERSAL JURISDICTION

If States are to be able to prosecute all those responsible for grave breaches "regardless of their nationality," universal jurisdiction is indispensable. Given the broad scope of the obligation to bring those responsible "before its own courts" – unrestricted as it is – prosecuting anybody is only possible by providing for jurisdiction over everybody. In this section, I will address the question how the obligation to establish universal jurisdiction over grave breaches is met by the Parties to the Conventions in their national legislation. But before doing so, I will turn to the *travaux préparatoires* in order to provide a definition of universal jurisdiction and to elaborate on the need to establish such a basis of jurisdiction.

3.1. Travaux préparatoires on universal jurisdiction

An incident that occurred at the Diplomatic Conference at which the Conventions were concluded amply demonstrates the intention of the negotiators to include an obligation to establish universal jurisdiction (§ 3.1.1.). The same incident is also appropriate to provide a definition of universal jurisdiction (§ 3.1.2.) which, moreover, coincides best with the idea underlying the insertion of a new penal regime in the Geneva Conventions (§ 3.1.3.).

3.1.1. Universal jurisdiction included

When the final draft provision to either prosecute or hand over was under discussion before a Committee at the Diplomatic Conference, an Italian delegate proposed to impose this obligation only on the "Parties to the Conflict" instead of "each Contracting Party." This restriction was rejected by Mouton, the Dutch delegate, to whom the commentaries refer as the "main-artisan" of the provisions on penal repression.[22] The report of the Committee Proceedings is illuminating:

> [T]he Italian Delegate proposed to limit the obligation of the Parties to the conflict, to search for persons alleged to have committed any of the grave breaches and to bring them before the courts.
>
> The Netherlands Delegate (Mouton) answered that each Contracting Party should be under this obligation, even if neutral in a conflict. The principle of universality should be applied here.[23]

22. Pictet, *supra* note 17, at 587.
23. Fourth Report drawn up by the Special Committee of the Joint Committee 12 July 1949, Final Record, Vol. II-B, at 116; ICRC Doc. CDG/MIX/SC.1/CR.30, 27 June 1949, at 3.

The Italian delegate subsequently withdrew his proposal.

Although universal jurisdiction was not subsequently discussed at the Diplomatic Conference again, the two proposals preceding the draft referred to above which was discussed by the Committee were also based on universal jurisdiction. The main points of both proposals agree with the draft, while the draft agrees with the provision eventually included in the Conventions.

The most talked-about proposal was produced in December 1948 by five experts among whom were Mouton and the ICRC's Honorary President Max Huber. It included universal jurisdiction, as grave breaches had to be punished "by the tribunals of any of the High Contracting Parties."[24] If this formula left room for any doubt, the Commentary to the provision is concise: "[t]he principle of the universality of jurisdiction has been adopted for the purpose of repressing such acts."[25] But as the proposals also included provisions on obedience to superior orders, acting in pursuance of a law, and referred to a then non-existent international criminal tribunal, they were considered too controversial and were subsequently rejected when they were put before the Diplomatic Conference.[26] Following negotiations in the corridors of the Conference, an amendment was produced which was introduced and discussed in the Committee as described above.[27]

Earlier, at a meeting where the results of the 1947 Conference of Government Experts were evaluated, another provision had been introduced which was also based on universal jurisdiction. This was the first proposal that explicitly included the obligation either to prosecute or hand over a suspected war criminal. The obligation to prosecute included universal jurisdiction since – according to a member of the ICRC who explained the provision drafted by Max Huber – it meant that "he who would commit an act contrary to the Conventions had to be punished wherever he was found."[28] Such jurisdiction for the *judex deprehensionis* is synonymous with universal jurisdiction.[29]

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24. *See infra* note 25.
25. ICRC, Remarks and Proposals submitted by the International Committee of the Red Cross 18-19 (1949); *see* for the original French version, CICR, Remarques et propositions du comité international de la croix-rouge 19 (1949). Article 40 reads: "[G]rave breaches of the Convention shall be punished as crimes against the law of nations by the tribunals of any of the High Contracting Parties or by any international jurisdiction, the competence of which has been recognised by them."
26. Final Record, Vol. II-B, at 115; R.T. Yingling & R.W. Ginnane, *The Geneva Conventions of 1949*, 46 American Journal of International Law 393, at 424 (1952).
27. Final Record, Vol. III, at 42, No. 49 Amendments Australia, Belgium, Brazil, France, Italy, Netherlands, Norway, United Kingdom, United States of America and Switzerland (1949).
28. Commission des Sociétés Nationales de la Croix-Rouge pour l'étude des projets de Conventions Nouvelles, Sténogramme de la session tenue à Genève les 15 et 16 septembre 1947 (1947); Archive Dutch Red Cross, Inv. No. 269, at 66 (C. Pilloud, 15 September 1947): "Nous sommes partie de l'idée suivante: c'est que celui qui commet un acte contraire aux Conventions doit pouvoir être puni où qu'il se trouve." *See* the identical articles put by the ICRC to the XVIIth conference: ICRC, *Draft Revised or New Conventions for the Protection of War Victims (1948)*, No. 4a, Archive of the ICRC, Geneva, Box B III 1 A, at 29, 51, 136-137, 215: "The Contracting Parties shall be under the obligation to

3.1.2. A definition of universal jurisdiction

Universal jurisdiction relates to crimes considered to be of concern to the international community at large,[30] and can be established or exercised regardless of the *locus delicti,* the nationality of the suspect, and the nationality of the victim. As regards the Geneva Conventions, the principle of extended protection has to be distinguished from universal jurisdiction in particular, as is illustrated by the Italian proposal made at the Diplomatic Conference referred to above (§3.1.1.).

If the obligation either to prosecute or hand over were to be limited to "Parties to the conflict" as an Italian delegate had proposed, the principle of extended protection would have applied. Jurisdiction would be exercised by belligerents not by virtue of the nature of the crime involved, but to protect their own national interests or the national interests of their fellow-belligerents.[31] Although Röling vigorously contended that the provisions on the penal repression of breaches only obtain between belligerents,[32] the idea that the Geneva Conventions were based on the principle of extended protection instead of universal jurisdiction was rejected when the Italian proposal was withdrawn.[33] Universal jurisdiction was included in order to enable a prosecution wherever a suspected war criminal is found. That is why universal jurisdiction is sometimes referred to as the *Weltrechtsergreifungsprinzip.*[34]

3.1.3. Why universal jurisdiction was included

The inclusion of universal jurisdiction in the four Geneva Conventions is essentially explained by the *de facto* impunity awarded to those responsible for previ-

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search for persons charged with breaches of the present Convention, whatever their nationality. They shall further, in accordance with their national legislation or with the Conventions for the repression of acts considered as war crimes, refer them for trial to their own courts, or hand them over for judgment to another Contracting Party."

29. G. Solna, Das Weltrechtsprinzip im internationalen Strafrecht (Universal Jurisdiction in International Criminal Law) 14 (1927).
30. Restatement of the Law (Third) § 404 "certain offenses recognized by the community of nations as of universal concern"; K.C. Randall, *Universal Jurisdiction Under International Law*, 66 Texas Law Review 785, at 814 (1988): "particular crimes of international concern."
31. I. Cameron, The Protective Principle of International Criminal Jurisdiction 81 (1994): "The conceptual distinction between the universality and protective principles is that the purpose of the former is to protect the interests of the international community, or of individuals in the states who make up that community, whereas the latter is to protect the interests of particular states."
32. B.V.A. Röling, *The Law of War and the National Jurisdiction Since 1945*, 100 RdC 323, at 359-363 (1960-II): "But, apart from specific provisions applicable to neutrals, the Conventions *obtain only between belligerents*. And between belligerents the principle of universality can be recognized, but, then, it signifies nothing more that the principle of extended protection."
33. Th. Meron, *International Criminalization of Internal Atrocities*, 89 American Journal of International Law 554, at 567 (1995): "universal jurisdiction, the right of third states to prosecute those who commit international offenses."
34. G.F. Von Cleric, *Das Weltrechtsergreifungsprinzip*, 16 Schweizerische Juristen-Zeitung 345 (1920).

ous violations of humanitarian law. Following WW I, only a handful of suspected war criminals were prosecuted and they were either acquitted or their sentences were reduced significantly.[35] In addition, a 1934 ICRC study showed that the obligation to enact special legislation imposing sanctions on those who violate certain provisions of the 1929 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick of Armies in the Field, were hardly complied with.[36] It was therefore felt necessary to include a stricter regime on the penal repression of violations.[37] This resulted in what have been called "little parcels of international law"[38] of which the obligation either to prosecute or to hand over is the cornerstone.

Why the *aut judicare aut dedere* obligation – including universal jurisdiction – was incorporated is probably best summarized in the ICRC-report *Repression of Infringements of the Humanitarian Conventions*. It identifies six principles that guided the ICRC regarding the proposals to repress violations. The fifth principle is as follows:

> (5) – No violation of the Convention shall remain unpunished. The State which detains a person presumed guilty must therefore bring him to trial or hand him over to another State for trial.[39]

To this a passionate reason was added in the commentary to the proposals made by the five experts in December 1948. Their proposal included a summary of particularly serious violations of the Convention which, if they went unpunished, would lead to the "dégradation de la personalité et la régression du concept d'humanité." In order to repress such acts, "[L]e principe de l'universalité de juridiction a été adopté pour la répression de tels actes."[40]

Universal jurisdiction was included in the Geneva Conventions to end the *de facto* impunity that existed with regard to violations of humanitarian law prior to WW II. Wherever a suspected war criminal was to be found, universal jurisdic-

35. J.F. Willis, Prologue To Nuremberg (The Politics and Diplomacy of Punishing War Criminals of the First World War) 126-147 (1982).
36. ICRC, Recueil de Textes relatifs à l'application de la Convention de Genève et à l'action des Sociétés nationales dans les États parties à cette Convention (1934); Art. 29 of the Convention for the Amelioration of the Condition of the Wounded and Sick of Armies in the Field, 118 LNTS 303 (1931-1932).
37. Final Record, Vol. II-B, at 114-115; ICRC, Repression of Infringements of the Humanitarian Conventions, No. 20A, (1948), ICRC Archive Geneva, Box B III 6, at 1 (1948).
38. Conference d'experts gouvernementaux pour l'étude des Conventions protégeant les victimes de la guerre, Geneva 14-26 April 1947, Proces-verbaux, Assemblées plénières, Vol. I, Archive Dutch Red Cross, Inv. No. 270, at 42: "de petites parcelles de droit international penal" (H.J. Phillimore, 24 April 1947). French was the official language; *id.*, at 15.
39. ICRC, Repression of Infringements of the Humanitarian Conventions, *supra* note 37, at 2.
40. CICR, Remarques et propositions, *supra* note 25, at 20-21; the 'passion' is lost in the translation; ICRC, Remarks and Proposals, *supra* note 25, at 20-21 "degradation of human personality and a diminished sense of human worth. [...] The principle of the universality of jurisdiction has been adopted for the purpose of repressing such acts."

tion – included in the obligation to either prosecute or hand over a suspect for trial elsewhere – would enable criminal proceedings to be initiated and would therefore ensure that no one would escape his criminal responsibility for grave breaches.

3.2. Universal jurisdiction over grave breaches in national legislation

Assuming that the "little parcels of international law" concerned are not self-executing,[41] legislation is required to comply with the obligation to establish universal jurisdiction over grave breaches of the Geneva Conventions. This section will describe and evaluate to what extent grave breaches are penalised as such (§ 3.2.1.) and to what extent universal jurisdiction is established in national legal systems (§ 3.2.2.). A table will show the status of the way universal jurisdiction over grave breaches is implemented by most of the parties to the Geneva Conventions. The outcome of this analyses is that most High Contracting Parties do not comply with this obligation, and some reasons will be postulated for this shortcoming (§ 3.2.3.). Finally, a recently enacted Belgian law offers a valuable model for countries that so far have failed to meet their obligation (§ 3.2.4.).

