The Grave Breaches System and the Armed Conflict in the Former Yugoslavia

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THE GRAVE BREACHES SYSTEM AND
THE ARMED CONFLICT IN THE
FORMER YUGOSLAVIA

Oren Gross*

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**INTRODUCTION**

Articles 2 to 5 of the Statute of the International Criminal Tribunal for the Former Yugoslavia (International Tribunal),¹ adopted by the United Nations Security Council upon recommendation of the U.N. Secretary-General,² deal with the competence, *ratione materiae*, of the International Tribunal to try serious violations of international humanitarian law committed in the territory of the former Yugoslavia since

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² Secretary-General’s Report, supra note 1, para. 48, 32 I.L.M. at 1173.

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**They came for the Communists**
and I didn’t object for I wasn’t a Communist;

**They came for the Socialists**
and I didn’t object for I wasn’t a Socialist;

**They came for the labour leaders**
and I didn’t object for I wasn’t a labour leader;

**They came for the Jews**
and I didn’t object for I wasn’t a Jew;

**Then they came for me**
and there was no one left to object.

*Martin Niemöller, German Protestant Pastor (1892–1984)** **
1991. It is no mere coincidence that the list of articles relating to the subject-matter competence of the International Tribunal opens with an article which deals with grave breaches of the four Geneva Conventions for the Protection of Victims of War of 1949 (1949 Geneva Conventions or Conventions). Grave breaches of the Conventions constitute serious violations of the very core of international humanitarian law.

The system of grave breaches, established in the Conventions, is the focal point of the enforcement mechanism of international humanitarian law in general and of the Conventions in particular. It is therefore surprising that very little has been written to date about this system. This article is intended to fill that gap by discussing the repression — the prohibition, prosecution, and adjudication — of grave breaches of the Conventions. The article's main purpose is to chart and map the basic contours of the terrain of an area which despite its vast significance has not been adequately and systematically explored. It is thus that the article pursues a predominantly descriptive theme. Indeed, such a descriptive project seems necessary for any further informed discus-

3. Article 2 deals with grave breaches of the Geneva Conventions of 1949; Article 3 focuses on violations of the laws or customs of war; Article 4 deals with genocide; and finally Article 5 includes a list of crimes considered to be crimes against humanity. See Statute of the International Tribunal, supra note 1, arts. 2-5, 32 I.L.M. at 1192-94.


Article 2 of the Statute of the International Tribunal, entitled "Grave Breaches of the Geneva Conventions of 1949," provides that:

The International Tribunal shall have the power to prosecute persons committing or ordering to be committed grave breaches of the Geneva Conventions of 12 August 1949, namely the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

(a) wilful killing;
(b) torture or inhuman treatment, including biological experiments;
(c) wilfully causing great suffering or serious injury to body or health;
(d) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
(e) compelling a prisoner of war or a civilian to serve in the forces of a hostile power;
(f) wilfully depriving a prisoner of war or a civilian of the rights of fair and regular trial;
(g) unlawful deportation or transfer or unlawful confinement of a civilian;
(h) taking civilians as hostages.

Statute of the International Tribunal, supra note 1, art. 2, 32 I.L.M. at 1192.
sion and evaluation of the grave breaches system in the specific context of the proceedings before the International Tribunal and of this system's usefulness as an enforcement mechanism of international humanitarian law.

The system for repression of grave breaches was established after almost a century in which there had been no working penal sanctions system for the enforcement of international instruments related to armed conflicts. Part I of this article briefly outlines this background history, spanning a period between 1864 and the end of World War II.

Part II delineates the structure of the grave breaches system in the Conventions. Following a description of the obligations imposed upon the High Contracting Parties (or Signatory States) and of the principle of universal jurisdiction, the article examines two issues. First, is the grave breaches system intended to impose direct responsibility upon individuals? Second, is there a place for an international tribunal under this system? This part of the article concludes with a review of the development of the concept of "grave breaches," which appeared for the first time in the Conventions.

Part III concentrates on the actual content of each of the grave breaches included in the Conventions, analyzing the specific elements of the various violations that amount to grave breaches. This part of the article deals with definitions of torture, inhuman treatment, deportations, unlawful confinement, extensive destruction of property, and so forth.

Part IV examines whether the crime of rape may be considered a grave breach of the Conventions despite the fact that it is not explicitly mentioned as such in the Conventions. As explained in this part, there are significant implications attached to a recognition of rape as a grave breach along with its inclusion in the Statute of the International Tribunal as a crime against humanity.

Part V briefly discusses the issue of penalties to be imposed on persons found responsible for grave breaches of the Conventions. Part VI examines the applicability of the system of repression of grave breaches to the armed conflicts in the territory of the former Yugoslavia.

Finally, Part VII briefly explains the development of the grave breaches system under Protocol I. The principal goal is to complete the picture entitled "grave breaches" and show the direction of development of international humanitarian law in this area.

I. REPRESSION OF VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW — A BRIEF HISTORICAL OVERVIEW

Not until 1906 did provisions dealing with repression of violations and infractions appear in a legally binding international document in the area of humanitarian law. The relevant documents on the laws of war, such as the 1864 Geneva Convention and the series of Hague Conventions of 1899 and 1907, did not include any penal provision for violations of their provisions, despite their prohibitive nature.

Thus, the 1906 Geneva Convention, which included an article on the repression of abuse and infractions, was the first to deal with the issue of repression. According to Article 28(1) of this Convention, the Contracting Parties agreed, in case their domestic laws were insufficient, to take steps to prevent abuse of the emblem of the Red Cross and to repress certain infractions of the Convention. However, this provision, which did not stipulate a mandatory compliance, did not trigger action by the State Parties to the Convention.

After World War I, the Preliminary Peace Conference established a commission on January 25, 1919 to inquire into "the responsibility of

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8. A partial exception is Convention (X) for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention, Oct. 18, 1907, reprinted in SCHINDLER & TOMAN, supra note 7, at 313. Mention may be made in this context of Article 3 of the Convention (IV) Respecting the Laws and Customs of War on Land, Oct. 18, 1907, reprinted in SCHINDLER & TOMAN, supra note 7, at 63. This article provides for an obligation to pay compensation for violation of the regulations made under that Convention. This obligation is directed at the state.


11. 1906 Geneva Convention, supra note 10, art. 28(1). The infractions specified in Article 28(1) — acts of robbery, ill treatment of the wounded and sick of the armies, and wrongful use of the flag of the Red Cross — were those considered to be the most grave. See Sandoz, Penal Aspects, supra note 6, at 213.
the authors of the war" and the means of punishing them. One important product of this commission was a list of violations of the laws of war.\textsuperscript{12} In addition, Articles 227 to 230 of the Treaty of Versailles provided for the punishment of Germans (including former Emperor Wilhelm II) accused of committing acts in violation of the laws and customs of war and for the extradition by the German government of some of its citizens.\textsuperscript{13} Yet, for a variety of reasons, these articles were of very limited practical significance. The Leipzig trials were the only tangible outcome of these provisions, and a poor outcome they were; few persons were brought to trial, the sentences imposed by the Court were light, and in many cases the convicted persons did not serve out their sentences.\textsuperscript{14}

The 1929 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field [1929 Geneva Convention]\textsuperscript{15} followed the provisions laid down in the 1906 Geneva Convention regarding repression of abuses and infractions, but it included an important innovation in the existing system. Based on the experience of states' failure to implement voluntarily the dictates of Article 28(1) of

\textsuperscript{12} Sandoz, \textit{Penal Aspects}, supra note 6, at 214, 226. The list includes: murders and massacres; systematic terrorism; torture of civilians; deliberate starvation of civilians; rape; abduction of girls and women for the purpose of enforced prostitution; deportation of civilians; internment of civilians under inhuman conditions; forced labor of civilians or others in connection with the military operations of the enemy; usurpation of sovereignty during military occupation; compulsory enlistment of soldiers among the inhabitants of occupied territory; attempts to denationalize the inhabitants of occupied territory; pillage; confiscation of property; exaction of illegitimate or of exorbitant contributions and requisitions; debasement of currency and issue of spurious currency; imposition of collective penalties; wanton devastation and destruction of property; deliberate bombardment of undefended places; wanton destruction of religious, charitable, educational and historic buildings and monuments; destruction of merchant ships and passenger vessels without warning and without provision for the safety of passengers and crew; destruction of fishing boats and of relief ships; deliberate bombardment of hospitals; attack on and destruction of hospital ships; breach of other rules relating to the Red Cross; use of deleterious and asphyxiating gases; use of explosive or expanding bullets and other inhuman appliances; directions to give no quarter; ill-treatment of wounded and prisoners of war; employment of prisoners of war on unauthorized works; misuse of flags of truce; and poisoning of wells. \textit{Id.} at 226.


\textsuperscript{14} A list of 896 war criminals was submitted by the Allied governments to the German government for prosecution. Originally, the intention had been to prosecute them before military tribunals of the Allies. Eventually a compromise was struck, based on a German proposal, which allowed trials before the German Supreme Court in Leipzig. The original list was substantially cut down to include only 45 names. Moreover, only 12 were subsequently tried, and only 6 were convicted. The final blow to the program to try war criminals was the issuance of disproportionately light sentences, which in many cases were either not fully served or not served at all. \textit{See, e.g.}, G\textsc{erhard} V\textsc{on} G\textsc{lahn}, \textit{Law Among Nations} 878 (6th ed. 1992).

\textsuperscript{15} Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, July 27, 1929, 118 L.N.T.S. 303 [hereinafter 1929 Geneva Convention]. This Convention was the third version of the 1864 Geneva Convention (the second version being the 1906 Geneva Convention).
the 1906 Geneva Convention, Article 29 of the 1929 Geneva Convention imposed a *mandatory* obligation on the High Contracting Parties to adopt the necessary measures for the repression, in time of war, of *any* act contrary to the provisions of the Convention.¹⁶ Yet, despite its mandatory character, Article 29 failed to initiate a more rigorous implementation by the Signatory States. Finally, both Geneva Conventions of 1929¹⁷ aimed to improve their implementation and application, by, for example, instituting the mechanism of a Protecting Power and providing for an inquiry in case an allegation is made that the Convention has been breached.

The trials of war criminals following the end of World War II have decisively reaffirmed the principle of individual responsibility for crimes committed under international law, that is, that international law may impose direct duties and obligations upon the individual. In the famous words of the Nuremberg Tribunal, "[t]hat international law imposes duties and liabilities upon individuals as well as upon States has long been recognized. . . . Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."¹⁸

The Charter of the International Military Tribunal (IMT)¹⁹ enumerates three types of acts which are considered to be crimes coming within the jurisdiction of the IMT and for which individual responsibility may be incurred: crimes against peace, war crimes,²⁰ and crimes against


¹⁷. See *supra* notes 15 and 16.


Regardless of criticisms of the Nuremberg and Tokyo Tribunals, the norms of the IMT Charter and both Tribunals' judgments have since 1945 come to represent and be part of general international law.

21. See IMT Charter, supra note 19, art. 6(c), 82 U.N.T.S. at 288. The concept of crimes against humanity was deemed necessary because war crimes did not cover offenses committed by a state against its own nationals. See, e.g., G.I.A.D. Draper, War, Laws of, Enforcement, in 4 Encyclopedia 1981, supra note 20, at 323, 325. In order to show that a crime against humanity has been committed, it is necessary to demonstrate the systematic or massive nature of certain acts (and, according to the traditional view, also their official character, i.e., organization or acquiescence by a state) targeting a certain group on national, political, ethnic, racial, or religious grounds. See, e.g., Benjamin B. Ferencz, Crimes Against Humanity, in 1 Encyclopedia of Public International Law 869, 870 (Rudolf Bernhardt, ed., 1992) (hereinafter Encyclopedia 1992); 2 Georg Schwarzenberger, International Law as Applied by International Courts and Tribunals 498 (1968) (crimes against humanity were meant to focus on acts of persecution and extermination of whole groups of civilians); Secretary-General's Report, supra note 1, para. 48, 32 I.L.M. at 1173. But see Fourth Report on the Draft Code of Offences Against the Peace and Security of Mankind, [1986] 2(1) Y.B. Int'l L. Comm'n 53, 56, para. 13, U.N. Doc. A/CN.4/SER.A/1986/Add.1 (Part 1), cited in Lyal S. Sunga, Individual Responsibility in International Law for Serious Human Rights Violations 136 (1992) (a view that crimes against humanity need not necessarily involve mass action and that an attack on a single person may constitute such a crime if it has a specific character which shocks the human conscience; however, such crimes can only be acts of state and cannot be carried out by private persons).

Due, inter alia, to the debate about whether such crimes were previously recognized by international law, this category of crimes was substantially played down by the IMT. The IMT interpreted its Charter to mean that such crimes were punishable only if committed in connection with crimes against peace or war crimes. This restriction was lifted in the Control Council Law No. 10 of December 1945 and in subsequent decisions handed down in the twelve Nuremberg trials conducted under that law. See, e.g., James C. O'Brien, The International Tribunal for Violations of International Humanitarian Law in the Former Yugoslavia, 87 Am. J. Int'l L. 639, 649-50 (1993) (link to other war crimes required only for crimes against humanity committed before the eruption of an armed conflict); Theodor Meron, War Crimes in Yugoslavia and the Development of International Law, 88 Am. J. Int'l L. 78, 84-87 (1994) (in light of post-Nuremberg developments, especially in the area of human rights law, crimes against humanity need no longer be linked to war but rather exist independently of it).