3.2.1. Grave breaches

Only 35 High Contracting Parties have penalised all grave breaches as such. While an additional 38 have penalised most or some of the grave breaches as such *(a)*, the majority have failed to penalise grave breaches as such. Some of them explicitly take the view that the common crimes included in their penal code already sufficiently cover acts that are defined as grave breaches in the Conventions *(b)*.

(a) Grave breaches as such. Most of the 35 countries that have penalised all grave breaches have done so by promulgating a special Act (23) which incorporates the grave breaches as defined in the Conventions or has a definition that includes grave breaches. Switzerland, Norway and Venezuala incorporate all grave breaches *via* their military penal code. Nine countries have incorporated all grave breaches as such in their penal code.

41. Cour de Cassation (ch. crim.) 26 March 1996, Revue de science criminelle et de droit comparé 684, at 685-686 (1996); reported *in* YIHL 442 (1998). *Compare* C. van den Wijngaert, *De toepassing van de strafwet in de ruimte. Enkele beschouwingen, in* R. Bützler *et al.* (Eds.), Liber Amicorum Frédéric Dumon 501, at 507 (1983) "in afwachting daarvan [de nodige implementatiewetgeving] kan de Belgische strafrechter zijn bevoegdheid rechtstreeks uit de conventies putten, die voor wat de bevoegdheidsregels betreft directe werking hebben" (awaiting [legislation implementing the Geneva Conventions] the Belgian criminal courts can derive their jurisdiction straight from the Conventions, as their provisions on jurisdiction are self-executing); E. Lauterpacht, *The Contemporary Practice of the United Kingdom in the field of International Law – Survey and Comment V*, 7 International and Comparative Law Quarterly 92, at 135, n. 18 (1957).

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The UK Geneva Conventions Act 1957[42] incorporates and thereby penalises the grave breaches exactly as defined in the Conventions. Section 1 of the Act at the time it was enacted reads as follows:

> 1. (1) Any person, whatever his nationality, who, whether in or outside the United Kingdom, commits, or aids, abets or procures the commission by any other person of, any such grave breach of any of the scheduled Conventions as is referred to in the following articles respectively of those Conventions [art. 50 (I); art. 51 (II); art. 130 (III); art. 147 (IV)] shall be guilty of felony and on conviction thereof.[43]

At least four former UK dependencies have promulgated their own Geneva Conventions Act.[44] Ireland, India and recently Zimbabwe have promulgated Acts independent from but very similar to the UK Geneva Conventions Act.

Section 8 of the Dutch Crimes in Wartime Act 1952[45] penalises "violations of the laws and customs of war" which include grave breaches of the Geneva Conventions.[46] Of particular interest is the Belgian 1993 Act Relative to the Punishment of Grave Breaches of the International Geneva Conventions of 12 August 1949 and the Additional Protocols I and II of 8 June 1977,[47] of which Section 1 defines all grave breaches in detail. It is "un modèle unique d'incrimination spécifique complète."[48]

Whereas the Netherlands and Belgium have penalised grave breaches in a special Act, Switzerland modified its Military Penal Code to do so.[49] Section 109 of the Swiss Military Penal Code refers to the "laws and customs of war." As the accompanying Message by the Federal Council states, "[o]ne has to think of the acts considered in the four Geneva Conventions to be 'grave breaches'."[50]

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42. 1957 Geneva Conventions Act, The Public General Acts 1957, at 543 (1958).
43. *Id.*, at 543.
44. Kenya (1968 Geneva Conventions Act); Nigeria (1990 Geneva Conventions Act); Seychelles (1985 Geneva Conventions Act) and Uganda (1964 Geneva Conventions Act). Paragraph 2 of the Geneva Conventions Act (Colonial Territories) Order in Council, 1959 also referred to (nowadays a party the Conventions themselves) the Bahamas, the British Solomon Islands, Cyprus, Fiji, Gambia, Sierra Leone and Swaziland, reproduced *in* ICRC Doc. Conf. D 4 a/1, note 72 *infra*, at 158.
45. Staatsblad (Official Gazette), No. 408 (1952).
46. *See* the decision of the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) in the case of the Prosecutor *v.* Darco Knezević, 11 November 1997, Nederlandse Jurisprudentie No. 463 (1998).
47. Loi relative à la répression des infractions graves aux Conventions internationales de Genève du 12 août 1949 et aux Protocoles I et II du 8 juin 1977, additionnels à ses Conventions, Moniteur Belge No. 157 (5 August 1993), at 17751.
48. A. Andries *et al.* (Eds.), *Commentaire de la loi du 16 juin 1993 relative à la répression des infractions graves au droit humanitaire*, 74 Revue de droit pénal et de criminologie 1114, at 1117 (1994).
49. *See* note 50 *infra*.
50. *Message du Conseil fédéral à l'Assemblée fédérale concernant une revision partielle du code pénal militaire*, 119 Feuille Fédérale 605, at 611 (1967): "On pourrait penser à n'ériger en faits punissables que les actes considérés dans les quatre conventions de Genève comme 'infractions grave'."; A.R. Ziegler, *Domestic Prosecution and International Cooperation with Regard to Viola-*

Goran Grabez (Switzerland). Grabez, a 32-year-old chauffeur, was the first – and till now only – foreigner to be prosecuted in Switzerland for war crimes committed in the former Yugoslavia. He was indicted on 28 February 1997, accused of having maltreated six prisoners in Omarska concentration camp, having submitted prisoners to degrading treatment, and one of them in particular, by forcing him to lick the boots of a guard. After a highly publicised trial, during which the Public Prosecutor requested four years imprisonment, Grabez was acquitted by the Military Tribunal in Lausanne on 18 April 1997, as the evidence, which mainly consisted of eye-witness testimony, was considered to be too contradictory.[51] Nevertheless, the Tribunal held that it was competent to try the alleged crimes as they violated the laws of war as referred to in section 109 of the Military Penal Code.[52]

Ethiopia is one of nine countries that penalise all grave breaches as such in their Penal Code. Sections 282 ("war crimes against the civilian population"), 283 ("war crimes against wounded, sick or shipwrecked persons"), 284 ("war crimes against prisoners and interned persons") and 292 ("denial of justice") in particular specify and penalise grave breaches.[53] It is noteworthy that these sections were drafted by Jean Graven who was one of the five experts that gathered in Geneva in December 1948 and created the draft that caused so much controversy at the Diplomatic Conference (§ 3.1.1.). By sanctioning violations against international law according to general principles of its national law – Graven wrote in his commentary – the Ethiopian code would set an example and had placed itself "en tête des législations."[54]

Twenty-four countries have penalised only some of the grave breaches as such, probably because they rely on the existing provisions in their (military) penal codes.

(b) Grave breaches as common violations of the penal code. While only Germany and South Africa have explicitly stated that their common penal code already covers the grave breaches as defined in the Geneva Conventions,[55] it is

tions of International Humanitarian Law: The Case of Switzerland, 7 Schweizerische Zeitschrift für internationales und europäisches Recht 561, at 568-569 (1997).

51. Tribunal Militaire de Division 1 (Lausanne), 18 April 1997; reported by A.R. Ziegler, *In re G.*, 92 American Journal of International Law 78 (1998).
52. Tribunal Militaire de Division 1 (Lausanne), 18 April 1997, at 8 "Le conflit armé dans l'ex-Yougoslavie devrait donc être qualifié d'international à compter du 8 octobre 1991 puisque ces deux États étaient alors indépendents. [...] Ainsi, dès lors que les faits reprochés à l'accusé, s'ils étaient réalisés, constituent des violations des lois de la guerre au sens de l'art. 109 CPM, le tribunal de céans est par conséquent compétent."
53. *Proclamation No. 158 of 1957 Penal code of the Empire of Ethiopia*, 16 Negarit Gazeta 1 (1957).
54. J. Graven, Le Code pénal de l'empire d'Ethiopie du 23 juillet 1957 [The Penal Code of the Empire of Ethiopia of 23 July 1957], at 35 (1959): "Le code éthiopien a vraiment donné dans ce domaine un exemple qui le place en tête des législations: ces infractions internationales sont toutes régies et sanctionnées d'apres les principes ordinaires de son droit."
55. ICRC Doc. Annex (Replies received from States to the ICRC's written representations concerning national measures to implement international humanitarian law) to 1991 C.I/4.1/1 Implementation of International Humanitarian Law National Measures 12 (1991): "Grave breaches of international

most likely the prevailing reason why most countries do not penalise grave breaches as such. This approach is understandable; for instance, "wilful killing" would appear to be covered by violations of the penal code such as murder and manslaughter. However, the assumption that common violations of the penal code cover all grave breaches is as tempting as it is erroneous.

First of all, grave breaches may not be equated with common crimes such as maltreatment, because the latter usually ignores the seriousness of the violation of international law, especially if they are committed on a large scale (e.g. frequent maltreatment of prisoners). Secondly, common penal law in most cases does not cover all grave breaches such as the wilful deprivation "of a protected person of the rights of fair and regular trial prescribed in the present Convention."[56] It is unlikely that the common crime of causing "grievous bodily harm" covers "inhuman treatment," which according to the Commentary includes cutting "the civilian internees off completely from the outside world and in particular from their families."[57] Thirdly, grave breaches are not violations of national but of international law. This aspect should be acknowledged as it might be decisive to judge defences such as duress, coercion, necessity, *error juris* and superior orders.[58] Moreover, the argument that common crimes of the penal code sufficiently cover all grave breaches tends to overlook the fact that the Conventions not only obligate the punishment of grave breaches but also require the Parties to establish universal jurisdiction over such grave breaches.

3.2.2. Universal jurisdiction over grave breaches

Fifty-five countries have established universal jurisdiction over all or some of the grave breaches. Roughly three ways can be identified to do so. Firstly, 21 countries have established universal jurisdiction over (all, most, or some of the) grave breaches by a special Act promulgated in order to comply with the obligations imposed by the Geneva Conventions. Secondly, several countries have established universal jurisdiction in their (military) penal codes and specifically refer to the grave breaches specified in the code. Thirdly, a 'Blankettnorm' which establishes universal jurisdiction over certain crimes against international

humanitarian law are in principle sanctioned by the general penal provisions." (Germany) and at 52: "[t]he serious misdeeds set out in Art. 147 are all adequately prohibited by and punishable in terms of Sout African Common Law, as crimes such as murder, assault, theft, malicious damage to property, and abduction."

56. Art. 130 (III) and Art. 147 (IV), *supra* note 11.
57. Pictet, *supra* note 17, at. 598.
58. *See* in particular Chr. Van den Wijngaert, *Een bijzondere wet voor de bestraffing van oorlogsmisdaden: een overbodige onderneming?* (A special Act to punish war crimes: a superfluous undertaking?), 10 Panopticon 516, at 517-522 (1989); H.-H. Jescheck, *Der strafrechtliche Schutz der internationalen humanitären Abkommen* (The Penal Protection of International Humanitarian Conventions) 65 Zeitschrift für die gesamte Strafrechtswissenschaft 112, at 124-125 (1953).

law is the way in which 24 countries have established universal jurisdiction over grave breaches.[59]

The UK Geneva Conventions Act 1957 is an example of a special act which penalises grave breaches and establishes universal jurisdiction over them. Section 1 of the Act (cited above § 3.2.1.(a)) includes universal jurisdiction over the grave breaches as it applies to "any person, whatever his nationality, who, whether in or outside the United Kingdom" is responsible for a grave breach. Members of Parliament referred to universal jurisdiction as "an unusual extension of our jurisdiction, but it is necessary by the special circumstances against which we are providing."[60]

Section 17 of the Ethiopian Penal Code establishes jurisdiction over any person who has committed "an international offence specified in Ethiopian legislation." Such offences are the grave breaches as specified in sections 282, 283, 284 and 292 of the Code.