22. For example, the criticisms that the trials were "victors' justice" (especially since the Nuremberg and the Tokyo Tribunals did not include any judges from neutral nor vanquished countries) and that there was retroactive application of penal norms (especially with regard to crimes against peace and crimes against humanity) and sanctions. For discussion of such arguments, see, e.g., Donald A. Wells, War Crimes and Laws of War (2d ed. 1990); Bassiouni, Crimes Against Humanity, supra note 21, at 466-72.

23. See, e.g., Ian Brownlie, Principles of Public International Law 562 (4th ed. 1990); Malcolm N. Shaw, International Law (3d ed. 1991); Sunga, supra note 21, at 30-50; Bassiouni, Holocaust, supra note 21, at 235. Yet, subsequent attempts to generalize the Nuremberg principles have produced meager results. See 2 Schwarzenberger, supra note 21, at 526-40; Hans-Heinrich Jescheck, Nuremberg Trials, in 4 Encyclopedia 1981, supra note 20, at 50, 55. Schwarzenberger lists five indications of the impact of the Nuremberg principles on international law:

(1) The 1946 General Assembly resolutions affirming the principles of the IMT judgment and the London Charter. But see Jescheck, Nuremberg Trials, supra, at 56.
The failure of the various Geneva Conventions prior to 1949 to establish a strong system for repression of breaches of their provisions, as well as the horrors of World War II and the desire to avoid the criticisms leveled against the Nuremberg and Tokyo proceedings, led to the incorporation of a new system of repression in the 1949 Geneva Conventions — the grave breaches system.

II. SYSTEM OF REPRESSION OF VIOLATIONS UNDER THE 1949 GENEVA CONVENTIONS — OVERVIEW

A. The Contours of the "Grave Breaches" System

The 1949 Geneva Conventions were a result of the horrors of World War II. The experience of the war substantially affected not only the scope, substantive content, and procedural safeguards included in the Conventions but also the system for repression of violations of those Conventions. It became clear that there was a need for separate, specialized provisions for the repression of violations of the existing humanitarian conventions.

At the basis of the new system, elaborated in common Articles 49/50/129/146 of the Conventions, lies the distinction between "grave breaches" and all other breaches of the Conventions. The Conventions

(4) Inadequate alterations made in the military laws of the leading powers.
(5) Subsequent practice of parties to armed conflicts and the pervasiveness of war crimes and grave breaches in post World War II armed conflicts.
See 2 Schwarzenberger, supra note 21, at 526–40.
25. This notation refers to Article 49 of the First Geneva Convention, Article 50 of the Second Convention, Article 129 of the Third, and Article 146 of the Fourth.
26. Protocol I adds a third category of breach — "serious" breach. See Protocol I, supra note 5, art. 90(2)(c)(i), 16 I.L.M. at 1430; see also Third Geneva Convention, supra note 4, art. 13, 6 U.S.T. at 3328, 75 U.N.T.S. at 146. However, the distinction between a "grave" breach and a "serious" violation or breach is not entirely clear. Yoram Dinstein, LAWS OF WAR 275 (1983) (Hebrew); Röling, supra note 20, at 213.
With respect to nongrave breaches, Articles 49/50/129/146 of the Conventions prescribe that each High Contracting Party "shall take measures necessary for the suppression" of such breaches. First Geneva Convention, supra note 4, art. 49, 6 U.S.T. at 3146, 75 U.N.T.S. at 62; Second Geneva Convention, supra note 4, art. 50, 6 U.S.T. at 3250, 75 U.N.T.S. at 116;
impose a three part obligation on the High Contracting Parties with regard to grave breaches. First, there is an obligation to *legislate*. Each Party is required to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any grave breach of the Conventions. Second, each Party is under an obligation to *search* for persons alleged to have committed, or to have ordered the commission of, such grave breaches. Finally, there is an obligation to *try* such persons before the national courts, regardless of their nationality. However, each Party enjoys discretion, in accordance with the provisions of its domestic legislation, to hand such persons over for trial to another High Contracting Party.

Thus, the system for repression of grave breaches in the Conventions is based not on international tribunals but on national enforcement by means of legislation and adjudication before national courts. In order to facilitate such a system, the principle of universality of jurisdiction was introduced into the Conventions. According to that principle, a national court of each of the High Contracting Parties enjoys the jurisdiction to try a person accused of committing, or ordering the commission of, a grave breach of the Conventions, regardless of the absence of traditional sources of jurisdiction, such as the nationality of that person or of the victim, or the place where the offense was committed. The principle of universality further implies that the enforcement of the Conventions is not limited to the states that are parties to an armed conflict. The obligations of repressing grave breaches are imposed on any High Contracting Party, including a neutral state.

Several arguments can be put forward in order to explain and support the grave breaches system. First, there was an apparent need to

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28. This is supposed to be a reflection of the principle, first explicated by Grotius, of *aut dedere aut punire* (or, in another version, *aut judicare*). For criticism of the extradition provision, see, e.g., Draper, *Red Cross Conventions, supra* note 26, at 22 (subjecting the obligation to extradite an accused person to the provisions of the domestic legislation of a Party, making that obligation virtually nonexistent). See also Joyce A.C. Gutteridge, *The Geneva Conventions of 1949*, 26 *Brit. Y.B. Int'l L.* 294, 306 (1949).

foster respect for the Conventions and to ensure their efficient implementation. Grave breaches were given a special place in the Conventions in order to prevent such acts from going unpunished. Second, the rules provided by the Conventions are meant to contribute to uniformity in the practice of states, thus preventing the resort to ad hoc penal legislation and adjudication by victorious states of persons belonging to the vanquished nations. Third, designating certain acts as "grave breaches" serves an educational function by drawing special condemnation to acts perceived to be egregious violations of international humanitarian law. Finally, the system was intended to ensure a minimum standard of safeguards to persons accused of committing (or ordering the commission of) such grave breaches.

Two preliminary issues ought to be addressed briefly before further exploration of the concept of "grave breaches." First, does the grave breaches system invoke individual responsibility? Second, does the system preclude an international (as opposed to a national) tribunal?

An argument may be put forward that the Conventions do not impose any direct international obligations on individuals but are confined to the imposition of duties upon states (for instance, to legislate and prosecute). However, such an argument is clearly refuted by the principles enunciated in the IMT Charter and in the Nuremberg Judgment. Indeed, although the drafters of the Conventions have avoided using the term "war crimes" with regard to acts defined as "grave breaches," it seems overwhelmingly accepted that those acts do, in fact, constitute war crimes and involve individual responsibility for breaches of the laws of war. It may thus be contended that the national

30. Id. at 85, 114, 356.
31. Id. at 115. See also G.I.A.D. Draper, The Geneva Conventions of 1949, 114 R.C.A.D.I. 63, 156 (1965-I); Sandoz, Penal Aspects, supra note 6, at 225.
32. Guarantees of fair trial are assured such persons. The last paragraph of Articles 49/50/129/146 of the Geneva Conventions provides that, "In all circumstances, the accused persons shall benefit by safeguards of proper trial and defence, which shall not be less favourable than those provided by Article 105 and those following of the Geneva Convention relative to the Treatment of Prisoners of War of 12 August 1949." First Geneva Convention, supra note 4, art. 49, 6 U.S.T. at 3146, 75 U.N.T.S. at 62; Second Geneva Convention, supra note 4, art. 50, 6 U.S.T. at 3250, 75 U.N.T.S. at 116; Third Geneva Convention, supra note 4, art. 129, 6 U.S.T. at 3418, 75 U.N.T.S. at 239; Fourth Geneva Convention, supra note 4, art. 146, 6 U.S.T. at 3616, 75 U.N.T.S. at 386.
33. See supra notes 18–21 and accompanying text; see also Edward M. Wise, International Crimes and Domestic Criminal Law, 38 DePaul L. Rev. 923, 932–35.
34. See infra note 45 and accompanying text.
courts are to be regarded as organs of the international community in this context.\textsuperscript{36}

Second, it may be argued that the Conventions preclude resort to an international tribunal for adjudication of alleged grave breaches by vesting exclusive jurisdiction in the national courts of the High Contracting Parties.\textsuperscript{37} Thus, the argument goes, the system introduced in the Conventions has created a jurisdictional difference between grave breaches and other war crimes — whereas grave breaches will be subject to the exclusive jurisdiction of national courts under the principle of universality, other war crimes can be brought before an international tribunal.\textsuperscript{38} However, the better view seems to be that, while the Conventions contemplate trial by national courts, they do not preclude trials before an international tribunal.\textsuperscript{39} The establishment of the International Tribunal by a Security Council resolution as a measure under Chapter VII of the U.N. Charter bypasses such concerns. The International Tribunal’s source of subject matter jurisdiction is therefore not to be found in the Conventions as such, although its Statute practically incorporates the Conventions by way of reference.\textsuperscript{40}


\textsuperscript{37} See Draper, \textit{Implementation and Enforcement}, supra note 35, at 38; Draper, \textit{The Geneva Conventions}, supra note 31, at 158. A draft clause proposed by the International Committee of the Red Cross, intending to provide the possibility of an international jurisdiction as an alternative to trial by national courts of persons accused of committing grave breaches of the Conventions, was rejected by the Diplomatic Conference. See infra note 43; 2 SCHWARZENBERGER, supra note 21, at 542–43 (such a move reflected the antipathy to international war crimes trials).

\textsuperscript{38} See Draper, \textit{The Geneva Conventions}, supra note 31, at 158.

\textsuperscript{39} See M. Cherif Bassiouni, \textit{Repression of Breaches of the Geneva Conventions Under the Draft Additional Protocol to the Geneva Conventions of August 12, 1949}, 8 RUTGERS CAMDEN L.J. 185, 196 (1977) (although grave breaches are punishable by national courts, they have also been deemed international crimes and thus are punishable by any competent international tribunal; in addition, each of the High Contracting Parties may confer jurisdiction upon such an international tribunal); Theodor Meron, \textit{The Case for War Crimes Trials in Yugoslavia}, 72 FOREIGN AFFAIRS, Summer 1993, at 122, 129.

\textsuperscript{40} See Statute of the International Tribunal, supra note 1, art. 2, 32 I.L.M. at 1192. It may be further noted that in any case the obligations incurred by Member States under the U.N. Charter prevail over other international obligations imposed on them. See U.N. CHARTER art. 103; Payam Akhavan, \textit{Punishing War Crimes in the Former Yugoslavia: A Critical Juncture for the New World Order}, 15 HUM. RTS. Q. 262, 277–79.

The principle of universal jurisdiction is also maintained by means of Articles 9 and 10 of the Statute of the International Tribunal. See Statute of the International Tribunal, supra note 1, arts. 9–10, 32 I.L.M. at 1194–95. As was stated by the U.N. Secretary-General, "[i]ndeed national courts should be encouraged to exercise their jurisdiction in accordance with their relevant national laws and procedures." \textit{Secretary-General’s Report}, supra note 1, para. 64, 32 I.L.M. at 1176.
B. The Development of the Concept of "Grave Breaches"  

In December 1948, the International Committee of the Red Cross (ICRC) prepared a draft of four new articles dealing with repression and suppression of breaches of the draft Conventions. In these draft articles it was suggested for the first time that the Conventions themselves incorporate the concept and definition of "grave breaches." According to the proposed draft, each High Contracting Party was obligated to enact provisions for the repression of any breach of the Conventions and to ensure the prosecution of any act contrary to their provisions. The draft instructed the High Contracting Parties' domestic tribunals, or "any international jurisdiction the competence of which has been recognized by [the High Contracting Parties]," to punish grave breaches as crimes against the law of nations.

Although there are several differences between the draft articles put forward in December 1948 and the final text of the articles as incorporated in the Conventions, the two basic principles of uniformity of practice and punishment were left intact. The Conventions incorporated a system of universal jurisdiction in order to facilitate uniform treatment

41. For a more detailed description, see IV GENEVA CONVENTIONS COMMENTARY, supra note 6, at 584-89; 2B FINAL RECORD, supra note 29, at 114-18.

42. A previous draft article presented by the International Committee to the Seventeenth International Red Cross Conference in 1948 stated as follows:

The Contracting Parties shall be under the obligation to 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.

IV GENEVA CONVENTIONS COMMENTARY, supra note 6, at 585.

43. The proposed draft article, entitled "Grave Violations" provided as follows:

Without prejudice to the provisions of the foregoing Article [dealing with legislative measures to repress any violation of the Conventions], grave 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 recognized by them. Grave breaches shall include in particular those which cause death, great human suffering or serious injury to body or health, those which constitute a grave denial of personal liberty or a derogation from the dignity due to the person or involve extensive destruction of property, also breaches which by reason of their nature or persistence show a deliberate disregard of this Convention.

Each High Contracting Party shall in conformity with the foregoing Article enact suitable provisions for the extradition of any person accused of a grave breach of this Convention, whom the said High Contracting Party does not bring before its own tribunals.

IV id. at 586.
in the repression of grave breaches while sending an advance warning to potential offenders. Indeed, it was because of this notion of uniformity of treatment that the drafters preferred the term grave “breaches” to the suggested terms of “grave crimes” and “war crimes” — the idea being that the concept of “crime” had different meanings in different legal systems and cultures.

Evaluation of the implementation of the system of grave breaches since its inception in 1949 leads to mixed conclusions. The High Contracting Parties have yet to exercise universal jurisdiction over grave breaches. Moreover, although of an absolute character, the majority of states have not fulfilled their obligation under common Articles 49/50/129/146 to enact proper legislation. Interestingly enough, the former Yugoslavia was one of the first states to fulfill this obligation by

44. See 1 id. at 370-71.

45. Use of the terms “grave crimes” or “war crimes” had been suggested by the U.S.S.R. delegation. The term “breaches” was preferred, although it was clear that most acts defined as “grave breaches,” if not all of them, had already been defined as crimes under the various domestic penal laws of the High Contracting Parties. 2B FINAL RECORD, supra note 29, at 31, 33, 85-87, 115-16, 355-60, 363; see also I GENEVA CONVENTIONS COMMENTARY, supra note 6, at 371; Draper, The Geneva Conventions, supra note 31, at 155.

A related argument leveled against using the term “war crimes” in this context was that an act is considered a crime only when made punishable under the relevant domestic legislation. Since the Conventions are not a penal code, a violation of their provisions could not directly be made into a crime. 2B FINAL RECORD, supra note 29, at 86, 116, 357; see also Waldemar A. Solf & Edward R. Cummings, A Survey of Penal Sanctions Under Protocol I to the Geneva Conventions of August 12, 1949, 9 CASE WESTERN RES. J. INT’L L. 205, 239 (1977). But see Richard R. Baxter, The Municipal and International Law Basis of Jurisdiction over War Crimes, 28 BRIT. Y.B. INT’L L. 382 (1951) (international law is directly applicable to war criminals; no need for implementing legislation in order to make grave breach a crime).

Another objection to the use of the term “war crimes” was based on the ground that it would be premature to attempt a definition of a certain category of war crimes or include any provisions for the repression and punishment of war crimes as such. This objection pointed to the (at the time) anticipated codification of the Nuremberg principles by the International Law Commission. Thus, the draft articles prepared by the ICRC, see supra notes 42–43, which implicitly codified the legal principles of the Nuremberg Judgment, were replaced by the grave breaches system. 2B FINAL RECORD, supra note 29, at 117; see also Gutteridge, supra note 28, at 304–05; Raymund T. Yingling & Robert W. Ginnane, The Geneva Conventions of 1949, 46 AM. J. INT’L L. 393, 424–25 (1952).

46. See infra note 52.

47. See 2 SCHWARZENBERGER, supra note 21, at 542 (such obligations are absolute and of a jure cogens character). The absolute character of the states’ obligations is also reflected in common Articles 51/52/131/148 of the Conventions, providing that the obligations imposed on states with regard to grave breaches cannot be waived or in any way affected by means of an agreement among the belligerents. Thus, there is no effect to an agreement by which a defeated state has been compelled to abandon all claims due for violations of the Conventions committed by persons in the service of the victorious state. IV GENEVA CONVENTIONS COMMENTARY, supra note 6, at 602–03; see also Yves Sandoz, Implementing International Humanitarian Law, in INTERNATIONAL DIMENSIONS OF HUMANITARIAN LAW, supra note 23, at 259, 275 (1988).

modifying its Penal Code to conform to the provisions of the Conventions.49

III. "GRAVE BREACHES" OF THE CONVENTIONS — THE
SUBSTANTIVE CONTENT50

Analysis of the substantive content of the grave breaches enumerated in the Conventions is no easy task. Not only are the language and terms used vague at times, but the mechanism for repression of grave breaches established in 1949 has never been applied. No international penal tribunal was established until the International Tribunal in 1993,51 and the High Contracting Parties have never used the universal jurisdiction granted them under the Conventions.52

Apart from an examination of the Conventions themselves, the following analysis of the content of "grave breaches" seeks to incorporate references to other international documents (global as well as regional) and to the experience of domestic jurisdictions. This mode of analysis derives its strength from the growing trend towards greater convergence and intersection of the norms and rules of international humanitarian law and of those pertaining to human rights law.53

49. See IV GENEVA CONVENTIONS COMMENTARY, supra note 6, at 590 n.1, 594. In fact, according to the Commentary, the Yugoslav Penal Code went further in its prohibition of war crimes than the list of grave breaches included in the Conventions. Id.

Indeed, the 1976 Criminal Code of the Republic of Yugoslavia (as amended) includes a separate Heading (Number 16), entitled "Criminal Acts Against Humanity and International Law." The articles appearing under this heading encompass such crimes as Genocide, Instigation of an Aggressive War, and Destruction of Cultural and Historical Monuments. Of special significance is Article 142, dealing with "War Crimes Against Civilian Population." I thank Jennifer Green for supplying me with a translated copy of the relevant parts of the Criminal Code.


50. The following analysis of the specific acts constituting grave breaches of the Conventions does not purport to cover fully the complex range of issues which arise with regard to concepts such as "torture," "inhuman treatment," "destruction of property," and "deportations." Rather, it is meant to give a synopsis of the major issues connected with each of the above mentioned terms and concepts.


53. See, e.g., STARKE'S INTERNATIONAL LAW, supra note 20, at 500-01 (trend of importing human rights rules and standards into the law of armed conflicts); Dietrich Schindler, Human
The lists of "grave breaches" found in common Articles 50/51/130/147 of the Conventions are comprised of nine categories of violations. The lists are not identical. In fact, only three grave breaches are mentioned in all four Conventions; they are noted in italics in the list below. The nine categories of acts constituting grave breaches of the Conventions are as follows:

(1) Wilful killing (First, Second, Third, and Fourth Conventions);
(2) Torture or inhuman treatment, including biological experiments (First, Second, Third, and Fourth Conventions);
(3) Wilfully causing great suffering or serious injury to body or health (First, Second, Third, and Fourth Conventions);
(4) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly (First, Second, and Fourth Conventions);
(5) Compelling a Prisoner of War or a protected person to serve in the forces of the hostile Power (Third and Fourth Conventions);
(6) Wilfully depriving a prisoner of war or a protected person of the rights of fair and regular trial prescribed in the Convention (Third and Fourth Conventions);
(7) Unlawful deportation or transfer of a protected person (Fourth Convention);
(8) Unlawful confinement of a protected person (Fourth Convention); and
(9) Taking of hostages (Fourth Convention).

In order to be considered a grave breach, each of the acts listed above must be committed against persons or property protected by the relevant

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Rights and Humanitarian Law: Interrelationship of the Laws, 31 AM. U. L. REV. 935 (1982); Asbjorn Eide, The Laws of War and Human Rights — Differences and Convergences, in STUDIES AND ESSAYS ON INTERNATIONAL HUMANITARIAN LAW AND RED CROSS PRINCIPLES 675 (Christophe Swinarski ed., 1984); A.H. Robertson, Humanitarian Law and Human Rights, in STUDIES AND ESSAYS ON INTERNATIONAL HUMANITARIAN LAW AND RED CROSS PRINCIPLES, supra, at 793. Indeed, it may be argued that the system of grave breaches in the Conventions is, in and of itself, a reflection of the growing intersection between the two fields of law, contributing to the blurring of any sharp distinctions between the two. See SUNGA, supra note 21, at 53–54.

54. First Geneva Convention, supra note 4, art. 50, 6 U.S.T. at 3146, 75 U.N.T.S. at 62; Second Geneva Convention, supra note 4, art. 51, 6 U.S.T. at 3250, 75 U.N.T.S. at 116; Third Geneva Convention, supra note 4, art. 130, 6 U.S.T. at 3420, 75 U.N.T.S. at 238; Fourth Geneva Convention, supra note 4, art. 147, 6 U.S.T. at 3618, 75 U.N.T.S. at 388.
Convention. One of the impacts of this qualification is that no grave breach can be committed by a state and its agents against the nationals of that state.

Several issues are left unresolved by the Conventions. Thus, it might be argued that the level of criminal intent, mens rea, needed to establish criminal responsibility is not clear. The term "wilful" appearing as the mental element required for some of the grave breaches mentioned above, may literally signify no more than the voluntary commission of a criminal act. On the other hand, it covers conscious and intentional acts. In addition, issues pertaining to the range, scope, and content of permissible defenses which may be invoked by an accused person, the penal responsibility for omission to act or for participation (other than committing

55. The term “protected persons” is defined in Article 13 of the First Geneva Convention, Article 13 of the Second Convention, Article 4 of the Third Convention, and Article 4 of the Fourth Convention. First Geneva Convention, supra note 4, art. 13, 6 U.S.T. at 3124, 75 U.N.T.S. at 40; Second Geneva Convention, supra note 4, art. 13, 6 U.S.T. at 3228, 75 U.N.T.S. at 94; Third Geneva Convention, supra note 4, art. 4, 6 U.S.T. at 3320, 75 U.N.T.S. at 138; Fourth Geneva Convention, supra note 4, art. 4, 6 U.S.T. at 3520, 75 U.N.T.S. at 290. The “protected property” is to be deduced from various articles incorporated in each of the Conventions. See infra part III.D.

56. However, in the Commentary on the Additional Protocols, the term “wilfully” refers to acts committed consciously and with intent, i.e., the perpetrator’s mind is on the act and its consequences, and he or she wills those consequences to occur. See INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS 994 (Yves Sandoz et al. eds., 1987). Thus, while recklessness is covered by that term, negligence or lack of foresight is not.

See also BLACK’S LAW DICTIONARY 1599 (6th ed. 1990) for a definition of “willful”:

An act or omission is “willfully” done, if done voluntarily and intentionally and with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done; that is to say, with bad purpose either to disobey or to disregard the law. It is a word of many meanings, with its construction often influenced by its context. Screws v. United States, 325 U.S. 91, 101 (additional citations omitted).

A willful act may be described as one done intentionally, knowingly, and purposely, without justifiable excuse, as distinguished from an act done carelessly, thoughtlessly, heedlessly, or inadvertently. A willful act differs essentially from a negligent act. The one is positive and the other negative.

57. Under Articles 49/50/129/146 of the Geneva Conventions, penal sanctions are to be imposed (in national legislation) on persons committing or ordering to be committed a grave breach of the Conventions. First Geneva Convention, supra note 4, art. 49, 6 U.S.T. at 3146, 75 U.N.T.S. at 62; Second Geneva Convention, supra note 4, art. 50, 6 U.S.T. at 3250, 75 U.N.T.S. at 116; Third Geneva Convention, supra note 4, art. 129, 6 U.S.T. at 3418, 75 U.N.T.S. at 239; Fourth Geneva Convention, supra note 4, art. 146, 6 U.S.T. at 3616, 75 U.N.T.S. at 386. Thus, issues such as the responsibility for failure to act to prevent or put an end to a grave breach when a person had a duty to act was left for the discretion of the different states. Under Protocol I, however, responsibility for “negative criminality,” i.e., failure to act, is explicitly recognized in Article 86. See Röling, supra note 20, at 208, 211, 213–14 (Protocol I merely codifies the rules applied by the Nuremberg and Tokyo Tribunals concerning the responsibility for omission to prevent war crimes).
or ordering the commission of a grave breach), and the proper penalties to be imposed on persons duly convicted of violations of the Conventions, are left open. Finally, the question of proper canons of interpretation may carry special weight in the context of adjudication under penal provisions included in an international convention. In other words, are the general rules of treaty interpretation applicable to the Conventions, or should courts (whether national or international) refer to special rules which may pertain to the construction of penal norms?

A. Wilful Killing

According to the Commentary on the Conventions, the term "wilful killing" refers, broadly speaking, to cases where protected persons are put to death without any resistance on their part. It covers cases where death occurred through an omission provided that "the omission must have been wilful and there must have been an intention to cause death by it." The Commentary emphasizes that a requirement for an "intention to cause death" exists and that mere negligence or cases of actual physical impossibility are not covered under the category of "wilful killing.

Some of the examples mentioned in the Commentary as constituting wilful killing are: (1) execution of hostages; (2) putting protected persons to death as a reprisal; (3) giving instructions to decrease the food rations of prisoners of war or civilian internees to a point that deficiency diseases causing death occur; (4) in the Commentary for the First and Second Conventions, attempts on the life of medical personnel or chaplains are

58. The Genocide Convention imposes criminal responsibility for conspiracy, attempt, complicity, and incitement to commit the crime of genocide. See Genocide Convention, supra note 23, 78 U.N.T.S. at 277. However, the Conventions (and the Additional Protocols) limit the imposition of criminal responsibility to those who committed or ordered the commission of a grave breach.

Article 7(1) of the Statute of the International Tribunal provides that, "A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime." Statute of the International Tribunal, supra note 1, art. 7(1), 32 I.L.M. at 1194; see also id. art. 2, 32 I.L.M. at 1192 (targeting those who "committed or ordered to be committed"); 2B FINAL RECORD, supra note 29, at 115; Dinstein, International Criminal Law, supra note 36, at 231 (the general principles of international criminal law have not evolved to a stage where every act of attempt, complicity, conspiracy, and incitement to commit an offense is, by itself, such an offense).

59. See discussion infra part V.

60. See I GENEVA CONVENTIONS COMMENTARY, supra note 6, at 371.

61. See IV id. at 597.

62. Id. From the cumulative language used here it seems apparent that "wilfulness" is not to be equated with the existence of an intention to cause death.

63. See I id. at 371.
also mentioned. Finally, the Commentary leaves open the question whether the death of a prisoner of war or a civilian internee as a result of an act of war may be considered "wilful killing."  