About half of the countries that have established universal jurisdiction over grave breaches have done so by means of a, what I will call, 'blanket' provision in the penal code or code of penal procedure. It is a 'blanket' provision because it does not sum up or refer to certain conventions or crimes. It establishes universal jurisdiction whenever a convention, to which the country concerned is a party, requires it to provide for universal jurisdiction or obligates the party to prosecute certain crimes committed abroad.

Section 6, Paragraph 9, of the German Penal Code is such a blanket provision and states:

> Moreover, German Penal Law applies, regardless of the law of the *locus delicti*, to the following acts, committed abroad: [...]
> 9. acts which are, according to an international Convention binding the Federal Republic of Germany, to be prosecuted if committed abroad.[61]

59. *See* the Penal Codes of Armenia (section 14, para. 2(1)); Austria (section 64); Brazil (section 7 II a); China (section 9); Denmark (section 8, para. 5); Estonia (section 4, para. 2); Finland (section 7); Germany (section 6, para. 9); Hungary (section 4, para. 1(c)); Italy (section 7(5)); Kazakhstan (section 7, para. 4); Kyrgyzstan (section 6, para. 3); Norway (section 12); Paraguay (section 8, para. 7); Portugal (section 5, para. 2); Russian Federation (section 12, para. 3); Sweden (section 3, para. 6); Tajikistan (section 14, para. 2); Turkey (section 6); Turkmenistan (section 8, para. 2); Ukraine (section 5); Uruguay (section 10(7)); Uzbekistan (section 12, para. 3); Viet Nam (section 6, para. 2).

60. 204 HL Hansard columns 350-351 (The Lord Chancellor Viscount Kilmuir, 25 June 1957); 573 HC Hansard columns 716-717 (Frank Soskice, 12 July 1957).

61. Section 6, Para. 9 of the German Penal Code: "Auslandstaten gegen international geschützte Rechtsgüter. Das deutsche Strafrecht gilt weiter, unabhängig vom Recht des Tatorts, für folgende Taten, die im Ausland begangen werden: [...] 9. Taten, die auf Grund eines für die Bundesrepublik Deutschland verbindlichen zwischenstaatlichen Abkommen auch dann zu verfolgen sind, wenn sie im Ausland begangen werden".

The White Paper accompanying the Bill which introduced this section in the German Penal Code explicitly referred to the four Geneva Conventions as an example of the treaties included.[62]

The advantage of such a 'Blankettnorm' is obvious.[63] Instead of having to adopt a new provision establishing universal jurisdiction whenever the country concerned accedes to another convention with mandatory universal jurisdiction, the blanket provision suffices. As stated in the German White Paper it enables the implementation of "such an obligation by international law after accession to the Convention concerned, without having to change the Penal Code."[64]

If universal jurisdiction has been established *via* a 'Blankettnorm' the question remains which national provisions have to be applied in order to prosecute grave breaches. In only a few cases a 'Blankettnorm' is combined with provisions which penalise all grave breaches as such.[65] In most cases, however, no specific provision applies. In such cases provisions of the common penal code are to be applied in so far as they cover the grave breaches concerned. This method has enabled four prosecutions before German courts.

> *Novislav Djajić (Germany).* Djajić took part in the shooting of fifteen Muslim citizens of Trnovaca near the river Drina in the evening of 22 June 1992. The Bavarian District Court convicted Djajić on 23 May 1997 for having violated section 211 of the German Penal Code (murder). The Court based its jurisdiction on section 6, paragraph 9 of the German Penal Code as Germany was bound by the four Geneva Conventions to prosecute and punish those responsible for grave breaches. Djajić was sentenced to five years imprisonment.

Only recently, Maksim Sokolović and Djuradj Kusljić were sentenced to nine years and life imprisonment respectively.[66] Both were preceded by the cases against Nikola Jorgić who was also sentenced to life and Novislav Djajić.[67]

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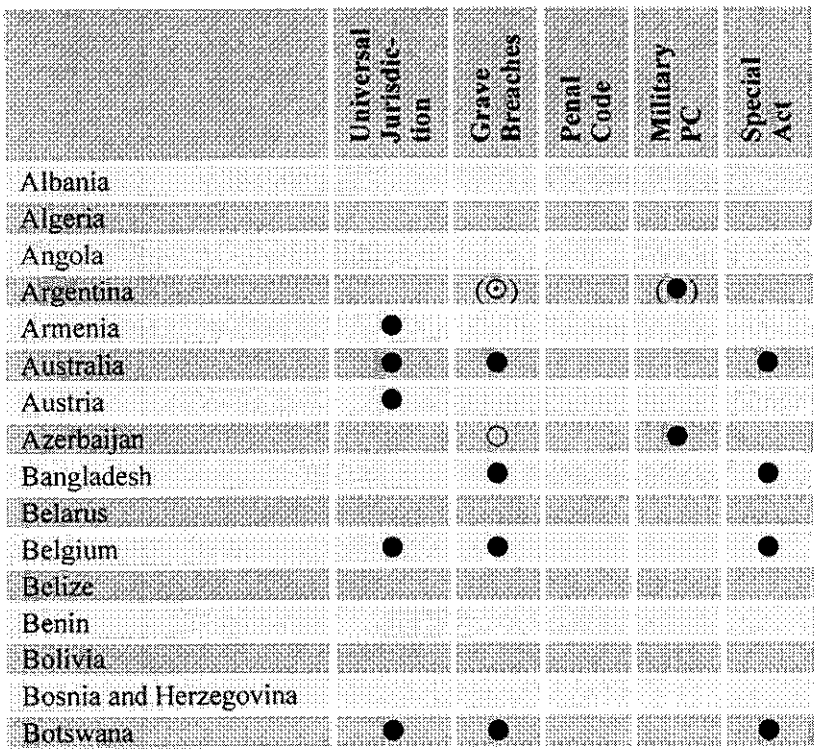
62. Entwurf eines Strafgesetzbuches (StGB) E 162, *Drucksache IV/650* [Draft Penal Code, Printed Matters IV/650] (4 October 1962), at 110 (Draft Penal code, *Printed Matters IV/650*): "Für die Bundesrepublik besteht eine solche völkerrechtliche Verpflichtung zur Verfolgung von Taten, die gegen die von der Bundesrepubliek Deutschland ratifizierten vier Rotkreuzabkommen von 1949 [...] verstoßen."
63. W. Zieher, Das sog. International Strafrecht nach der Reform (The so-called International Penal Law after the Revision) 168-169 (1977).
64. *Supra* note 62: "ermöglicht es, völkerrechtlichen des betreffenden Abkommens nachzukommen, ohne daß das Strafgezetsbuch geändert werden muß."
65. Section 7 of Chapter 1 of the Finnish Penal Code: "Finnish law shall apply to an offence committed outside of Finland where the punishability of the act, regardless of the law of the place of commission, is based on an international agreement binding on Finland or on another statute or regulation internationally binding on Finland." Sections 1, 2 and 3 of Chapter 11 (War Crimes and Offences Against Humanity) penalise war crimes, aggravated war crimes and petty war crimes respectively.
66. Oberlandesgericht Düsseldorf, 29 November 1999; *Serbe wegen Gräueltaten in Bosnien verurteilt,* Frankfurter Allgemeine, 30 November 1999, at 6; Bayerische Oberste Landesgericht München, 15 December 1999; *Lebenslange für Kusljić wegen Kriegsverbrechen* (Kusljić sentenced to life for war crimes), Süddeutsche Zeitung, 16 December 1999, at 1.

Despite the fact that common violations of the Penal Code cannot be relied on to fulfil the treaty obligations as they do not cover *all* grave breaches, combined with the 'Blankettnorm' to establish universal jurisdiction they enable the prosecution of most grave breaches based on universal jurisdiction.

If the numbers of countries that have penalised all or some of the grave breaches (73) are combined with the numbers of countries that have established universal jurisdiction (54), it turns out that only 30 countries have established universal jurisdiction over all grave breaches, as the table shows. Bills have been drafted which would establish universal jurisdiction over all grave breaches in three additional countries.



67. Bayerische Oberste Landesgericht, 23 May 1997, 3 St 20/96 (on file with author); reported *in* Neue Juristische Wochenschrift 392 (1998); 18 Zeitschrift für die gesammte Straftrechtswissenschaft 138 (1998) (Novislav Djajić); Oberlandesgericht Düsseldorf, 26 September 1997, 2 StE 8/96 (on file with author); Bundesgerichtshof, 30 April 1999; 45 BGHSt No. 9, 64 (2000); 19 Zeitschrift für die gesammte Strafrechtswissenschaft 396 (1999) (Nicola Jorgić): appeal dismissed.

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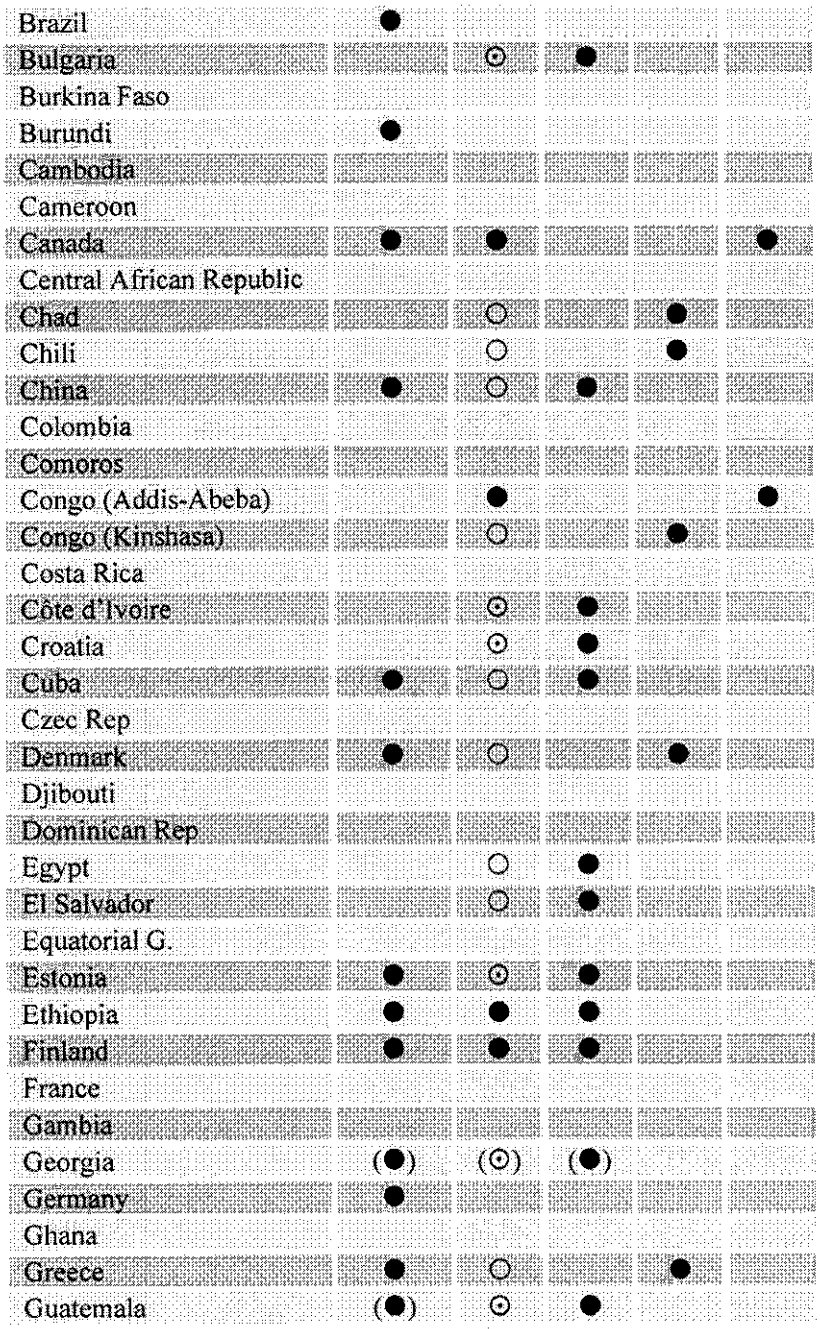