B. Torture or Inhuman Treatment Including Biological Experiments

1. Torture

The Commentary on the First Geneva Convention devotes only a few lines to the grave breach of "torture or inhuman treatment," explaining that the terms "torture," "inhuman treatment," and "biological experiments" are clear enough and need no detailed comment. However, the Commentary on the Fourth Convention devotes more space to this issue. The position adopted by the Commentary suggests that, although the term "torture" may have a range of permissible meanings, it must be viewed in the context of the other expressions which follow, such as "inhuman treatment" and "suffering." Such contextual examination leads to the conclusion that "torture" must be given its "legal meaning" — the infliction of suffering on a person to obtain from that person, or from another, confessions or information. Thus, the crucial issue is not the pain inflicted on a person but the purpose behind its infliction. In the absence of the required purpose, assault on the physical or moral integrity of a person is not considered to be "torture.

a. Prohibition Against Torture Under International Instruments and Custom

Since 1949, a substantial body of international instruments, court judgments, and scholarly writings have developed around the prohibition of torture, which forms part of human rights law. These sources can enhance and enrich our understanding of the concept and scope of the parallel prohibition found in international humanitarian law. Thus, it is to these sources that this article now turns.

64. See I id. at 371; II id. at 267; III id. at 626–27; IV id. at 597.
65. See III id. at 627; IV id. at 597. One example given is that of bombardment of a civilian hospital.
66. See I id. at 372.
67. See IV id. at 598. This "legal meaning" has since been expanded to include other purposes for the infliction of suffering on a person. See discussion infra part III.B.1.b.
68. IV GENEVA CONVENTIONS COMMENTARY, supra note 6, at 598. Although, of course, such an assault may fall into other categories of acts constituting grave breaches of the Conventions, e.g., inhuman treatment or wilfully causing great suffering or serious injury to body or health. See infra notes 75–76 and accompanying text.
69. See supra note 53.
The prohibition against torture is entrenched in numerous international instruments. Moreover, those international instruments recognize that the right not to be subjected to torture is nonderogable—it cannot be compromised, limited, derogated from, or completely abandoned, even in the face of real emergency. In addition, it seems that the prohibition against torture forms part of international customary law.

b. What Constitutes "Torture"?

Only two of the international instruments mentioned above define the term "torture." Other international instruments usually state, in a general


73. Article 1 of the 1975 Declaration defines "torture" as follows:

1. For the purpose of this Declaration, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person for such purposes as obtaining from him or a third person information or confession, punishing him for an act he has committed or is suspected of having committed, or intimidating him or other persons. It does not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions to the extent consistent with the Standard Minimum Rules for the Treatment of Prisoners.
language, that "[n]o one shall be subjected to torture or inhuman treatment" without supplying a definition for these terms.

Even if, at first blush, it may seem that the concept of torture is "clear enough and needs no detailed comment," that perceived clarity is blurred when "torture" is put side by side with concepts such as "inhuman" or "degrading" treatment. In fact, the terms "torture" and "inhuman treatment" are not wholly separable, the former forming a part of the latter. Thus, the difference between an act of inhuman treatment and an act amounting (or better still, descending) to the level of torture is not one of kind, but rather of degree — both may be seen as occupying different points on the same spectrum. Torture may be regarded as an aggravated form of "inhuman treatment." Consequently, the distinction between torture and inhuman treatment may be drawn along one of two lines, namely, the distinction may be one of severity or one of specific purpose.

Two of the prominent commentators on the Convention Against Torture offer some guidelines to understanding the nature of "torture" as described in that Convention. First, in order to constitute torture, an

2. Torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment.

1975 Declaration, supra note 70, art. 1, U.N. GAOR 30th Sess., Supp. No. 34, at 91. Article 1 of the Convention Against Torture provides as follows:

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

2. This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.


For a discussion of the negotiating history of the definition of "torture" in the Convention, see BURGERS & DANELIUS, supra note 72, at 41-47.

74. See supra note 66 and accompanying text.


76. See 1975 Declaration, supra note 70, art. 1(2), U.N. GAOR, 30th Sess., Supp. No. 34, at 91; see also infra note 86.

77. Those two lines are by no means mutually exclusive and may be considered together.

78. See supra note 70.

79. BURGERS & DANELIUS, supra note 72, at 117–23. The commentators remark that the Convention does not define "torture" but rather describes it.
act must cause severe pain. That pain need not be inflicted systematically, and even an isolated act may be considered torture. Second, an omission may, in certain cases, be considered as similar to an act. Third, torture must be intentional; mere negligence would not be sufficient. Fourth, the list of purposes for which severe pain or suffering is intentionally inflicted is not exhaustive. Rather, it includes the most common purposes. Other purposes, of similar type (but not any other purpose), may be recognized. Fifth, the primary objective of the Convention Against Torture is to eliminate torture committed by or under the responsibility of public officials for purposes connected with their public functions. Indeed, the Convention Against Torture is directed only at acts of torture for which the authorities could be held responsible; it does not cover criminal acts by private individuals.

Case law regarding use of torture and resort to inhuman treatment is most developed under the regime of the European Convention for the Protection of Human Rights and Fundamental Freedoms. In the Greek Case, the European Commission of Human Rights stated that “[t]he word ‘torture’ is often used to describe inhuman treatment, which has a purpose, such as the obtaining of information or confessions, or the infliction of punishment, and it is generally an aggravated form of inhuman treatment.”

80. For example, intentional failure to provide a prisoner with food or drink.
81. The common element of those purposes is understood to be the existence of some, even remote, connection with the interests or the policies of the state and its organs. See Burgers & Danelius, supra note 72, at 119. In any event, the purpose of extracting information from a person is not a necessary condition for an act to be considered torture.
82. However, Burgers and Danelius suggest that only in exceptional cases may it be possible to conclude that the infliction of severe pain or suffering by a public official did not constitute torture on the ground that he or she acted for purely private reasons. Id. Prison officials and employees, law enforcement personnel, members of the military, as well as members of paramilitary forces acting with actual or implied support of government officials, may be considered as “public officials.” See Deborah Blatt, Recognizing Rape as a Method of Torture, 19 N.Y.U. Rev. L. & Soc. Change 821, 863 (1992).
83. It is important to note, in this context, that torture and inhuman treatment are not confined to prisons nor to persons held in detention. Thus, for example, many acts of rape have been committed, according to reports, in the rape victim’s own home. See, e.g., Letter Dated May 24, 1994 from the Secretary-General to the Presidents of the Security Council, Annex (Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780), paras. 241–42, U.N. Doc. S/1994/674 (1994) [hereinafter Report of the Commission of Experts].
86. Id. at 186, ch. IV, para. 2. Some of the methods involved in this case were: intimidation (by means of mock executions and death threats) and humiliation (by use of insulting language
In the case of *Ireland v. United Kingdom*,\(^7\) the European Commission of Human Rights unanimously found that the combined use of the "five techniques" constituted a practice of torture and inhuman treatment.\(^8\) The European Court saw the distinction between the two categories as deriving from "a difference in the intensity of the suffering inflicted."\(^9\) The concept of "torture" was meant to "attach a special stigma to deliberate inhuman treatment causing very serious and cruel suffering."\(^9\) Thus, while recognizing that the five techniques constituted inhuman treatment, the Court ruled that they were not "torture."\(^9\) In no other case brought before the European Commission or the European Court has either organ determined that the acts in question constituted prohibited "torture" under Article 3 of the European Convention.

Finally, in an affidavit submitted recently to the United States District Court for the District of Massachusetts by twenty-seven international law scholars, a list of acts constituting torture was offered. According to the authors of the affidavit, this list reflects a consensus among international law publicists. The acts included in the list are as follows:\(^2\)

1. Rape, sexual abuse, and other forms of gender-based violence;

and stripping detainees naked) of prisoners; threats of reprisals against relatives of prisoners; coercing to witness the torture of others; prolonged isolation; *falanga* and *bastinado*, electrical shocks, and beatings directed at the genitals; exposure to loud noise; pulling out of nails; and severe detention conditions.


88. The five techniques were techniques of interrogation which had been used against detainees in Northern Ireland. Those techniques included wall-standing, hooding, subjecting to noise, deprivation of sleep, and deprivation of food and drink. *Ireland*, [1976] Y.B. Eur. Conv. on H.R. at 788–94.


90. *Id.*

91. *Id.* For criticism of this mode of distinction between torture and inhuman treatment, see FAWCETT, *supra* note 75, at 45–46 (inhuman treatment is itself an extreme, and it is difficult to see how it can be further aggravated). This case may also give rise to an argument which emphasizes a holistic approach when determining the occurrence of "torture," i.e., in certain circumstances, a series of acts, which by themselves might not amount to torture, may be considered as such when examined and evaluated as pieces of a broader picture, rather than considered as distinct and separate from each other. Such an approach may be discerned in the Commission’s Report in *Ireland v. United Kingdom*, where each of the five techniques was not considered, standing alone, to constitute torture, although a combination of elements in the use of those techniques transferred them to the level of torture. A somewhat related notion is that of "administrative practice" (i.e., repetition of acts of ill-treatment and official tolerance of them) as explained in the *Greek Case* by the European Commission.

92. See Ortiz v. Gramajo, Civil Action No. 91-11612 (Mass. Dist. Ct.), Affidavit of International Law Scholars [hereinafter Affidavit] (on file with author). The list is not meant to be exhaustive.
(2) Sustained, systematic beating (particularly if performed with certain instruments or when the victim is bound or otherwise forced into a position that will increase the pain of the beating; the same would apply to beating directed at certain parts of the body, e.g., genitals or the soles of the feet);
(3) Electric shocks, infliction of burns, and exposure to extreme heat or cold;
(4) Binding or otherwise forcing the victim into positions that cause pain;
(5) Denying food, water, or medical attention when that denial will cause the victim to suffer, or to continue to suffer, severe physical or mental pain and suffering.

2. Inhuman treatment

a. The 1949 Geneva Conventions

While few international instruments have attempted to define or even to describe “torture,” the concept of “inhuman treatment” has not even gotten that far.93 The Conventions supply the most detailed guidelines to understanding what acts constitute “inhuman treatment.” The Commentary on the Conventions ties the expression “inhuman treatment” to Articles 12/12/13/27 of the Conventions, which relate to the humane treatment to be accorded to protected persons.94 Thus, it is submitted that any act in contravention of the rules enumerated in those articles amounts to

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93. Indeed, as the Geneva Conventions Commentary recognizes, “[t]his idea is rather difficult to define.” IV GENEVA CONVENTIONS COMMENTARY, supra note 6, at 598. See BURGERS & DANELIUS, supra note 72, at 70–71, 122.

94. For example, Article 27 of the Fourth Geneva Convention provides that:

Protected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity.

Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault.

Without prejudice to the provisions relating to their state of health, age and sex, all protected persons shall be treated with the same consideration by the Party to the conflict in whose power they are, without any adverse distinction based, in particular, on race, religion or political opinion.

However, the Parties to the conflict may take such measures of control and security in regard to protected persons as may be necessary as a result of the war.

Fourth Geneva Convention, supra note 4, art. 27, 6 U.S.T. at 3536, 75 U.N.T.S. at 306.
prohibited "inhuman treatment." The intention of that prohibition is to grant protection for protected persons by preserving their human dignity and preventing them from "being brought down to the level of animals." Thus, for an act to be considered "inhuman treatment," it is not necessary for there to be a physical attack on a protected person; an attack against his or her human dignity may, in certain circumstances, be sufficient. The term "inhuman treatment" does not lend itself to a comprehensive, exhaustive listing of what constitutes such treatment. Rather, for the purposes of the Conventions, this concept should be given specific content in each particular case in light of the general principles laid down in Article 27 of the Fourth Convention (and the equivalent articles in the other Conventions) and the examples given in that article of acts constituting inhuman treatment of protected persons.

b. Outside the Geneva law

In international instruments and under customary international law, the prohibition against inhuman treatment enjoys a status similar to the prohibition against torture. Indeed, the two always appear together in the various relevant international instruments.

The European Commission of Human Rights described the concept of "inhuman treatment" as including within its scope "at least such treatment as deliberately causes severe suffering, mental or physical, which, in the particular situation, is unjustifiable." The European Court

95. See II GENEVA CONVENTIONS COMMENTARY, supra note 6, at 268; III id. at 627; IV id. at 598.
96. See IV id. at 598.
97. See id.; II id. at 268; III id. at 627. Thus, for example, the Commentary recognizes as "inhuman treatment" measures which might completely cut off contact between civilian internees or prisoners of war and the outside world and in particular their families, or which cause grave injury to their human dignity. III id. at 627; IV id. at 598. The European Commission of Human Rights has stated, on a number of occasions, that complete solitary confinement and isolation can destroy the personality and thus may constitute inhuman treatment. See, e.g., RALPH BEDDARD, HUMAN RIGHTS AND EUROPE 151 (3d ed. 1993).
It is important to note, however, that the term "inhuman treatment" is not to be identified with "maltreatment." See 2B FINAL RECORD, supra note 29, at 31, 33.
98. See IV GENEVA CONVENTIONS COMMENTARY, supra note 6, at 204.
99. See discussion supra part III.B.1.a.
100. Greek Case, [1969 Greek Case] Y.B. Eur. Conv. on H.R. at 186, ch. IV, para. 2; see also BEDDARD, supra note 97, at 149. In a later report, the Commission explained that the use of the expression "unjustifiable" was not intended to derogate from the absolute nature of the prohibition on inhuman treatment; rather, it connotes the need to evaluate the specific circumstances of each particular case. See Louise Doswald-Beck, What Does the Prohibition of "Torture or Inhuman or Degrading Treatment or Punishment" Mean? The Interpretation of the European Commission and Court of Human Rights, 25 NETH. INT'L L. REV. 24, 35–39 (1978).
of Human Rights, without defining or describing the constitutive elements of the concept of "inhuman treatment," emphasized several factors — premeditation, long duration, intense physical and mental suffering, and acute psychiatric disturbances — in its judgment in the case of Ireland v. United Kingdom, concluding that the use of the "five techniques" amounted to inhuman treatment of the detainees.\(^1\)

In a 1976 report, the European Commission arrived at the conclusion that the failure to supply enough food and water or to provide necessary medical treatment to detainees in the area of Cyprus occupied by Turkey, as well as unpunished and unrepressed acts of rape committed by Turkish soldiers in that area, amounted to inhuman treatment.\(^2\)

The prohibition of torture and inhuman treatment is usually accompanied by a prohibition of degrading treatment.\(^3\) Although such a prohibition is absent from the list of grave breaches of the Conventions, its absence seems to make little difference since, for the purposes and in the context of the Conventions, and in light of the interpretation of the concept of "inhuman treatment" in those Conventions, many acts which might otherwise be categorized as degrading may be considered to constitute inhuman treatment. An alternative formulation would be to define such acts as coming within the category of "great suffering."\(^4\)

Without purporting to classify all of the cases dealt with by the European Commission or the European Court of Human Rights where the question arose as to whether Article 3 of the European Human Rights Convention had been violated, some of the main categories of cases are as follows:

1. Detention and prison conditions, e.g., solitary confinement, psychiatric detention, and disciplinary measures. See, e.g., Beddard, supra note 97, at 151-52, 153-55; Fawcett, supra note 75, at 47-48, 50-51.


3. Deportation, expulsion, extradition, and political asylum. See, e.g., Beddard, supra note 97, at 155-58; Fawcett, supra note 75, at 51-53.


102. See Antonio Cassese, Human Rights in a Changing World 95 (1990); see also infra note 163.

103. The European Commission of Human Rights recognized treatment or punishment of a person to be degrading if it "grossly humiliates him before others or drives him to act against his will or conscience." Greek Case, [1969 Greek Case] Y.B. Eur. Conv. on H.R. at 186, ch. IV, para. 2. The European Court of Human Rights emphasized certain elements — feelings of fear, anguish, and inferiority; humiliation and debasement; breaking physical or moral resistance — in reaching the conclusion that the "five techniques" constituted "degrading treatment." Ireland, 25 Eur. Ct. H.R. (ser. A) at 66, para. 167.

104. See infra part III.C.
c. A Brief Concluding Remark

Pouring substantive content into general terms such as "torture" or "inhuman treatment" is no easy task. However, the obvious difficulties in distinguishing torture from inhuman treatment ought not detract from the fact that, in most cases, deciding whether a certain act comes within the larger category of prohibited acts (whether torture, inhuman treatment, or wilfully causing great suffering) will be a relatively straightforward process. Only when a decision is made that specific conduct under review severely attacked the human dignity of a protected person does the question of further classification of that act as torture, inhuman treatment, or wilful suffering arise. Yet, determining whether certain acts committed against protected persons, in the meaning of that term in the Conventions, constitute the prohibited crime of torture or "merely" an inhuman act is of great importance not only for the case at hand (such as when deciding the proper punishment to be imposed on a convicted person) but also for future purposes. Thus, for example, the decisions which the International Tribunal is expected to hand down will carry an immense precedential value for the development of international humanitarian and human rights law as well as national criminal law. The Tribunal's decisions will also have an educational significance for the general public which cannot be overemphasized. Labeling certain acts as "torture" will thus underscore their heinousness.

3. Biological Experiments

The prohibition in the Conventions against biological experiments is clearly based on the horrific experience of World War II and seems to be self-explanatory.105

105. See IV GENEVA CONVENTIONS COMMENTARIES, supra note 6, at 598–99. The Commentary clarifies that this prohibition does not apply to the use of new methods of treatment by doctors if justified by medical reasons and based only on concern to improve the state of health of the patient. Id.; III id. at 627–28; II id. at 269. The case of United States v. Brandt et al., 1 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS 3 (1950), resulted in convictions for human experimentation on concentration camp inmates and prisoners of war, as well as the notorious euthanasia program. The Court laid down ten principles for scientific experimentation on human beings. See generally M. Cherif Bassiouni et al., The Crime of Human Experimentation, in 1 INTERNATIONAL CRIMINAL LAW, supra note 6, at 399; Matthew Lippman, The Nazi Doctors Trial and the International Prohibition on Medical Involvement in Torture, 15 LOY. L.A. INT'L & COMP. L.J. 395 (1993).
C. Wilfully Causing Great Suffering or Serious Injury to Body or Health

The first part of this grave breach, "wilfully causing great suffering," complements the prohibition against torture and inhuman treatment.\(^{106}\) According to the Commentary on the Conventions, the prohibition against causing great suffering is directed at situations where suffering is inflicted without the special purposes for which torture is carried out,\(^{107}\) i.e., when the acts considered do not fall into this category.\(^{108}\) In any case, in view of the second part of the grave breach ("serious injury to body or health"), it is clear that the suffering need not be of a physical nature, and mental suffering may be sufficient.\(^{109}\) With respect to the term "serious injury to body or health" itself, the Commentary on the Conventions refers to national penal codes since that term is usually to be found in such codes.\(^{110}\)

D. Extensive Destruction and Appropriation of Property, not Justified by Military Necessity and Carried out Unlawfully and Wantonly

Unlike protected persons, the term "protected property" is not defined in the Conventions. An examination of the specific provisions incorporated in each of the Conventions reveals that there are some types of property entitled to special protection:

(1) Hospitals and buildings of the Medical Service; ambulances, vehicles, and medical aircraft; and medical equipment and material.\(^{111}\)

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106. Indeed, the point may be made here that similarity exists between acts causing great suffering, as this term is to be construed for the purposes of Articles 50/51/130/147, and acts constituting degrading treatment. See supra note 104 and accompanying text.

107. Thus, for example, the suffering may be inflicted as a result of punishment, revenge, sadism, or other motives. See II GENEVA CONVENTIONS COMMENTARY, supra note 6, at 269; III id. at 268; IV id. at 599.

108. See IV id. at 599; I id. at 372. The Commentary on the First Convention gives as an example of such a grave breach mutilation of the wounded or exposure of the wounded to useless and unnecessary suffering.

109. Id.

110. Id. The Commentary merely mentions that the length of time a victim is incapacitated for work is usually used as the measurement for the evaluation of the seriousness of an injury.

111. See First Geneva Convention, supra note 4, chs. III, V, and VI, 6 U.S.T. at 3128, 3136, 3138, 75 U.N.T.S. at 32, 52, 54. In addition, the property of aid societies is to be regarded as private property and protected as such. Id. art. 34, 6 U.S.T. at 3138, 75 U.N.T.S. at 54.
(2) Hospital ships; coastal rescue craft; medical transports; and coastal medical installations;\(^\text{112}\)

(3) Civilian hospitals and their equipment; medical transports; movable or immovable property (in occupied territories); and food and medical supplies of the population (in occupied territories).\(^\text{113}\)

The use of the term "extensive" signifies that it is not enough to indicate an isolated incident of destruction or appropriation of protected property.\(^\text{114}\) However, two qualifications may be attached to such an interpretation. First, the Commentary on the Fourth Geneva Convention suggests that the bombing of a single civilian hospital would constitute a grave breach if done intentionally.\(^\text{115}\) Second, in some cases, such as the destruction of hospital ships, other grave breaches of the Conventions may be involved (for instance, wilful killing).\(^\text{116}\)

What constitutes military necessity which might justify destruction or appropriation\(^\text{117}\) of property, even protected property, is a thorny question. Generally speaking, the laws of war are based on balancing humanitarian needs with the requirements of military necessity.\(^\text{118}\) However, in the specific case at hand, such balancing is explicitly left for a subsequent determination.\(^\text{119}\) Thus, two principal questions arise. First, what is the scope and extent of "military necessity" which may justify the extensive destruction and appropriation of property? Second, how should a determination be made in each specific case?

\(^{112}\) See Second Geneva Convention, supra note 4, chs. III and V, 6 U.S.T. at 3226, 3242, 75 U.N.T.S. at 100, 108. Protection is also granted to neutral vessels under the provisions of Articles 21 and 25 of the Second Convention. Id. arts. 21 and 25, 6 U.S.T. at 3234, 3236, 75 U.N.T.S. at 100, 102.

\(^{113}\) Fourth Geneva Convention, supra note 4, arts. 18-22, 53, 55, and 57, 6 U.S.T. at 3530-32, 3552-54, 75 U.N.T.S. at 300-02, 322-24. The Third Geneva Convention does not protect property as such.

\(^{114}\) See IV GENEVA CONVENTIONS COMMENTARY, supra note 6, at 601.

\(^{115}\) See IV id. at 601 n.1.

\(^{116}\) See, e.g., II id. at 270.

\(^{117}\) Under the Fourth Geneva Convention, the requisitioning of civilian hospitals and their material, as well as the requisitioning of foodstuff, is subject to certain additional restrictive conditions not included in the term "military necessity."

\(^{118}\) See, e.g., Yoram Dinstein, Military Necessity, in 3 ENCYCLOPEDIA 1981, supra note 20, at 274, 274. Thus, even absolute prohibitions included in the laws of war represent the outcome of such balancing. However, in certain cases, the laws of war may explicitly subject a general prohibition of a certain conduct to an exception based on military necessity. See, e.g., N.C.H. Dunbar, Military Necessity in War Crimes Trials, 29 BRIT. Y.B. INT'L L. 442, 452 (1952); William G. Downey, Jr., The Law of War and Military Necessity, 47 AM. J. INT'L L. 251, 262 (1953).

\(^{119}\) Dinstein, Military Necessity, supra note 118, at 274.
As for the scope and content of military necessity which may justify extensive destruction and appropriation of property, the Commentary on the First Geneva Convention refers to Articles 33 to 36 of the Convention as setting the limits for claims of military necessity. Those articles use the term "urgent military necessity," which as the Commentary explains connotes tactical considerations (when the need arises to use such property by the forces in the field) or even extreme cases in which tactical reasons may necessitate the destruction of such property.

With regard to real or personal property in occupied territories, Article 53 of the Fourth Geneva Convention proscribes its destruction, except where such destruction is rendered absolutely necessary by military operations. In the Commentary on the Fourth Geneva Convention, the term "military operations" is tied to "imperative military requirements."

120. I GENEVA CONVENTIONS COMMENTARY, supra note 6, at 372; II id. at 269–70.
121. See, e.g., I id. at 275. Such tactical considerations are still subject to certain limitations prescribed in the relevant articles, which derive from pure humanitarian needs.
122. See, e.g., I id. at 276.
123. The article refers only to destruction of such property, since the Occupying Power enjoys the right of requisitioning or confiscating property under defined conditions and circumstances. Fourth Geneva Convention, supra note 4, art. 53, 6 U.S.T. at 3552, 75 U.N.T.S. at 322.
124. Article 53 covers only property found in an occupied territory and does not, for example, cover the destruction of property in enemy territory. For a broader prohibition, see Hague Convention (IV), supra note 8, Annex (Regulations), art. 23(g), which provides that, "[i]t is especially forbidden . . . to destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war."
125. IV GENEVA CONVENTIONS COMMENTARY, supra note 6, at 302. Many writers support a narrow reading of Article 53's exception for destruction made "absolutely necessary by military operations." According to those writers, a broad construction of the exception might do away with the basic prohibition. See, e.g., GERHARD VON GLAHN, THE OCCUPATION OF ENEMY TERRITORY 225–27 (1957) (military necessity ought to be urgent and vital, contributing in a decisive manner to ending the conflict or to the surrendering of the enemy; necessity proper will be almost impossible to prove, except in a few minor situations during the initial combat phases of the invasion of the enemy territory); 2 SCHWARZENBERGER, supra note 21, at 244; 2 L. OPPENHEIM, INTERNATIONAL LAW 414 (Hersch Lauterpacht ed., 7th ed. 1952) ("[I]n every case destruction must be 'imperatively demanded by the necessities of war', and must not merely be the outcome of a spirit of plunder or revenge . . . ."); MORRIS GREENSPAN, THE MODERN LAW OF LAND WARFARE 279–80 (1959) ("In judging actions of destruction and seizure of property committed under a plea of military necessity, a fair standard to be applied in assessing their justifiability would be that of their reasonableness . . . . In applying such a test due latitude should be allowed for the stress under which men make their decisions in conducting military operations, and they should be judged according to the conditions under which they operated, rather than whether they would have made the same decision looking back on the matter from the unhurried calm of court-room proceedings. Wanton destruction and seizure may be distinguished from that which is necessary by the gross disparity between the extent of the destruction and seizure and any valid reason for it.").

The scope of the expression "military operations" has been heavily debated in the context of house demolitions by Israel in the territories which came under its control in 1967. Whereas some (including the ICRC) believe that this expression refers only to actions taken by the armed forces with a view to fighting, others (including the majority of justices of the Israeli Supreme Court) believe that it includes any action that is taken in the course of a military operation, even if not immediately connected to hostilities. The ICRC has taken the position that the destruction of houses in the Occupied Territories is justified as "military operations" only if it is absolutely necessary and if it is carried out in accordance with the rules of international humanitarian law. Other legal scholars argue that the term "military operations" should be interpreted narrowly to include only actions taken in the course of actual combat or self-defense, and that any destruction of property must be proportionate to the military advantage sought.