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Guinea					
Guyana	●	●			●
Haiti					
Honduras					
Hungary	●	⊙	●		
Iceland					
India	●	●			●
Indonesia					
Iran					
Iraq		○		●	
Ireland	●	●			●
Israel	(●)	(●)			(●)
Italy	●	○		●	
Jamaica					
Japan					
Jordan		○		●	
Kazakhstan	●	○	●		
Kenya	●	●			●
Korea (Republic)		○		●	
Kyrgyzstan	●	○	●		
Latvia					
Lebanon	(●)	(●)		(●)	
Lesotho					
Liberia					
Libya					
Liechtenstein					
Lithuania	(●)	(●)	(●)		
Luxembourg					
Malawi	●	●			●
Malaysia	●	●			●
Maldives	●	●			●
Mali		○		●	
Mauritius					
Mexico		⊙		●	
Moldova		⊙	●		
Monaco					

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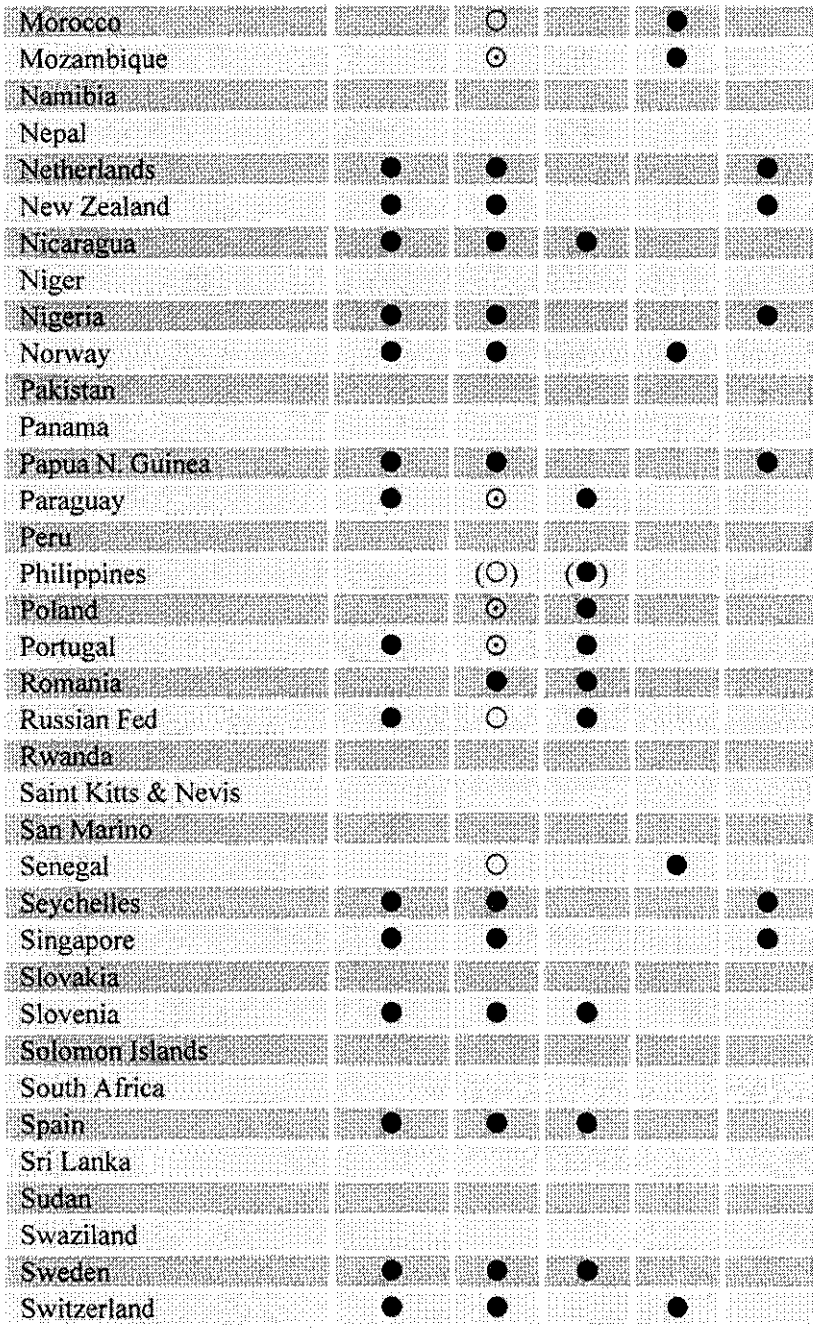

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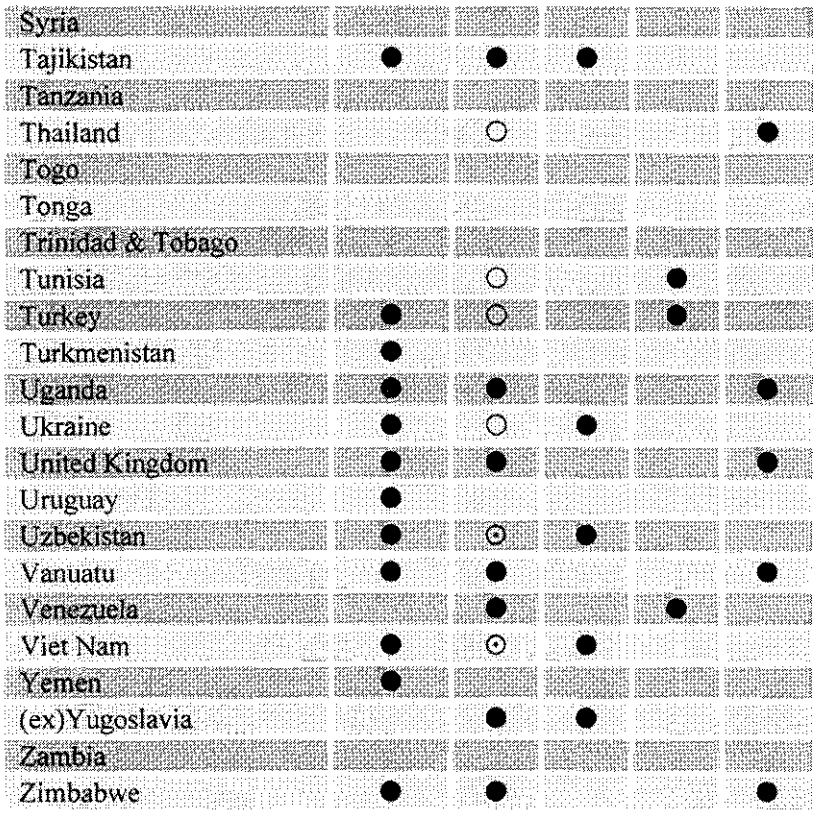

The table shows 146 countries about which information is available at the ICRC Advisory Service Documentation Centre which, among other things, provides technical assistance in order to pass the necessary laws to ensure the repression of war crimes.[68] As 188 countries are party to the Geneva Conventions, this means that some sort of information is available of about four-fifth of all Contracting Parties. On the one hand, it is regrettable that Contracting Parties are not obligated to submit information to the ICRC about the way in which they ob-

68. Advisory Service on International Humanitarian Law, National Implementation of International Humanitarian Law Annual Report 1996, at 11. The Advisory Service was established pursuant to Resolution 1 para. 8 (International Humanitarian Law: From Law to Action) adopted at the 26th International Conference of the Red Cross and Red Crescent (Geneva 3-7 December 1995), reproduced *in* 310 International Review of the Red Cross 59 (1996) which was preceded by Recommendation III adopted at the Meeting of the Intergovernmental Group of Experts for the Protection of War Victims (Geneva, 23-27 January 1995), reproduced *in* 304 International Review of the Red Cross 36 (1995). "The Experts recommend that the ICRC [...] strengthen its capacity to provide advisory services to States, with their consent, in their efforts to implement and disseminate IHL."

serve the obligations imposed by the Conventions, so the represented countries and information submitted remains rather patchy. On the other hand, in terms of quantity the situation is far better than in 1969, when the ICRC made an inventory. At that time the information submitted was confined to 49 states out of the 122 Contracting Parties.[69]

Some examples might clarify the information presented in the table.[70] Zimbabwe has established universal jurisdiction over all grave breaches as described in the Geneva Conventions and has done so by special legislation (the Geneva Conventions Act).[71] The Russian Federation has also established universal jurisdiction, but only over some, not all grave breaches, in the Federation's Penal Code. Estonia has established universal jurisdiction over most but not all grave breaches in its Penal Code. And, finally, Mexico has not established universal jurisdiction, but has penalised most of the grave breaches in its Military Penal Code.

The conclusion which emerges from the above is that the implementation of universal jurisdiction over grave breaches is inadequate. Less than one in six of the parties to the Conventions have established universal jurisdiction over all grave breaches as they are obligated to do. Little seems to have changed since the ICRC reported in 1965 that "it is to be admitted that in many countries the regulations for the repression of violations of the Geneva Conventions are not adequate."[72]

3.2.3. Some reasons not to establish universal jurisdiction over grave breaches

Apart from the lack of mandatory supervision,[73] a number of reasons can be identified as to why Parties are lax when it comes to implementing universal jurisdiction. A considerable number of countries have explicitly argued that it is

69. ICRC Doc. Conf. D.S. 3/3, Respect of the Geneva Conventions Measures taken to repress Violations, Volume 2, at 3 (1969).
70. Information available on 31 March 1999. In the column "grave breaches" () concerns a draft read in parliament; ● all grave breaches are covered; ⊙ most grave breaches; ○ some grave breaches. When interpreting this table it has to be kept in mind that the table is based on the information available at the ICRC's Advisory Service Documentation Centre. Additional information will be welcomed at richardvanelst@hotmail.com. I would like to thank the ICRC Geneva for disclosing the information filed at the Advisory Service's Documentation Centre and Monika Cometti who assisted me in particular.
71. M.T. Dutli, *National Implementation Measures of International Humanitarian Law: Some Practical Aspects*, 1 Yearbook of International Humanitarian Law 245, at 254-257 (1998).
72. ICRC Doc. Conf. D 4a/1, Respect of the Geneva Conventions Measures taken to Repress Violations, Volume 1, at 2 (1965).
73. Interesting to note is a letter by the government of one of the parties to the Conventions, adressed to the ICRC, reacting to a letter in which the ICRC had proposed to submit reports on the measures adopted, to stimulate international co-operation and offered advice on national measures to implement international humanitarian law. These suggestions were rejected as they were considered to be inconsistent with the imperative limits posed by national sovereignty. Letter dated 26 June 1991 (on file with author).

unnecessary for them to amend their laws in order to implement the treaty obligations. The most naive argument was put forward by Japan, in 1969, when the ICRC made an inventory of the measures taken to repress violations of the Geneva Conventions. The Japanese Report contained the following paragraph:

> As Japan renounces war by Article 9 of the Constitution, it is considered that no act of violation of the Geneva Conventions could be committed by Japanese nationals, and therefore no legislation is established in Japan to repress acts of violation of the Four Geneva Conventions.[74]

This position erroneously assumes that the obligation to repress violations is limited to those committed by nationals.

Another argument used for not amending the existing national laws is that 'ordinary' penal law already covers the grave breaches as defined in the Conventions (§ 3.2.1.(b)).

One country in particular has recognised the necessity to penalise grave breaches as such but has refused to establish universal jurisdiction over them. Though both the State Department and the Defense Department stressed the treaty obligation to do so, the US House of Representatives thought it "unwise at present" to establish universal jurisdiction over grave breaches.[75] The Committee on the Judiciary gave the following arguments against the establishment of universal jurisdiction.

> Domestic prosecution based on universal jurisdiction could draw the United States into conflicts in which this country has no place and where our national interests are slight. In addition, problems involving witnesses and evidence would likely be daunting. This does not mean that war criminals should go unpunished. There are ample alternative venues available which are more appropriate. Prosecutions can be handled by the nations involved or by an international tribunal. If a war criminal is discovered in the United States, the Federal Government can extradite the individual upon request in order to facilitate prosecution overseas. The Committee is not presently aware that these alternative venues are inadequate to meet the task.[76]

Whatever the merits of these self-interest-centred arguments, they did not prevent the United States establishing universal jurisdiction over other crimes, such as torture, to which the same objections could be raised.[77]

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74. ICRC Doc. Conf. D.S. 3/3, Respect of the Geneva Conventions Measures Taken to Repress Violations, at 50 (1969).
75. HR Report No. 104-698, 104th Congress, 2nd Session (1996), at 7.
76. HR Report No. 104-698, 104th Congress, 2nd Session (1996), at 8 (footnotes omitted).
77. Public Law 103-236 (30 April 1994) Foreign Relations Authorisation Act, Fiscal Years 1994 and 1995, section 506. *See* on the US position, P. van W. Magee, *The United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: The Bush Administration's Stance on Torture*, 25 George Washington Journal of International Law and Economics 807, at 822-827 (1991).

The hearing before a Congressional Subcommittee reveals a potentially more important reason as to why the United States and other countries have so far failed to establish universal jurisdiction over grave breaches. At the hearing, Alfred P. Rubin submitted a statement denying that the Geneva Conventions required the exercise of criminal jurisdiction, even calling them "notoriously badly drafted."[78] Even though it might be doubted whether or not countries can legitimately take the view that universal jurisdiction is *not* included, it would have been preferable if a provision had made explicit the obligation to establish universal jurisdiction. Nevertheless, no country is known to have rejected the obligation to establish universal jurisdiction by arguing that the Conventions do not require it.

3.2.4. Evaluation and outlook for the future: the Belgian Act of 10 February 1999

(a) Evaluation. If one wants to promote the fulfilment of the obligation to establish universal jurisdiction over grave breaches, the enactment of a special Act is to be preferred. Almost all countries which have adopted a separate Act in order to implement the obligations imposed by the Geneva Conventions have successfully established universal jurisdiction over grave breaches. Thailand seems to be the only exception which proves the rule. The Act for the Application of the Geneva Convention relative to the Treatment of Prisoners of War of August 12th B.E. 2492, B.E. 2498 relates only to the third Geneva Convention and applies only to members of the (probably only Thai) armed forces.[79]

A 'blanket' provision has the advantage that it covers not only grave breaches but also other crimes against international law – such as torture under the UN Convention against Torture – over which universal jurisdiction has to be established. Unfortunately, the other side of this coin is that in most cases the penal code is not amended at all, even when a provision is required to specify and penalise the conduct which the Convention criminalises. This could be the reason why a German draft to amend the penal code in order to penalise grave breaches as such was abandoned when the draft of Section 6, Paragraph 9 was read in Parliament (see § 3.2.2.). Earlier, however, when the Government introduced a Bill to accede to the Geneva Conventions, it had taken the view that such an amendment was indispensable.[80] Nowadays the German Government

78. Hearing on HR 2587 Before the Subcommittee on Immigration and Claims of the House Committee on the Judiciary, 104th Congress, 2nd Session (1996), at 56-60.
79. Reproduced *in* ICRC Doc. Conf. D 4a/1, *supra* note 72, at 179. I do not consider the US War Crimes Act 1996 to be a separate one as it amends title 18 of the US Code by adding section 2401. It is unclear whether or not universal jurisdiction is established over crimes (including grave breaches) covered by the recent Congo (Addis-Abeba) Law No. 8-98 of 31 October 1998 on the definition and the repression of genocide, war crimes and crimes against humanity, *see* www.icrc.org/ihl-nat.
80. Entwurf eines Gesetzes über den Beitritt der Bundesrepublik Deutschland zu den vier Genfer Rotkreuz-Abkommen vom 12. August 1949 (Bill for the Federal Republic of Germany to accede to

takes the view that the common crimes of its penal code sufficiently cover grave breaches.[81]

Amending the (military) penal code in most cases leads to a fragmented penalisation of grave breaches as such and tends to neglect the obligation to establish universal jurisdiction.

(b) Outlook for the future. An opportunity to establish universal jurisdiction over grave breaches is offered by the review and revision of national legislation regarding crimes against international law which seems inevitable if a country wishes to ratify or accede to the Statute of the International Criminal Court (ICC).[82]

The Belgian Act of 10 February 1999 Relative to the Punishment of Serious Violations of International Humanitarian Law[83] is a good example of the impetus given by the Rome Statute to a country to review the way in which it represses the most serious crimes against international law. Initially the Bill – an initiative from Members of Parliament introduced on 16 October 1997 – was only intended to implement Belgium's obligations under the Genocide Convention. While the Bill was before Parliament, however, the Rome Statute was adopted. Within five months the Government radically changed the Bill, no longer proposing a separate Act but a revision of the pioneering 1993 Act,[84] which already penalised grave breaches and established universal jurisdiction over them. Two reasons can be given for this change. First, the Government wanted to adjust the Bill to the "youngest developments of the relevant international law as confirmed by the adoption of the Rome Statute of the International Criminal Court on 17 July 1998."[85] Second, to seek association with the 1993 Act would improve the quality of "law-technique."[86] While the Government was right not to argue that universal jurisdiction over the crimes concerned follows from the Rome Statute, the main arguments used to establish universal jurisdiction – such heinous crimes have to be punished; Belgium may not become a safe

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the four Geneva Conventions of 12 August 1949), *Drucksache* 152, at VIII (1953): "Jedenfalls müssen zur Durchführung der Abkommen ergänzende Strafvorschriften deutscherseits erlassen werden, die aber wegen ihres speziellen Charakters nicht in das Strafgesetzbuch eingefügt, sondern in einem Sondergesetz zusammengefaßt werden sollten."

81. *Supra* note 55.
82. 1998 Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9.
83. *Loi du 10 fevrier 1999 relative à la répression des violations graves de droit international humanitaire*, Moniteur Belge 1999 No. 57 (23 march 1999), at 9286; translated and reproduced *in* 38 ILM 918 (1999). The translation of the Act in ILM erroneously refers to "grave breaches of international humanitarian law." Exactly this wording was rightly rejected in parliament as "grave breaches" have a special connotation in the Geneva Conventions, *see* Gedr. St. van de Senaat (Printed Senate Documents) 1998-1999, No. 1-749/2 Amendments, at 4.
84. Loi du 16 juin 1993, *supra* note 47.
85. Gedr. St. van de Senaat (Printed Senate Documents) 1998-1999, No. 1-749/2, Amendments, at 4.
86. *Id.*

haven for those responsible[87] – corresponds closely with the very purpose of the ICC as expressed in its preambular paragraphs.[88] Section 1 of the Act of 10 February 1999 penalises the crimes as described in the Statute, whereas Section 7 establishes universal jurisdiction over them.

A limited revision of national legislation also took place in France with regard to the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). The reason for establishing what was called universal jurisdiction is interesting. The French Parliament acknowledged that neither the Statute of the ICTY and the ICTR nor the UN Security Council Resolutions establishing these Tribunals require universal jurisdiction. Nevertheless France established universal jurisdiction in order to demonstrate its will to collaborate as efficiently as possible in the repression of the crimes involved.[89] There are also moves towards the revision of other national laws. A review of national legislation has been announced by the Swiss Government.[90] In December 1999 the Canadian Government introduced the Crimes Against Humanity Bill, which establishes universal jurisdiction over genocide, crimes against humanity and war crimes.[91] Even though the 1998 Statute of the ICC strictly does not require the establishment of universal jurisdiction, ratifying the Statute could serve as a reminder of existing treaty obligations to do so.

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87. Gedr. St. van de Senaat (Printed Senate Documents) 1998-1999, No. 1-749/3, Report, at 6, 15.
88. 1998 Rome Statute of the International Criminal Court, *supra* note 82:
Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international co-operation.
Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes.
Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes."
89. *Débats Parlementaires Assemblée Nationale* (Parliamentary Debates National Assembly), 130 Journal Officiel 9437 (1994).
90. Message relatif à la Convention pour la prévention et la répression du crime de génocide, et révision correspondante du droit pénal (Message relative to the Convention to prevent and repress the crime of genocide and revision of the corresponding penal law), 31 March 1999, Feuille Fédérale IV 4911, 4919 (1999).
91. Sections 4, 6(1) and 8(b) of Bill C-19 An Act Respecting Genocide, Crimes Against Humanity and War Crimes and to Implement the Rome Statute of the International Criminal Court, and to make Consequential Amendments to other Acts, 10 December 1999 (www.parl.gc.ca *via* parliamentary business and government bills) as assented to 29 June 2000.
"4. (1) Every person is guilty of an indictable offence who commits (a) genocide, (b) a crime against humanity, or (c) a war crime [...];
6. (1) Every person who, either before or after the coming into force of this section, commits outside Canada (a) genocide, (b) a crime against humanity, or (c) a war crime, is guilty of an indictable offence and may be prosecuted for that offence in accordance with section 8 [...].
8. A person who is alleged to have committed an offence under section 6 or 7 may be prosecuted for that offence if [...] (b) after the time the offence is alleged to have been committed, the person is present in Canada."

4. PROSECUTING GRAVE BREACHES BEFORE NATIONAL COURTS

Until the early 1990s, no modern-day war criminals had been prosecuted on the basis of universal jurisdiction. This changed after the establishment of the ICTY in 1993 and the ICTR in 1994 as these events increased awareness of the presence of possible war criminals in several countries. This not only led to arrests of war criminals indicted by the tribunals, in Germany, Austria, the United States, France, the United Kingdom, Denmark, Belgium, Ethiopia and Cameroon,[92] but also to prosecutions before national courts. Denmark was the first to initiate such criminal proceedings when it arrested Refik Sarić in early 1994. His case, and those against others, will illustrate some of the obstacles which are imposed on the prosecution of grave breaches before national courts and why Franz von Liszt called universal jurisdiction "praktisch undurchführbar."[93]

4.1. A duty 'to search for'

The attitude towards prosecuting grave breaches of the Geneva Conventions has to be set by the unusually strongly worded obligation, included in each of the Conventions, to search for those responsible for grave breaches and to bring them before national courts. The obligation to search for those responsible imposes an active duty on the Contracting Parties. According to the Commentaries to the Conventions, the necessary police action has to be taken 'spontaneously':

> As soon as a Contracting Party realizes that there is on its territory a person who has committed such a breach, its duty is to ensure that the person concerned is arrested and prosecuted with all speed. The necessary police action should be taken spontaneously, therefore, not merely in pursuance of a request from another State.[94]

A 'wait and see' attitude towards the search for war criminals not only creates an obstacle to their prosecution but also violates the obligations imposed by the Geneva Conventions.