The issue of military necessity has also been debated in the context of the use of drone strikes in targeted killings. Some legal scholars argue that drone strikes cannot be justified as military necessity because they do not meet the test of "urgent military necessity" as defined by the Commentary on the Fourth Geneva Convention. Others argue that drone strikes can be justified as military necessity if they are taken in self-defense or in response to an imminent threat.

In summary, the scope and content of military necessity are complex and subject to ongoing debate among legal scholars and practitioners. The interpretation of the term "military operations" can significantly impact the legality of actions taken in the course of hostilities, and ongoing efforts are being made to clarify these issues through further legal scholarship and court decisions.
Whatever that term means, the scope of what constitutes a grave breach of the Conventions seems narrower than the prohibition envisioned by Article 53. First, whereas Article 53 proscribes "any destruction," the relevant grave breach of the Conventions arises when "extensive destruction" occurs. Second, the exception to the prohibition included in Article 53 is invoked in cases where the destruction of property was rendered "absolutely necessary by military operations," as compared with "justified by military necessity." However, this last discrepancy may in fact be smaller than it at first appears due to the operation of such general principles as reasonableness and proportionality. Moreover, "extensive" destruction may be harder to justify on the basis of "military necessity" in certain circumstances and may require a stricter scrutiny of the military reasons put forward as justification for such a destruction. Finally, the question of destruction of property was dealt with by the IMT Charter and by subsequent judgments of war criminals.

A second issue of great significance concerns how and who is to make the determination as to whether "military necessity" existed and whether it reached such a level as to justify an exception to the prohibition against extensive destruction or appropriation of property. One possible view is that the task of judging the weight to be accorded military requirements in specific cases should be left entirely to the discretion of the state, which

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126. See, e.g., IV GENEVA CONVENTIONS COMMENTARY, supra note 6, at 302; Dinstein, Military Necessity, supra note 118, at 275. One obvious example of clearly prohibited acts is "widespread destruction of villages by systematically burning them to the ground and blowing up all the houses and structures in a given area," the purpose of which is "to eradicate cultural, social and religious traces that identify the ethnic and religious groups." See Report of the Commission of Experts, supra note 82, para. 136. See also, GREENSPAN, supra note 125, at 285–86 (devastation for the purpose of intimidating the civilian population or in an attempt to damage the territory permanently or for a long period is illegal).

127. Article 6(b) of the IMT Charter provides, inter alia, that the wanton destruction of cities, towns, or villages or devastation not justified by military necessity are to be considered as war crimes. IMT Charter, supra note 19, art. 6(b), 82 U.N.T.S. at 288. However, in some of the trials before military tribunals at the end of World War II, German commanders were not held criminally responsible for adopting a "scorched earth" policy when forced to retreat from an occupied territory. See VON GLAHN, supra note 125, at 228; Dunbar, supra note 118, at 449–52.
might invoke a claim of "military necessity." Such an approach might lead, of course, to rendering meaningless the safeguards incorporated into the Conventions with regard to protected property. This approach is similar to the argument that a state claiming self-defense is alone competent to decide the legitimacy of this claim.\textsuperscript{128} This argument was explicitly rejected in the judgment of the IMT, which stated that "whether an action taken under the claim of self-defense was in fact aggressive or defensive must ultimately be subject to investigation and adjudication if international law is ever to be enforced."\textsuperscript{129}

Another approach, posited as the opposite to the first, is that it is up to the court or tribunal before which a specific case is brought to decide those issues, without giving any weight to the position of the state on the matter.\textsuperscript{130} A third possible approach may resemble the "margin of appreciation" doctrine developed by the European Commission and Court of Human Rights. Under this doctrine, the tribunal will review the claims of military necessity put forward by a state but will accord some margin of appreciation to that state in such matters on the grounds that the state understands better the specific conditions prevailing in a territory which it occupies.\textsuperscript{131} If this approach is adopted, a further determination will have

\textsuperscript{128} Such argument was made by some Nazi leaders during the proceedings at Nuremberg. A somewhat similar position was asserted by the United States to justify the withdrawal of its acceptance of the compulsory jurisdiction of the International Court of Justice, following that Court's ruling against the United States on jurisdictional issues involved in the Nicaragua case. See Oscar Schachter, \textit{Self-Defense and the Rule of Law}, 83 AM. J. INT'L L. 259, 262 (1989).


\textsuperscript{130} Taking into consideration the fact that the Conventions foresaw the implementation of the principle of universal jurisdiction by national courts, such an approach seems unrealistic (e.g., national courts of State A determining whether military necessity existed in State B, without regard to the position of State B on the matter). Such an approach might not be more practicable when made with regard to international tribunals. It seems unlikely that such tribunals would choose to disregard the position of the relevant state in this matter, as the tribunal's jurisdiction is likely to be based upon state consent and thus subject to withdrawal by aggrieved state parties.


Relating to the evaluation of claims of military necessity put forward by occupation authorities, von Glahn remarks that "[t]he judgment of the occupation authorities has to be measured against the known facts and, if at all possible, against any evidence that there
to be made as to the breadth and scope of the margin of appreciation to be granted.

E. Compelling a Prisoner of War or a Protected Person to Serve in the Forces of a Hostile Power

The prohibition on "compelling a prisoner of war or a protected person to serve in the forces of a hostile power" seems to be straightforward. A note should be taken of Article 51 of the Fourth Geneva Convention, which prohibits a belligerent from compelling protected persons to serve in its armed or auxiliary forces, as well as from using pressure or propaganda with the intention of securing voluntary enlistment. 132

F. Wilfully Depriving a Prisoner of War or a Protected Person of the Rights of Fair and Regular Trial as Prescribed in the Third and Fourth Geneva Conventions

Several articles in the Third and Fourth Geneva Conventions lay down basic guarantees directed at assuring a protected person or a prisoner of war a fair and regular trial. 133

G. Unlawful Deportation or Transfer of a Protected Person

The grave breach of unlawful deportation or transfer of a protected person appears only in Article 147 of the Fourth Geneva Convention. It is important to note that the prohibition enshrined in this article relates to the unlawful transfer or deportation of persons protected under that Convention. Thus, for example, it does not cover the deportation or transfer of a deporting state's own nationals. 134

Article 45 of the Fourth Geneva Convention deals with a range of issues concerning the transfer of protected persons to another power. 135

132. Fourth Geneva Convention, supra note 4, art. 51, 6 U.S.T. at 3550–52, 75 U.N.T.S. at 320–22. Similar prohibitions are included in the Regulations annexed to the Hague Convention (IV). See Hague Convention (IV), supra note 8, Annex (Regulations), arts. 23(h) and 52; see also Fourth Geneva Convention, supra note 4, art. 40, 6 U.S.T. at 3542–44, 75 U.N.T.S. at 312–14; 2 OPPENHEIM, supra note 125, at 440–41.

133. See especially Fourth Geneva Convention, supra note 4, arts. 71–75, 126, 6 U.S.T. at 3562–66, 3602, 75 U.N.T.S. at 332–34; Third Geneva Convention, supra note 4, arts. 87, 99–108, 6 U.S.T. at 3384, 3392–98, 75 U.N.T.S. at 202, 210–18. Among the basic guarantees are the opportunity to present a defense and the right to be assisted by a qualified advocate or counsel.

134. Fourth Geneva Convention, supra note 4, art. 147, 6 U.S.T. at 3618, 75 U.N.T.S. at 388; see infra note 141.

135. Article 45 provides that:
This article is directed at preventing a belligerent from evading its obligations and responsibilities under the Convention by transferring protected persons to a state which is not bound by the Convention.\textsuperscript{136} It is important to note that this article is found in Section II of Part III of the Convention, which deals with aliens within the territory of a party to the conflict.\textsuperscript{137}

Article 49 of the Fourth Geneva Convention prohibits forcible transfers and deportations of protected persons from an occupied territory.\textsuperscript{138}

Protected persons shall not be transferred to a Power which is not a party to the Convention.

This provision shall in no way constitute an obstacle to the repatriation of protected persons, or to their return to their country of residence after the cessation of hostilities.

Protected persons may be transferred by the Detaining Power only to a Power which is a party to the present Convention and after the Detaining Power has satisfied itself of the willingness and ability of such transferee Power to apply the present Convention. If protected persons are transferred under such circumstances, responsibility for the application of the present Convention rests on the Power accepting them, while they are in its custody. Nevertheless, if that Power fails to carry out the provisions of the present Convention in any important respect, the Power by which the protected persons were transferred shall, upon being so notified by the Protecting Power, take effective measures to correct the situation or shall request the return of the protected persons. Such request must be complied with.

In no circumstances shall a protected person be transferred to a country where he or she may have reason to fear persecution for his or her political opinions or religious beliefs.

The provisions of this Article do not constitute an obstacle to the extradition, in pursuance of extradition treaties concluded before the outbreak of hostilities, of protected persons accused of offences against ordinary criminal law.


"Transfer" is broadly construed to include any movement of protected persons to another state, carried out by the Detaining Power on an individual or collective basis. \textit{IV Geneva Conventions Commentary}, \textit{supra} note 6, at 266.

\textsuperscript{136} \textit{IV Geneva Conventions Commentary}, \textit{supra} note 6, at 266. It is clear that the prohibition of transfers applies at least as forcefully to transfers of protected persons to the control of groups such as independent paramilitary units.

\textsuperscript{137} Thus, transfer of aliens to a power not party to the Conventions is prohibited, whether executed on an individual or collective basis. The Commentary on the Fourth Geneva Convention distinguishes, however, between (1) the deportation of such aliens “in individual cases when State security demands such action” and (2) their mass deportation. While the former is considered permissible, the latter is not. \textit{See id.}

\textsuperscript{138} Article 49 states as follows:

Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive.

Nevertheless, the Occupying Power may undertake total or partial evacuation of a given area if the security of the population or imperative military reasons so demand.
The question of whether deportations of protected persons from occupied territories are legal has received much attention in relation to the territories which came under Israeli control after the 1967 War. It is important to note, however, that all the participants in this debate agree that the Conventions prohibit mass, as opposed to individual, deportations. The Conventions were drafted with the horrors of the Nazi regime in mind.

Such evacuations may not involve the displacement of protected persons outside the bounds of the occupied territory except when for material reasons it is impossible to avoid such displacement. Persons thus evacuated shall be transferred back to their homes as soon as hostilities in the area in question have ceased.

The Occupying Power undertaking such transfers or evacuations shall ensure, to the greatest practicable extent, that proper accommodation is provided to receive the protected persons, that the removals are effected in satisfactory conditions of hygiene, health, safety and nutrition, and that members of the same family are not separated.

The Protecting Power shall be informed of any transfers and evacuations as soon as they have taken place.

The Occupying Power shall not detain protected persons in an area particularly exposed to the dangers of war unless the security of the population or imperative military reasons so demand.

The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies.

Fourth Geneva Convention, supra note 4, art. 49, 6 U.S.T. at 3548, 75 U.N.T.S. at 318.


140. The contours of the main arguments concerning the question of the legality of individual deportations from occupied territories, see supra note 139, may be delineated as follows: the proponents of an approach to regard individual deportations as permissible rely on the intent of the drafters of Article 49 of the Fourth Geneva Convention, thus emphasizing the desire to ban explicitly mass deportations such as had been executed by the Nazi regime. The proponents of this argument also point to Article 147 of the Fourth Geneva Convention, which refers to “unlawful deportations,” to show that certain deportations are considered to be lawful. See Fourth Geneva Convention, supra note 4, art. 147, 6 U.S.T. at 3616, 75 U.N.T.S. at 386.

On the other hand, opponents of such a view point to the plain text of paragraph 1 of Article 49 (which prohibits “individual” as well as mass forcible transfers and deportations) and argue that, although the primary purpose of Article 49 was to prohibit mass deportations, it cannot be considered to be the sole purpose of that article. According to this view, the prohibition of the first paragraph of Article 49 is absolute (subject only to the exception included in paragraph 2). This view is supported by the language “regardless of their motive” — indicating the totality of the prohibition. See id. art. 49, 6 U.S.T. at 3458, 75 U.N.T.S. at 318.

Both sides to this debate agree that the main purpose of Article 49 was to prohibit explicitly practices of mass deportations and forcible transfers.
still fresh in memory. The mass transfers and deportations of millions of people to concentration and death camps or to forced labor service were clearly the impetus behind the prohibition included in paragraph 1 of Article 49.

There are three additional points for consideration related to deportations as grave breaches. First, Article 49 does not, as such, prohibit voluntary transfer of protected persons from occupied territories. Second, views differ on whether a forcible transfer within an occupied territory of protected persons is a violation of Article 49. Third, since Article 147 of the Fourth Geneva Convention deals only with acts committed against protected persons, it seems that a violation by an Occupying Power of paragraph 6 of Article 49 of the Convention does not constitute a "grave breach" of the Convention.

H. Unlawful Confinement of a Protected Person

The Commentary on the Fourth Geneva Convention suggests that, in view of the extended powers granted to Occupying Powers under the Convention with regard to the confinement, internment, and detention of protected persons, it would be difficult to prove the illegal nature of confinement. However, arbitrary confinement would constitute a grave breach of the Convention.

141. Article 6(b) of the IMT Charter made it clear that deportation to slave-labor or for any other purpose was a war crime. Moreover, Article 6(c) recognized deportations of civilian population to be a crime against humanity. See IMT Charter, supra note 19, art. 6(b), (c), 82 U.N.T.S. at 288.