A special investigating unit at a national level seems to be a prerequisite for compliance with the obligation to search for those responsible for grave breaches. Such units have been set up in Canada, Germany and the Netherlands, while in Belgium an examining magistrate operates.[95] Special investigating units

92. M. Wells & C. McGreal, *Police hold genocide suspect*, The Guardian, 7 February 2000, at 1, 2 and 6 (United Kingdom); M. Simons, *Top Bosnian Serb Officer Arrest for UN Tribunal*, New York Times, 26 August 1999, at A10 (Austria); M.H. Morris, *The Trials of Concurrent Jurisdiction: The Case of Rwanda*, 7 Duke Journal of Comparative & International Law 349, at 363 (1997) (Cameroon and Ethiopia).
93. F. von Liszt, Lehrbuch des Deutschen Strafrecht (Textbook on German Criminal Law) 107 (1912).
94. Pictet, *supra* note 17, at 593.
95. A Bill has been introduced in the US Senate to expand the operations of the Office of Special Investigations from nazi-suspects to "alien participants in acts of genocide and torture abroad" but surprisingly not to grave breaches. *See* S. 1375 (15 July 1999).

can gather information on the whereabouts of suspects; evidence; the political, economic and human rights situation in the countries where the crimes occurred; criminal complaints and knowledge of the applicable law.[96] If such actions are not operated at the national level, but are left at the local or regional levels, specialised information will remain scattered or inaccessible and this will hamper the search for suspects and therefore violate the obligation to do so imposed by the Geneva Conventions.

Another source of information on the whereabouts of suspected war criminals are interviews with asylum-seekers who apply for refugee-status. Information about their possible involvement in grave breaches is not only relevant for initiating criminal proceedings, but also for the decision to be taken on their request for refugee-status. Section 1F(a) of the Convention Relating to the Status of Refugees provides that such a status cannot be granted to those against whom there are "serious reasons" for considering that they have committed a war crime.[97] Such information might even come spontaneously from the applicants: it has been reported that some are eager to confess their involvement in war crimes, expecting that they will not to be returned to their country of origin as suspected war criminals might face the death penalty or an unfair trial on their return. A number of suspected war criminals have been exposed by fellow asylum-seekers. One of them was Refik Sarić, who was the first to be tried before a national court.

> *Refik Sarić (Denmark).*[98] In the summer of 1993 Refic Sarić was recognized by fellow residents at a centre for asylum-seekers and arrested when he was taken by them to the nearest tree in the park of the centre to be hanged. Sarić was accused of having maltreated twenty-five prisoners at a prisoner-of-war camp in Dretelj (Croatia), two of whom died as a result of the maltreatment. Sarić appealed his conviction and sentence to eight years imprisonment by disputing that the crimes fell under the scope of Denmark's jurisdiction, as they did not amount to grave breaches of the Geneva Conventions. In its decision of 15 August 1995, the Supreme Court dismissed the appeal because "the requirements set out in the Conventions as to 'grave breaches' have been met in the case of all counts of the indictment."[99] Section 8 of the Penal

96. M. de Roos Schoenmakers, The Dutch Public Prosecutor investigating war crimes, quoted *in Asielzoeker ontmoet beul* (Asylum seeker meets tyrant), Contouren 24 (1999).
97. 1951 Convention Relating to the Status of a Refugees, 189 UNTS 137 (1954).
98. R. Maison, *Les premiers cas d'application des dispositions pénales des Conventions de Genève par les juridictions internes*, 6 European Journal of International Law 260 (1995).
99. Supreme Court 15 August 1995, reported *in* 1 *YIHL* 431 (1998); reported by E. Merlung, *National Implementation: the Universal Jurisdiction – The Sarić Case, in* Belgian Red Cross & Ministry of Foreign Affairs, The Punishment of War Crimes: International Legal Perspective 15 (1996). Merlung was the public prosecutor who took the case to court.

Code contains a 'Blankettnorm' providing for universal jurisdiction over crimes with regard to which Denmark is obliged by international agreement to prosecute.[100]

Searching for those responsible for grave breaches requires swift action, as is illustrated by the visit of the Iraqi Izzat Ibrahim to a conference in Austria. One day after a criminal complaint was filed against him for human rights abuses in Iraq, he had left the country.[101] The high international mobility of suspects underlines the need for international co-operation, in particular with regard to the tracing of suspects and the availability of admissible evidence once a suspect has been located. One of the means would be through the establishment of a centre similar to the Simon Wiesenthal Centre to trace suspects and gather evidence to be readily available as soon as a suspect is found.[102]

4.2. The alternative of handing over

Once a suspect has been found, the alternative of handing him over to another Contracting Party, seems to offer the easiest and cheapest way out. Another alternative is to transfer a suspect to an international court. Both options provide a reason not to instigate criminal proceedings and will be addressed here.

4.2.1. Handing over to another contracting party

Canada appears to be a good example of a country which prefers to expel suspected war criminals rather than bringing them before its own courts. As the Director General of the Department of Citizenship and Immigration stated before a Parliamentary Committee, the prime goal of his Department is to remove suspected war criminals from Canada: "we don't really care how we go about it. [...] if, for example, we can remove somebody because they don't have a visa, we don't really care that we don't class them as a war criminal."[103] This approach is in keeping with section 1(F)(a) of the Convention Relating to the Status of Refugees.[104] But expulsion is not the alternative referred to in the Geneva Conventions as "handing over."

Instead of extradition, the Geneva Conventions offer handing over as an alternative to prosecution. Extradition was avoided deliberately as it was considered to be "less practicable."[105] The handing over of suspected war criminals had become common practice in the years surrounding the end of World War II, as

100.M. Holdgaard Bukh, *Prosecution Before Danish Courts of Foreigners Suspected of Serious Violations of Human Rights for Humanitarian Law*, 6 European Review of Public Law 399, at 341-345 (1994).

101. *Austria: Iraqi Departs*, New York Times, 19 August 1999, at A10.

102. As proposed by M.T. Kamminga.

103. B. Sheppit before the Standing Committee on Citizenship and Immigration (12 March 1998) 1115.

104. *See* 4.1. and the text accompanying note 97.

105. Final Record, Vol. II-B, at 116-117.

some sort of executive measure instead of an extradition procedure with its judicial character.[106]

The alternative of handing over only exonerates a High Contracting Party from the obligation to bring a suspect before its own courts if the requesting State "has made out a *prima facie* case"[107] which clearly implies that the latter is about to bring the suspect before its own courts. A proposal to include this condition in the text of the Conventions was rejected during the *travaux préparatoires* because it was considered self-evident that a suspect would only be handed over to a contracting party that was about to bring, or already had initiated criminal proceedings. A French delegate at the Diplomatic Conference voiced the prevailing opinion when he reportedly "considered that a person could only be handed over to another Contracting Party if the latter had already brought, or declared itself ready to bring proceedings against the person concerned for similar or connected breaches."[108] Since expulsion *eo ipso* is not done with the intention of enabling criminal proceedings, it violates the *aut judicare aut dedere* obligation imposed by the Geneva Conventions.

4.2.2. Handing over to an international court

A recent alternative to initiate criminal proceedings arose with the establishment of the ICTY and the ICTR. A similar alternative will be provided by the forthcoming ICC.

If only the black letter law of the provision is taken into consideration, it might be doubted whether the transfer of a suspect to an international court would be in compliance with the obligation *aut judicare aut dedere* as it only refers to handing over to another High Contracting Party. Moreover, proposals to include a reference to an international court were rejected up until the Diplomatic Conference. However, all references to an international court were struck out not because the drafters objected to bringing those responsible before such a court, but because, as the Venezuelan delegate once put it, they did not want to refer to an "organisme international" that did not exist yet, and feared that such a

106. History of the United Nations War Crimes Commission and the Development of the Laws of War 392-394 (1948).

107. *Supra* note 11.

108. Final Record, Vol. II-B, at 87 (Cahen-Salvador – France – 27 June 1949); Commission Juridique, *Sténogramme des séances* 87, 88, 90 (27 August 1948), Archive of the Dutch Red Cross Inventory No. 302; M.W. Mouton, *De diplomatieke conferentie te Genève 21 April-12 Augustus 1949* (The Diplomatic Conference in Geneva), 25 Nederlands Juristenblad 117, at 123-124 (1950); C. Pilloud *et al.* (Eds.), Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, at 1027 para. 3567 (1987) "The requirement of a 'prima facie' case being made against the defendant by the requesting country is not only to protect individuals against excessive or unjustified requests, but also to ensure that penal proceedings as envisaged will not be frustrated or reduced in scope as a result of the transfer to another Contracting Party."

reference might hamper negotiations to establish it.[109] Furthermore, handing over a suspect to be tried before an international court would be consistent with the purpose of the obligation *aut dedere aut judicare* i.e., to end impunity and to ensure that those responsible do not escape punishment.

The other side of the coin is that the mere existence of an international court could be used to justify a 'wait and see' attitude at the national level. Why put time and effort into a complicated case when a better equipped forum is available, in particular if such an international court has primacy over proceedings initiated before national courts?[110] This explains why, in most cases, the Prosecutor's Offices of the ICTY or ICTR have been consulted in order to find out whether or not they would consider asking for the case concerned to be referred to the international tribunal.[111] However, no international court will be able to prosecute all available suspects, simply because its means are limited. For instance, fourteen indictments were withdrawn by the ICTY at the request of the Prosecutor after she had re-evaluated all outstanding indictments vis-à-vis the overall investigative and prosecutorial strategies of the Office of the Prosecutor and the growing number of arrests. One of the considerations relevant to the withdrawal of indictments against these fourteen suspects was that it would be possible to try them "in another forum, such as a State forum."[112] Both the Statutes of the *ad hoc* tribunals and the Statute of the ICC acknowledge the need for prosecutions before national courts alongside those before the international courts as they are based on concurrent and complementary jurisdiction respectively. The UN Secretary-General has underlined the need for the exercise of jurisdiction by national courts:

> [I]t was not the intention of the Security Council to preclude or prevent the exercise of jurisdiction by national courts with respect to such acts. Indeed national courts should be encouraged to exercise their jurisdiction in accordance with their relevant national law and procedures.[113]

109. Commission Juridique, *Sténogramme des séances, January 1949*, Archive of the Dutch Red Cross, Inv. No. 302, at 88 (27 August 1948; Mouton) and at 89 (27 August 1948; Moll, Venezuela): "n'existant pas encore, soulève un problème très grave." *See* Pictet, *supra* note 17, at 593.
110. Art. 9, para. 2, Statute of the ICTY, Annex to UN Doc. S/25704, *infra* note 113; Art. 8, para. 2, Statute of the ICTR, Annex to UNSC Res. 955 (1994), reproduced *in* 33 ILM 1602 (1995). *Compare* Art. 17, para. 1(a) of the Rome Statute of the ICC.
111. *See,* for instance, regarding the Netherlands M. de Roos Schoenmakers cited *in Asielzoeker ontmoet beul, supra* note 95.
112. Prosecutor *v.* D. Sikirica and others, Order Granting Leave for Withdrawal of Charges Against N. Janjić, D. Kondić, G. Lajić, D. Saponja and N. Timarax, No. IT-95-8-I, 5 May 1998; Prosecutor *v.* Z. Meakić and others, Order Granting Leave for Withdrawal of Charges Against Z. Govedarica, Gruban, N. Janjić, P. Kostić, N. Paspalj, M. Pavlić, M. Popović, D. Predojević, Z. Savić, M. Babić and D. Saponja, No. IT-95-4-I, 8 May 1998.
113. UN Doc. S/25704 (3 May 1993), Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), para. 64.