The IMT ruled that the German mass deportation practices, in which "whole populations were deported to Germany for the purposes of slave labour upon defence works, armament production and similar tasks connected with the war effort," constituted a war crime and a crime against humanity. See Nuremberg Judgment, supra note 18, at 225, 239-43; OPPENHEIM, supra note 125, at 441-42 (apart from the systematic extermination of large sections of the population in occupied territory, mass deportations for forced labor constituted the principal war crime of Germany in the course of World War II); GREENSPAN, supra note 125, at 268-69.

142. See IV GENEVA CONVENTIONS COMMENTARY, supra note 6, at 278-79.

143. The case in mind was that of ethnic or political minorities' suffering persecution or discrimination and expressing a wish to leave the occupied territories because of the persecution or discrimination. See id. at 279.

144. See, e.g., COMMENTARY ON THE ADDITIONAL PROTOCOLS, supra note 56, at 1000 n.28 and the cites therein.

145. "The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies." Fourth Geneva Convention, supra note 4, art. 49(6), 6 U.S.T. at 3548, 75 U.N.T.S. at 318.

146. Such a violation was specifically made a grave breach under Article 85(4)(a) of Protocol I. Protocol I, supra note 5, art. 85(4)(a), 16 I.L.M. at 1427.

147. IV GENEVA CONVENTIONS COMMENTARY, supra note 6, at 599. An Occupying Power enjoys broad powers of arrest and administrative detention of persons in the occupied territories.

148. Id.; see also, GREENSPAN, supra note 125, at 171 (illegal arrest and detention is a war crime, as are indiscriminate mass arrests for the purpose of terrorizing the population).
Grave Breaches System

I. Taking of Hostages

Article 34 of the Fourth Geneva Convention puts in place a categorical and absolute prohibition against the taking of hostages. According to the Commentary on the Convention, the term "hostages" ought to be interpreted in the widest possible sense in order to foster the principle of individual responsibility and the corollary prohibition on collective punishment. The article is especially directed at the taking of hostages as a means of intimidating the population in order to weaken its spirit of resistance and to prevent breaches of the law, to ensure the execution of orders given by the armed forces of the Power holding the hostages, and, in general, to ensure the safety and security of the armed forces of that Power.

The examples given by the Commentary as acts in violation of the prohibition on the taking of hostages are based upon the dreadful experience of the two World Wars.

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149. Article 34 states that: "The taking of hostages is prohibited." Fourth Geneva Convention, supra note 4, art. 34, 4 U.S.T. at 3540, 75 U.N.T.S. at 310; see also IV GENEVA CONVENTIONS COMMENTARY, supra note 6, at 231; International Convention Against the Taking of Hostages, Dec. 17, 1979, T.I.A.S. No. 11,081. Article 6(b) of the IMT Charter listed the killing of hostages among the war crimes over which the IMT had jurisdiction. IMT Charter, supra note 19, art. 6(b), 82 U.N.T.S. at 288. See also Nuremberg Judgment, supra note 18, at 230. The motive for the taking of hostages is immaterial. See M. Cherif Bassiouni, Hostages, in 8 ENCYCLOPEDIA 1981, supra note 20, at 264, 267. In the past, taking hostages had been a lawful means of enforcing the laws of war against a hostile party to a conflict. See Draper, War, supra note 21, at 324; 2 OPPENHEIM, supra note 125, at 589-90.

150. IV GENEVA CONVENTIONS COMMENTARY, supra note 6, at 230; 2 OPPENHEIM, supra note 125, at 591.

151. IV GENEVA CONVENTIONS COMMENTARY, supra note 6, at 229–30. Bassiouni suggests the following as a definition of "hostage": "[A] person forcefully detained by another without legal authority or in violation of national or international law for purposes of extracting from that person or another a ransom or concession." M. Cherif Bassiouni, The Crime of Kidnapping and Hostage Taking, in 1 INTERNATIONAL CRIMINAL LAW, supra note 6, at 475, 475.

152. See IV GENEVA CONVENTIONS COMMENTARY, supra note 6, at 230. Indeed, in several of the twelve trials of war criminals held under Control Council Law No. 10 subsequent to the Nuremberg Trial of the major war criminals, the courts held the killing of hostages to be a war crime. See, e.g., United States v. List, 11 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS 757 (1950) (issue was the taking of hostages and killing of civilians by way of reprisals for attacks on German troops by partisans); GREENSPAN, supra note 125, at 413–17.

detention is prohibited in a long line of international documents. See, e.g., International Covenant on Civil and Political Rights, supra note 70, art. 9, 999 U.N.T.S. at 175; Universal Declaration of Human Rights, supra note 70, art. 9, at 73; European Convention on Human Rights, supra note 70, art. 5, 213 U.N.T.S. at 226; American Convention on Human Rights, supra note 70, art. 7(3), O.E.A. T.S. No. 36, at 3, 9 I.L.M. at 677; African Charter on Human and Peoples' Rights, supra note 70, art. 6, at 21 I.L.M. at 60. See also Forti v. Suarez-Mason, 672 F. Supp. 1531, 1541 (N.D. Cal. 1987) (prohibition of arbitrary detention forms part of customary international law); Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382, 1388 (10th Cir. 1981) (no principle of international law is more fundamental than the concept that human beings should be free from arbitrary imprisonment).
(1) Taking as hostages prominent persons in a city or a district in order to prevent disorders or attacks on the armed forces of the Detaining Power;

(2) After an attack, arresting inhabitants and announcing that they will be held captive or executed if the guilty persons do not turn up;

(3) Taking of hostages in order to guarantee the life of persons held hostage by the adverse Party;

(4) Holding hostages in order to obtain the delivery of foodstuffs and supplies or the payment of an indemnity; and

(5) Taking accompanying hostages to prevent attack on convoys.

IV. THE CRIME OF RAPE AS A GRAVE BREACH OF THE CONVENTIONS

In light of persistent reports of rape of women as an instrument of terror in the territory of the former Yugoslavia, and allegations of such rape on a massive and systematic basis as a method for “ethnic cleansing,” it is imperative to examine whether the crime of rape may be considered a “grave breach” of the Conventions.153

The crime of rape is not explicitly included in common Articles 50/51/130/147 of the Conventions. There can be little doubt that different violations of the norms of international humanitarian law are as severe as those designated “grave breaches.” Moreover, the list of grave breaches is not exclusive in so far as war crimes are concerned — the range of recognized war crimes extends beyond that which is covered by “grave breaches.” Yet, the list is exhaustive in the sense that acts not enumerated in it cannot be considered as “grave breaches” of the Conventions, regardless of their own severity.155

Despite the Nazi and Japanese practices of forced prostitution and rape during World War II, the IMT did not deal with the crime of rape.156

153. The term “rape” should be understood in this context to encompass the broader spectrum of acts of grave sexual violence (e.g., forced prostitution and forced impregnation). See, e.g., Report of the Commission of Experts, supra note 82, para. 103; id. paras. 241–53 (patterns of rape examined in the context of “ethnic cleansing”).

154. See, e.g., I GENEVA CONVENTIONS COMMENTARY, supra note 6, at 371; II id. at 624; COMMENTARY ON THE ADDITIONAL PROTOCOLS, supra note 56, at 991; Röling, supra note 20, at 212.


156. In the proceedings before the Tokyo Tribunal, evidence of rape and “violence against women” was considered as one of the factors to support convictions of war criminals. See 20 R. JOHN PRITCHARD & SONIA M. ZAIDE, THE TOKYO WAR CRIMES TRIAL (1987) (judgment);
However, the gravity of rape is illustrated by the recognition of it as a crime against humanity. Thus, under Article II(1)(c) of the Control Council Law No. 10, rape was included in the list of crimes against humanity. This is also the case under Article 5(g) of the Statute of the International Tribunal. Such an act is also specifically prohibited under both the Fourth Geneva Convention and the Additional Protocols.

Although not explicitly mentioned, rape qualifies under two prongs of the categories defining grave breaches of the Conventions. First, the language "wilfully causing great suffering or serious injury to body or health" seems to cover acts of rape. Indeed, that is the opinion expressed by the ICRC.

Second, it seems that the act of rape falls into the category of "torture or inhuman treatment." Rape may specifically violate the international prohibitions against "torture" under certain circumstances, such as when rape is a politically (rather than purely privately) motivated crime. Even

id. at 49, 814–16, 49, 788–92. It is noteworthy that the indictment for the Tokyo Tribunal included, in the description of charges against the defendants accused of "violation of recognized customs and conventions of war," the following offenses, among others: "mass murder, rape, pillage, brigandage, torture and other barbaric cruelties upon the helpless civilian population of the over-run countries." 1 id. at 1 (Indictment).

See also Rhonda Copelon, Surfacing Gender: Reconceptualizing Crimes against Women in Time of War, in Mass Rape — The War Against Women in Bosnia-Herzegovina 197, 197 (Alexandra Stiglmayer ed., 1994). In the list of offenses in violation of the laws and customs of war, prepared by the 1919 Commission established to inquire into violations of international law, see supra note 12, rape was included as the fifth item.

In fact, the notorious practices of forced prostitution and rape during World War II seem to form the tip of an iceberg concerning the often ignored phenomenon of acts of rape during wars and armed conflicts. See, e.g., Susan Brownmiller, Against Our Will: Men, Women and Rape 31–113 (1975).


158. Statute of the International Tribunal, supra note 1, art. 5(g), 32 I.L.M. at 1194.

159. See Fourth Geneva Convention, supra note 4, art. 27, 6 U.S.T. at 3536, 75 U.N.T.S. at 306.


162. This indeed seems to be the case with regard to acts of rape committed in the territory of the former Yugoslavia since 1991. See, e.g., Copelon, supra note 156, at 201–02; Meron, Rape as a Crime, supra note 161, at 426 (act of rape as "torture or inhuman treatment" in certain circumstances); Affidavit, supra note 92; Blatt, supra note 82, at 853–64 (rape as torture when fulfilling the elements recognized as constitutive to an act of torture under Article 1 of the Convention Against Torture); Kooijmans Report, supra note 72; Amnesty International, Women in the Front Line (1990); Amnesty International, Rape and Sexual Abuse: Torture and Inhuman Treatment of Women in Detention (1991) (rape in detention and under military occupation is torture). Although not explicitly recognized as such, it seems that the
when doubt exists as to whether rape in specific circumstances amounts to torture, there is no doubt that rape qualifies as inhuman treatment.\textsuperscript{163} As mentioned above,\textsuperscript{164} the term "inhuman treatment" ought to be interpreted in the context of those articles of the Conventions dealing with treatment of protected persons. Such articles, for instance, Article 27 of the Fourth Geneva Convention, explicitly protect women against rape.\textsuperscript{165} Indeed, even without such an explicit prohibition, it seems clear that the act of rape gravely violates the protections granted to protected persons under the Conventions: it cannot be seen as commensurate with respect for the person, honor, or family rights of protected persons; it violates the dictate requiring that protected persons be humanely treated; and exposes such persons to violence or, at the least, to threats of violence.

Third, several states recognized the crime of rape as constituting a grave breach of the Conventions (and a war crime \textit{stricto sensu} or a crime against humanity).\textsuperscript{166} Indeed, under Article 142 of the 1976 Criminal Code of the Republic of Yugoslavia, "forced prostitution or rape" are enumerated in a list of "war crimes against civilian population" which is based on (but not limited to) the list of grave breaches of the Conventions.\textsuperscript{167}

There are important implications to regarding the crime of rape as constituting a grave breach of the Conventions (or for that matter, a war


Without detracting from the gravity of the act of rape itself, in many cases the actual rape is a core of a "cluster of violence," accompanied by other acts of violence which can, standing on their own, constitute a grave breach of the Conventions.

\textsuperscript{164} See \textit{discussion supra} part III.B.2.a.

\textsuperscript{165} Fourth Geneva Convention, \textit{supra} note 4, art. 27, 6 U.S.T. at 3536, 75 U.N.T.S. at 306. One of the questions which arises in this context is whether the crime of rape ought to be considered as an offense against honor (as it is characterized in Article 27) or rather as an offense of a distinct violent character. It is important to note that the two are not mutually exclusive. See Thomas & Ralph, \textit{supra} note 163, at 91-92, 98; Copelon, \textit{supra} note 156, at 200-01.

\textsuperscript{166} See Meron, \textit{Rape as a Crime, supra} note 161, at 427.

\textsuperscript{167} See \textit{supra} note 49.
crime under customary international law),\(^{168}\) along with its enumeration in a list of crimes against humanity. As explained above,\(^{169}\) war crimes and grave breaches of the Conventions are easier to prove than crimes against humanity. Recognizing the crime of rape as constituting a grave breach or a war crime shifts the focus of attention from the massive and systematic resort to such acts (and the need to prove such mass character and planning) towards repression of each individual act of rape.\(^{170}\) Moreover, identifying acts of rape as grave breaches would emphasize the criminality of each particular act of rape (and the importance of each single rape victim), standing on its own, independent of its being part of a massive and systematic pattern.

Finally, considering rape as a grave breach of the Conventions is consistent with recent international developments toward a growing recognition of crimes against women coupled with attempts to uproot such crimes.\(^{171}\) If the International Tribunal, in the cases coming before it, decides to label rape as a grave breach, its decision will put a definitive seal of intolerance on violence against women as well as open the door for effective remedies on the national level against the perpetrators of such acts through the implementation of the universal jurisdiction which applies to grave breaches. Such a development of international law is of special significance in light of the fact that crimes and offenses against women (whether as part of warfare or not) are not a phenomenon that started with the armed conflict raging in the former Yugoslavia.\(^{172}\) The most novel aspect in the current conflict with regard to attacks directed at women as such is the wide publicity that such attacks have attracted, and the subsequent international public outrage. This public awareness makes the

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169. See supra note 20.