A probable division of work would be that persons holding higher levels of responsibility and those who have been personally responsible for exceptionally brutal or otherwise extremely serious offences would be brought before an international court, leaving others to be tried by national jurisdictions.[114]

4.3. Concurring crimes

As the grave breaches provisions only apply during an international armed conflict, a lack of clarity about the nature of the armed conflict in which the acts were committed could result in a choice not to prosecute the criminal acts as grave breaches. This has proven to be the case in particular with regard to the conflict in the former Yugoslavia. Even the Appeals Chamber of the ICTY once qualified the conflicts as having a "mixed character," and stated that "the conflicts in the former Yugoslavia have both internal and international aspects."[115]

Nevertheless, even if an act might erroneously not be acknowledged as a grave breach, it might be possible to prosecute it on the basis of universal jurisdiction. An atypical example is the case of Darco Knezević against whom a pretrial investigation was opened in the Netherlands, into allegations of murder, aiding and abetting the deportation of Muslims and attempted rape. The Prosecutor assumed that these acts violated common Article 3 of the Geneva Conventions which is applicable only in an "armed conflict not of an international character," even though it is more likely that the conflict in the Prijedor-region, where the alleged acts were committed, was an international one.[116] It follows from the decision of the Supreme Court that Dutch courts can exercise universal jurisdiction over violations of common Article 3.

> *Darco Knezević (The Netherlands).* Bosnian-Serb Darco Knezević was charged with two cases of murder, aiding and abetting the deportation of Muslim civilians and the attempted rape of two Muslim sisters by putting a gun to their mother's head. According to the writ this amounted to violations of common Article 3 of the Geneva Conventions – probably because the Public Prosecutor erroneously considered violations of common Article 3 to be similar to grave breaches. Knezević was never arrested, but his case was used by the Public Prosecutor in charge of the then National Yugoslavian War Crimes Unit to provoke a decision by the Supreme Court on the issue of whether Section 3 of the Crimes in Wartime Act 1952 provides for universal

114. *See* Statement by the Prosecutor Following the Withdrawal of the Charges Against 14 Accused, 8 May 1998, ICTY Press Release CC/PIU/314-E (www.un.org/icty *via* latest documents and news, archived press releases).

115. Prosecutor *v.* Tadić, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-AR72, A. Ch., 2 October 1995, paras. 74 and 77.

116. *See* UN Doc. S/1994/674 (1994) Letter dated 24 May 1994 from the Secretary-General to the President of the Security Council, Annex: *Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)*, para. 44 "justifies the Commission's approach in applying the law applicable in international armed conflict" and para. 306.

jurisdiction over violations of the laws and customs of war (Section 8).[117] According to the Supreme Court, it does. Nowadays, Knezević 's whereabouts are said to be unknown.

Another apparent reason not to prosecute grave breaches as such relates to the view that the alleged acts would be more appropriately characterised as another offence. This seems to have been the case in Austria where Cvjetković was prosecuted for having participated in genocide, instead of grave breaches, even though Austrian courts could have exercised universal jurisdiction over grave breaches just as much as over genocide. Qualifying the acts as genocide would have emphasized the heinous nature of the acts and the underlying policy.

Dusko Cvjetković (Austria). Arrested on 19 May 1994, the then 26-year-old Cvjetković was accused of having, as commander of a military group of Bosnian Serbs in Kucice during the months July and August 1992, aided and abetted the murder of a Muslim, inflicting conditions of life calculated to bring about the the death of a named Muslim and having inflicted grave bodily harm on five Muslims. The eight members of the jury of the Salzburg criminal court acquitted Cvjetković on 31 May 1995.[118] Earlier, the Vienna Court of Appeal rendered a decision on 13 July 1994, rejecting an appeal based on the violation of his constitutional right of personal liberty, because Austria had no right to try him. The appeal was rejected, as section 65 of the Austrian Penal Code established jurisdiction over crimes committed by foreigners abroad, if the crime was punishable at the *locus delicti*. The accused was found in Austria and could not be extradited due to reasons related to the Act: genocide was such a crime, as was murder and arson. Cvjetković was accused of each of these crimes.[119]

An additional complication might arise if grave breaches were considered to relate as a so-called *lex generalis* to a *lex specialis* with regard to other crimes against international law such as genocide or torture. Even though such a relation has to be rejected as it would restrict the protection afforded by the Geneva Conventions, the idea was put forward by the Dutch Minister of Justice when the Bill Implementing the Convention Against Torture was before Parliament. He said that if torture occurred during an armed conflict, it was not to be prosecuted as a grave breach but as a violation of the Convention against Torture.[120] The latter might prove to be more difficult as torture under the Convention against Torture requires that someone acting in an official capacity be involved.[121]

117. Crimes War Act 1952, *supra* note 45.
118. Landesgericht Salzburg, 31 May 1995, 38 Vr 1335/94, 38 Hv 42/94 (on file with author).
119. Oberste Gerichtshof Wien, 13 July 1994, 15 Os 99/94-6 at 5 and 6 (on file with author).
120. Kamerstukken II (Parliamentary Papers) 1986-1987, 20 042, No. 3, at 3.
121. Prosecutor *v.* J. Akayesu, Judgment No. ICTR-96-4-T, T. Ch. I., 2 September 1998, para. 594. *Compare* Prosecutor *v.* Z. Delalić, Z. Mucić, H. Delić & E. Landžo, Judgment No. IT-96-21-T, T. Ch. II. *quater*, 16 November 1998, para. 473: "[i]n the context of international humanitarian law, this requirement must be interpreted to include officials of non-State parties to a conflict, in order for the

4.4. Evidence

Prosecuting foreigners suspected of having committed crimes abroad poses serious evidentiary obstacles. Two of these problems, neither of which is particularly related to prosecuting grave breaches, will be emphasised in this section. The first is a practical obstacle, the second has to do with the reliability of witness statements.

4.4.1. Practical obstacles

If a case is prosecuted based on universal jurisdiction, it will be unlikely that the country where the crimes have been committed (in most cases the country of origin of the suspect) will be willing to co-operate with the gathering of evidence. The first reason for this may be that the decision to prosecute based on universal jurisdiction arose because the country where the crime was committed ("the country of origin") was unwilling to initiate criminal proceedings itself, thus granting *de facto* immunity. Secondly, if the country of origin would want to initiate proceedings it would seem more appropriate to extradite the accused. However, extradition could be legally impossible if the accused would run the risk of being subjected to an unfair trial or would face the death penalty, or if the law of the requested state did not allow extradition to the country of origin, for example because there is no extradition treaty. In either case, it would not be surprising if the country of origin were, as some kind of reciprocity, to refuse to co-operate with criminal proceeding initiated abroad.

Even though according to Additional Protocol I the High Contracting Parties shall afford one another the greatest measure of assistance in connexion with criminal proceedings brought in respect of grave breaches, the conditions, modalities and obstacles to assist remain determined by the law of the requested Party.[122] According to the UN Principles of International Co-operation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes against Humanity "States shall co-operate with each other in the collection of information and evidence [...] and shall exchange such informa-

prohibition to retain significance in situations of internal armed conflicts involving non-State entities." Prosecutor *v.* A. Furundžija, Judgment No. IT-95-17/1-T, T. Ch. II, 10 December 1998, para. 162: "at least one of the persons involved in the torture process must be a public official or must at any rate act in a non-private capacity, *e.g.* as a de facto organ of a State or any other authority-wielding entity," supported by Prosecutor *v.* A. Furundžija, Judgment, No. IT-95-17/1-T, A. Ch., 21 July 2000, para. 111.

122. Art. 88 Protocol Addition to the Geneva Conventions of 12 Auigust 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), Adopted by the Conference on 8 June 1977; Annex I to UN Doc. A/32/144; 16 ILM 1396 (1977); C. van den Wyngaert, *The Suppression of War Crimes under Additional Protocol I, in* A. Delissen & G. Tanja (Eds.), Humanitarian Law of Armed Conflict Challenges Ahead 197, at 204 (1991), calls the obligation to afford the greatest measure of assistance "too vague to be really operative."

tion."[123] While these provisions will probably not prompt the country of origin to provide evidence, they might be used as a basis to exchange evidence and information with third countries. Another channel through which evidence could be gathered is provided by NGOs as has been proven in cases regarding sex-tourists.[124]

4.4.2. Reliability

Evidence originating from abroad raises questions with regard to its reliability for a number of reasons. Four examples will be given to illustrate the obstacles in the way of a prosecution based on universal jurisdiction.

Weighing the credibility of a witness (for instance through body-language), will be particularly hazardous if the witness has a different cultural background. An example is provided by the trial against Jean-Paul Akayesu before the ICTR, where an expert-witness recounted that most Rwandans live in an oral tradition in which facts are reported as they are perceived by the witness. The tribunal noted that evidence which had been reported as an eyewitness account was, in fact, a second-hand account.[125] Also illustrated by the conflict in Rwanda, but with wider relevance, is the question how the evaluate evidence provided by a witness from an ethnic group which opposes the one to which the suspect belongs. This was stressed by one of the US judges, who allowed the transfer of Elizaphan Ntakirutimana to the ICTR on legal grounds, but nevertheless advised the Secretary of State to deny the transfer as he regarded the affidavits of unnamed Tutsi witnesses as "highly suspect" because they were acquired in a political environment that has all the "earmarks of a campaign of tribal retribution."[126] In fact, during the trial of Duško Tadić before the ICTY, one of the witnesses was unmasked as having been 'trained' by the Bosnian Government to give incriminating evidence.[127] Moreover, the Dutch Public Prosecutor has re-

123. UNGA Resolution 3074 (XXVIII) 3 December 1973 reproduced *in* 13 ILM 230 (1974).

124. S. Alexander *et al.* (Eds.), Extraterritorial Legislation as a Tool to Combat Sexual Exploitation of Children, Defence for Children International 26, 72, 84, 140, 141, 207, 230 (1999). (Examples of NGOs locating victims, a victim's birth certificate, records and background information).

125. Prosecutor *v.* Akayesu, Judgement, Case No. ICTR-96-4-T, T.Ch.I, 2 September 1998, para. 155.

126. US Court of Appeals, 5th Circ., 5 August 1999, No. 98-41597: "Affidavits of unnamed Tutsi witnesses acquired during interviews utilizing questionable interpreters in a political environment that has all the earmarks of a campaigns of tribal retribution raises serious questions regarding the truth of their content." (Judge R. Parker) On 24 January 2000 the US Supreme Court denied certiorari, *see* B. Crossette, *Way Clear for U.S. to Deliver Rwanda War Crimes Suspect*, New York Times 25 January 2000, at A3; Ntakirutimana was transfered to the ICTR on 24 March 2000; *see* ICTR/INFO-9-2-225EN (25 March 2000) (www.ictr.org *via* press releases).

127. Prosecutor *v.* Tadić, Decision on Prosecution Motion to Withdraw Protective Measures for Witness L, Case No. IT-94-1, T. Ch. I, 5 December 1996, para. 4: "Mr. Reid testified that witness L had admitted to him that he had lied about the death of his father while under oath. Witness L asserted that he had done this at the behest of the Bosnian Government authorities who had allegedly 'trained' him to give evidence against the accused, Dusko Tadić."

lated more than one case in which an eye-witness account turned out to be based on the fact that the 'perpetrator' was a member of a certain regime, but not actually the one who committed a crime against the witness.[128]

Quite apart from obstacles relating to the use of foreign evidence, the use of eye-witness testimony related to crimes committed during an armed conflict poses complications in itself. These eye-witnesses will likely be traumatised which will make it hard for them to relate of the events over and over again to investigators or in a court if they want to come forward at all.[129] Moreover, the circumstances will make it hard for a reliable identification of a suspect dressed in a uniform, possibly wearing a beret and using an alias.

Using evidence originating from abroad demands particular caution and a critical approach exceeding what is usual in criminal proceedings, since the interests at stake go beyond those of the individual who stands trial.

5. CONCLUDING REMARKS

The Geneva Conventions contain an obligation to prosecute which is unmatched in any other Convention relating to crimes against international law. It includes not only an obligation to search for suspects, but also includes an obligation to establish universal jurisdiction. Since the *aut judicare aut dedere* obligation only covers grave breaches, the presence of "war criminals" or "mercenaries" or "human rights violators" without prosecuting them or handing them over to another state for prosecution, does not necessarily violate the Geneva Conventions.

Not prosecuting grave breaches would mean, to quote a passionate commentary, the "dégradation de la personnalité et la régression du concept d'humanité."[130] Notwithstanding this lofty encouragement, hardly any prosecutions have been brought based on universal jurisdiction over grave breaches.

One of the reasons for this seemingly disappointing number of prosecutions has to be that the grave breaches provisions of the Geneva Conventions only apply to international armed conflicts, and these have been scarce since the Conventions entered into force on 21 October 1950. Another explanation for the

128. M. de Roos Schoenmakers cited *in Opsporing beulen zeer tijdrovend* (Searching for tyrants is time-consuming), Wordt Vervolgd 24 (2000/3), at 25. "Als je dat zo leest, lijkt het eenvoudig: er is een getuige en er is een verdachte, dus de zaak is al bijna rond. Maar zo simpel werkt het in de praktijk niet. Het wonderlijke is dat het bij het horen van een slachtoffer, het verhaal over die beul afgezwakt raakt. Vaak blijft het steken in een aanwijzing dat deze beul lis geweest van een bepaald regime en is hij niet degene die het slachtoffer daadwerkelijk mishandeld heeft."

129. J. van Wijnkoop, *À propos de la poursuite en Suisse de personne soupçonnées d'avoir commis des crimes de guerre* (Regarding prosecutions in Switserland of suspected war criminals), *in* C. Pellandini, Répression nationale des vilations du droit international humanitaire (systèmes romano-germaniques): Rapport de la réunion d'experts (Geneva, 23-25 September 1997), 202 at 209-211 (1998).

130. *Supra* note 40, at 21.

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handful of prosecutions based on universal jurisdiction is the state-practice of expelling suspected war criminals rather than prosecuting them. Canada might be called the archetype of a State which shirks its responsibility on this basis under false pretences.[131] The Government claims that the Supreme Court has created an impregnably high threshold for a conviction, while the conditions set nowadays will hardly pose an obstacle.[132] On 28 June 1999 a Colonel in the Croatian army who was present during "ethnic cleansing" in the Siroki Bjreg area, was simply "removed" to Croatia.[133] Consistent with the purpose underlying the Geneva Conventions – which is to end impunity – and in accordance with the *travaux préparatoires*, suspected war criminals have to be handed over to another Contracting Party to accommodate criminal proceedings against them there.

Evidentiary obstacles related to the gathering and reliability of eye-witness testimony in particular, might suggest that a conviction is as good as impossible. Over the last decade, not more than five suspected war criminals have been convicted for having committed grave breaches.[134] One has been acquitted.[135]

Nevertheless, there have been promising developments, such as the criminal proceedings based on other crimes against international law closely related to grave breaches, such as violations of common Article 3 of the four Geneva Conventions, genocide and torture. Proceedings based on violations of common Article 3 were initiated in the Netherlands against Darco Knezević and resulted in clarity about the application of the Crimes in Wartime Act 1952. In Belgium the Rwandan citizens Vincent Ntezimana, Alphonse Higaniro, Julienne Kizito and Gertrude Mukangango are to be prosecuted for genocide.[136] In Switzerland, the

131. M. Murray, *Canada Accused of Dumping War Criminals*, The Toronto Star, 1 August 1998.

132. Canada's War Crimes Program 1999-2000, *supra* note 6, at 3: "[i]n 1994 the Supreme Court upheld the acquittal and as a result it became clear that it would be impractical to prosecute further cases under the (then) existing provisions of the *Criminal Code*." Regina *v.* Finta, Supreme Court Canada, 24 March 1994; reproduced *in* 104 ILR 285, at 362-363 (1997) *per* Cory "there must be an element of subjective knowledge on the part of the accused of the factual condition which render the actions a crime against humanity [...] Similarly, for war crimes, the Crown would have to establish that the accused knew or was aware of the facts of circumstances that brought his or her actions within the definition of a war crime. That is to say the accused would have to be aware that the facts or circumstances of his or her actions were such that, viewed objectively, they would shock the conscience of all right thinking people." Act reported *in* Law Reform Commission of Canada, *Extraterritorial Jurisdiction* 1984, at 83-85. W.J. Fenrick, *The Prosecution of War Criminals in Canada*, 12 Dalhousie Law Journal 256, at 291 (1989): "[n]o one has ever been prosecuted in Canada by means of the Geneva Conventions Act; although it would appear to be particularly relevant legislation for the prosecution of war criminals in contemporary conflict."

133. Canada's War Crimes Program 1999-2000, *supra* note 6, App. G.

134. Refić Sarić (Denmark), the text accompanying *supra* note 97; Djajić and Jorgić (both in Germany), *supra* note 67. Recently Sokolović and Kusljić (both in Germany) were convicted, according to reports also because of having committed grave breaches, *supra* note 66.

135. Goran Grabez (Switzerland), *supra* note 31.

136. *Rwandezen in België voor assisen wegens genocide*, De Standaard, 28 June 2000, at 4; *Justitie buigt zich over genocide-dossiers*, De Standaard, 29 March 2000, at 8. *See* on the case against Vincent Ntezimana in particular B. Beirlant, *Vervolging Rwandese verdachten valt stil*, De Standaard, 19

Rwandan citizen Fulgence Niyonteze was sentenced to life imprisonment for violations of common Article 3.[137] In Austria, Duško Cvjetković was acquitted of genocide.[138] Torture charges were brought in the UK against Mohammed Mahgoub, a Sudanese doctor, who had recently finished post-graduate research at a Scottish hospital. After a review of the evidence, however, the Crown Office, on 19 May 1999, decided to drop the charges (inflicting severe pain and suffering on three detainees at security headquarters and at a centre in Khartoum, Sudan in 1989 and 1990).[139]

Moreover, the London arrest of, and subsequent extradition proceedings against, Chilean senator Augusto Pinochet, have raised international awareness of the obligation to prosecute crimes against international law. Most notable are the charges of "torture and barbarity" brought against former Chadian leader Hissène Habré in Senegal, where he had found refuge since 1990.[140] Interesting to note is a report that former UK Prime Minister Margaret Thatcher rescheduled her trips abroad for fear of being arrested, as a result of what has been called 'the Pinochet Syndrome'.[141]

Despite these promising developments, only a small number of parties to the Geneva Conventions have fulfilled their obligation to establish universal jurisdiction over grave breaches. Most of these countries, therefore, will find themselves unable to comply with the obligation to prosecute grave breaches com-

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August 1997, at 1 and 4 and L. Reydams, *De Belgische wet ter bestraffing van inbreuken op het internationaal humanitair recht: een papieren tijger?*, 7 Zoeklicht 4, at 8 (1998). I would like to thank Luc Reydams who pointed me at this case and the newspaper report.

137. Tribunal Militaire de Division 2 (Lausanne), 30 April 1999. I would like to thank major Claude Nicati, public prosecutor in the cases against Grabez and Niyonteze, who provided me with the verdict against the latter.

138. *See* the text accompanying *supra* notes 118 and 119.

139. O. Bowcott, *Doctor faces torture charges*, The Guardian, 13 September 1997 (www.guardian.co.uk); K. Symon, *"Torture centre" Doctor Charged*, Sunday Times, 21 September 1997, at 12; J. Rougvie, *Sudan Torture Charges Dropped*, The Scotsman, 28 May 1999 (www.scotsman.com); R. Savill, *Sudan doctor torture case is dropped*, Daily Telegraph, 29 May 1999 (www.dailytelegraph.com); Redress, Universal Jurisdiction in Europe, 30 June 1999, at 44-45.

140. *Africa's many Pinochets-in-waiting*, The Economist, 12 February 2000, at 43; *Ex-Chad Ruler is Charged by Senegal with Torture*, New York Times, 4 February 2000, at A3. After the judge examining the case was removed, the charges were dismissed on 4 July 2000, *see Senegal Ends Case Against Chad's Former Ruler*, The Washington Post, 6 July 2000, at A16 (www.washingtonpost.com).

141. B. Crossette, *Dictators Face the Pinochet Syndrome*, New York Times, 22 August 1999, at WK3; P. Wintour, *Thatcher fears war crimes arrest*, The Observer, 27 June 1999, at 14: "Lady Thatcher [...] is said to be anxious that she might be indicted if she travelled to parts of South America in the light of her decision to recapture the Falklands by force. She is said to have been concerned that some countries might try to indict her for her role in Northern Ireland policy, including detention without trial and claims of alleged shoot-to-kill operations by the security forces." *See also* A. Spillius, *Suharto is wary after the arrest of Pinochet*, Daily Telegraph, 17 August 1999, at 11. "Indonesia's ailing former strongman, Suharto, has decided against seeking medical help abroad to avoid suffering the same fate as the former Chilean dictator Gen Pinochet. When in power, Suharto routinely flew to Germany in one of his private jets for medical treatment."

mitted by foreigners abroad. The establishment of the two *ad hoc* tribunals and the coming International Criminal Court have already proved to be an impetus for revising existing national laws and the ways in which universal jurisdiction over crimes against international law is provided for. This offers a promising opportunity to establish universal jurisdiction over grave breaches.

However, fulfilling the obligation to establish universal jurisdiction over grave breaches does not necessarily mean that prosecutions will be initiated. In the Netherlands, it took almost two years to find out whether or not universal jurisdiction was actually established in the Crimes in Wartime Act 1952, delaying investigations for an even longer period since it took time to rebuild the National War Crimes Unit. On the other hand, failure to fulfil the obligation to establish universal jurisdiction over grave breaches does not necessarily mean that war criminals will not be prosecuted. It has proved possible to prosecute them for other crimes against international law, and even for common crimes under the penal code over which universal jurisdiction had been established.

Nevertheless, it remains essential to comply with the obligation to establish universal jurisdiction over grave breaches, and not only because the obligation is imposed by the Geneva Conventions. It has been suggested that the growing number of suspected war criminals in the Netherlands has decreased since the special War Crimes Unit has resumed its operations and the Immigration and Naturalisation Service has transferred its 1F(a) case files to the Unit. Therefore, national interests will also be served by taking international obligations seriously. Moreover, it has to be borne in mind that criminal proceedings are not the only way to tackle suspected war criminals. Information insufficient to initiate criminal proceedings might suffice to take 'administrative' measures such as a denial or revocation of refugee status or citizenship of the person concerned.

Most Public Prosecutors, lawyers, judges and policemen will have no experience investigating and prosecuting crimes committed during (international) armed conflicts in general, let alone crimes committed during an armed conflict abroad. As far as the Netherlands is concerned, for instance, only a few *ad hoc* prosecutions have been initiated since the trials of WW II related war crimes and acts of collaboration ended in the early 1950s. This inexperience and lack of knowledge regarding war crimes has lead to a certain uneasiness towards the idea of initiating criminal proceedings. The Danish Public Prosecutor admitted that during the criminal proceedings against Refik Sarić he now and then asked himself: why did this happen to me? Why did he have to come to Denmark? Why did he not go somewhere else to seek asylum?[142] Lack of familiarity in the Netherlands with the Crimes in Wartime Act 1952 provoked a procedure to obtain a decision by the Supreme Court on the Act's applicability and provisions on universal jurisdiction, which delayed ongoing investigations for over two years.

142. Merlung, *supra* note 99, at 17.

Increasing knowledge, ongoing criminal proceedings before both *ad hoc* international tribunals and various national courts abroad, provide good examples to be followed. They also make it more difficult for other countries to remain indifferent, if only to avoid becoming a safe haven for suspected war criminals. Universal jurisdiction might be impracticable but it can be put into practice.