170. The same act of rape, of course, may be both a crime against humanity and a grave breach of the Conventions. See Thomas & Ralph, supra note 163, at 84–88; Copelon, supra note 156, at 205.


time ripe for action to uproot crimes against women. It must not be squandered.

V. PENALTIES FOR GRAVE BREACHES OF THE CONVENTIONS

One of the goals of the ICRC in putting forward the principle of universality was to ensure a higher degree of uniformity of punishment and penalties for breaches of the Conventions. In fact, at the 1949 Diplomatic Conference, the issue of penalties for the different violations of the Conventions was entrusted for study to the joint committee responsible for considering the provisions common to the Conventions. No prescription of penalties has ever been included. Thus, it was left to the High Contracting Parties to determine the specific penal sanctions to be attached to each of the violations, including grave breaches, of the Conventions.

In light of the above, and in order to maintain the principle of nulla poena sine lege and avoid claims of a retroactive application of criminal sanctions, Article 24(1) of the Statute of the International Tribunal provides that in determining the terms of imprisonment, "the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia." It is important to note, however, that such "general practice" is not determinative.

VI. THE 1949 GENEVA CONVENTIONS AND THE FORMER YUGOSLAVIA

Is the mechanism of grave breaches, incorporated in the Conventions, applicable to the armed conflict being waged in the territory of the former

173. See supra note 29 and accompanying text.
174. See IV GENEVA CONVENTIONS COMMENTARY, supra note 6, at 587.
175. See Meron, War Crimes Trials, supra note 39, at 126–27; Draper, The Geneva Conventions, supra note 31, at 156. The ICRC has expressed a preference for the promulgation of special domestic legislation defining breaches of the Conventions and providing for penalties for each of those violations. As an alternative, it was proposed that such special legislation would concentrate on defining and providing penalties for grave breaches of the Conventions, while a general clause would deal with other violations of the Conventions. In any case, the ICRC emphasized the need to specify in such legislation the penalty for each offense. See IV GENEVA CONVENTIONS COMMENTARY, supra note 6, at 601–02; III id. at 629. The ICRC thus rejected the pattern followed by the IMT Charter in so far as it left the question of penal sanctions to the IMT without setting out any criteria for sentencing. See e.g., I id. at 364 n.2.
177. See Meron, War Crimes Trials, supra note 39, at 127 (suggesting that the International Tribunal should not exceed the penalties stated in national laws implementing the Conventions in general and those in the laws of the former Yugoslavia in particular); Akhavan, supra note 40, at 280.

Yugoslavia? In what follows, the discussion will not focus on the application of specific prohibitions to particular facts; rather, the question examined is the applicability of the system of grave breaches, as a whole, to the situation in that area.

The Conventions attempt to regulate certain aspects of conduct in international conflicts. Thus, violations of common Article 3 of the Conventions (the only article to deal with noninternational armed conflict) do not constitute grave breaches of the Conventions, regardless of their gravity. However, it is widely accepted that the armed conflict in the former Yugoslavia is, in essence, of an international nature, thus clearing the way for the application of the grave breaches system in relevant cases.

All parties involved in the armed conflict in the former Yugoslavia have in fact agreed to abide by the Geneva Conventions and Protocol I. Thus, not only have they agreed to honor the obligations of the former Yugoslavia under those Conventions, but they have also specifically agreed to apply those Conventions to the armed conflict between them.

178. See Meron, War Crimes Trials, supra note 39, at 127–28 (violations of common Article 3 may give rise to charges of genocide or crimes against humanity but will not lead to prosecution for grave breaches of the Geneva Conventions or for war crimes); Meron, War Crimes in Yugoslavia, supra note 21, at 80–81; Report of the Commission of Experts, supra note 82, para. 42; Bassiouni, Crimes Against Humanity, supra note 21, at 475–76. For an opposing view, see Jordan J. Paust, Applicability of International Criminal Laws to Events in the Former Yugoslavia, 9 AM. U. J. INT’L L. & POL’Y 499, 510–11 (1994) (grave breaches system is applicable to violations of common Article 3).

179. Several arguments have been put forward to support the position that the armed conflicts taking place in the territory of the former Yugoslavia are of an international character. Among the arguments most frequently made in this context are: the involvement of Belgrade in the conflict in Bosnia-Herzegovina; the recognition by foreign states of Slovenia, Croatia, and Bosnia-Herzegovina and the admission of these new states to the U.N.; and the agreements signed by all the parties to the armed conflicts regarding the application of the Geneva Conventions to the armed conflicts between them. Indeed, the Statute of the International Tribunal, and the report of the U.N. Secretary-General to the Security Council in which the Statute was proposed and explained, clearly adopt this position. See Meron, War Crimes Trials, supra note 39, at 128; Meron, War Crimes in Yugoslavia, supra note 21, at 81; Paust, supra note 178, at 506-10; Report of the Commission of Experts, supra note 82, paras. 42–44, 306–07 (stating that the law applicable in international armed conflicts ought to apply to the entirety of the armed conflicts in the territory of the former Yugoslavia). This view is clearly discernible from the various Security Council resolutions related to the present armed conflict. See infra note 180.

180. In a pact of November 27, 1991 (between Croatia and Serbia) and an accord of May 22, 1992 (between all parties involved in the armed conflict in Bosnia-Herzegovina), the parties agreed to apply certain provisions of the Geneva Conventions and of Protocol I, excluding, however, those provisions dealing with grave breaches. Yet, all parties to the conflict accepted the London “Statement of Principles” of August 26, 1992, concerning compliance with international humanitarian law and personal responsibility for violations of the Conventions. Meron, War Crimes Trials, supra note 39, at 129; Paust, supra note 178, at 500–03; Report of the Commission of Experts, supra note 82, para. 108.

Moreover, even without such agreements, the grave breaches regime of the Conventions would have been applicable to violations of the Conventions performed in the course of the armed conflict. Whether or not the Conventions, as a whole, reflect and are part of customary international law, the case for such a position seems to be strongest in the context of grave breaches of the Conventions. As mentioned above, the list of grave breaches can be regarded as a codification of certain war crimes previously recognized, first and foremost by the Nuremberg Tribunal, to be part of customary international law.

VII. Grave Breaches under Protocol I

Protocol I (Section II, Part V) supplements the provisions of the Conventions relating to the repression of breaches, while extending the that "all parties are bound to comply with the obligations under international humanitarian law, and in particular the Geneva Conventions of 12 August 1949, and that persons who commit or order the commission of grave breaches of the Conventions are individually responsible in respect of such breaches";


181. Assuming that this conflict is, indeed, of an international character.

182. See, e.g., Theodor Meron, The Geneva Conventions as Customary Law, 81 AM. J. INT'L L. 348 (1987); Report of the Secretary-General, supra note 1, para. 35, 32 I.L.M. at 1170; Report of the Commission of Experts, supra note 82, para. 53. For an opposite approach, see Yoram Dinstein, Deportations from Occupied Territories, 13 TEL-AVIV U. L. REV. 403, 404 (1988) (Hebrew) (stating that the Fourth Geneva Convention is, in essence, of a constitutive, rather than declarative, nature. It represented an innovation in international law when it was drafted, and since 1949 only one state — Israel — has resorted to its provisions in a systematic manner). In addition, it should be noted that the former Yugoslavia was a signatory to the 1949 Geneva Conventions.

183. See supra notes 34-35 and accompanying text.

184. In fact it may be argued that the prohibition of grave breaches has reached a status of jus cogens. See, e.g., RESTATEMENT, supra note 72, § 702 cmt. n & rep. n.1; Paust, supra note 178, at 504-05.

185. Although the focus of this paper is the grave breaches system under the Conventions, it is important to discuss briefly the Additional Protocols in this context. Two main reasons may be suggested here. First, the Protocols represent a development of the grave breaches system.

Second, in the context of the armed conflict in the former Yugoslavia, it ought to be noted that the former Republic of Yugoslavia was a signatory not only to the 1949 Conventions, but also to the Additional Protocols. It is noteworthy that the United States, through Ambassador Madeleine K. Albright, expressed the view that “the ‘laws or customs of war’ referred to in Article 3 [of the Statute of the International Tribunal] include all obligations under humanitarian law agreements in force in the territory of the former Yugoslavia at the time the acts were committed, including . . . the 1977 Additional Protocols to these Conventions.” U.N. Doc. S/PV.3217, at 15 (May 25, 1993), quoted in Meron, War Crimes in Yugoslavia, supra note 21, at 80.
application of that system of repression to breaches of the Protocol. 186 This extension is in two areas. The first is the application of the concept of "grave breaches" under the Conventions to acts committed against new categories of persons and objects protected under Protocol I. 187 The second

For an in depth analysis of the penal provisions of Protocol I, see COMMENTARY ON THE ADDITIONAL PROTOCOLS, supra note 56, at 973-1058; MICHAEL BOTHE ET AL., NEW RULES FOR VICTIMS OF ARMED CONFLICTS 507-47 (1982); Solf & Cummings, supra note 45.

Brief mention ought to be made of the Draft Code of Crimes Against the Peace and Security of Mankind, adopted by the International Law Commission at its forty-third session. Article 22 of this Draft Code, entitled "Exceptionally Serious War Crimes," includes a list of "exceptionally serious violation[s] of principles and rules of international law applicable in armed conflict." Included in this list are the following:

(a) acts of inhumanity, cruelty or barbarity directed against the life, dignity or physical or mental integrity of persons [in particular wilful killing, torture, mutilation, biological experiments, taking of hostages, compelling a protected person to serve in the forces of a hostile Power, unjustifiable delay in the repatriation of prisoners of war after the cessation of active hostilities, deportation or transfer of the civilian population and collective punishment];
(b) establishment of settlers in an occupied territory and changes to the demographic composition of an occupied territory;
(c) use of unlawful weapons;
(d) employing methods or means of warfare which are intended or may be expected to cause widespread, long-term and severe damage to the natural environment;
(e) large-scale destruction of civilian property;
(f) wilful attacks on property of exceptional religious, historical or cultural value.


186. Proposals calling for a more stringent regime than offered by the Geneva Conventions with regard to the repression of grave breaches were rejected. The main reason was the fact that even the Conventions' grave breaches system had not been successfully implemented around the world.

187. Article 85, paragraph 2 of Protocol I increases the number of situations in which acts, already defined as grave breaches under the Geneva Conventions, would be considered as such. Protocol I, supra note 5, art. 85, para. 2, 16 I.L.M. at 1428.

The list of the new categories of persons or objects to be protected by the grave breaches provisions consists of the following:

(1) Persons who have taken part in hostilities and have fallen into the power of an adverse Party (Combatants and prisoners of war under Article 44 and persons falling into Article 45 of Protocol I);
(2) Refugees and stateless persons in the power of an adverse Party (persons with regard to whom Article 73 of Protocol I applies);
(3) The wounded, sick, and shipwrecked of the adverse Party (see Article 8 of Protocol I for definitions); and
(4) Medical or religious personnel, medical units or medical transports which are under the control of the adverse Party and protected under the Protocol (see Article 8 for definitions).

Some of these categories, although similar to those existing under the Conventions, are substantially broader in their scope (e.g., the category of persons protected under Articles 44 and 45 of Protocol I).
entails the expansion of the list of acts recognized as grave breaches. In addition, the Protocol specifically qualifies grave breaches of the Conventions and the Protocol as war crimes. Finally, Protocol I adopts and supplements the system of repression found in the Conventions and applies it to breaches of the Protocol.

Protocol I also deals with certain matters which were not covered under the Conventions' regime, for example, responsibility arising out of a failure to act when under a duty to do so and responsibility of commanders and superiors. In addition, Protocol I seeks to foster the principle of universal jurisdiction and to ensure that grave breaches would not go unpunished: it emphasizes the duty of the High Contracting Parties to afford mutual assistance in criminal matters as is necessary for the prosecution of any grave breaches of either the Protocol or the Conventions; it also deals with the thorny issue of extradition of perpetrators.

An attempt made to include Article 75 of Protocol I in this list, in order to extend further the categories of persons protected under the grave breaches provisions, was abandoned when opponents feared that such inclusion might extend the concept of "grave breaches" to breaches committed by a party to the conflict against its own nationals. See Commentary on the Additional Protocols, supra note 56, at 992–93.

188. See Protocol I, supra note 5, art. 11, para. 4, 16 I.L.M. at 1401, and art. 85, paras. 3–4, 16 I.L.M. at 1428. Paragraph 3 introduces a major conceptual extension of the system of grave breaches in dealing with violations related to the conduct of hostilities, i.e., to that body of law known as the "Hague law." Thus, paragraph 3 considers as grave breaches targeting civilians and launching an indiscriminate attack with the knowledge that it will cause excessive loss of life, injury to civilians, or damage to civilian objects. But see Bassionu, Repression of Breaches, supra note 39, at 200 (expanding the list of grave breaches dilutes the effect of selecting certain breaches as grave breaches); Draper, Modern Patterns, supra note 155, at 36–40.

Paragraph 4 of Article 85 is more consistent with the traditional contours of the "Geneva law," although some of its subparagraphs were the most controversial of all paragraphs included in Article 85, due to what seemed to many to be their overriding political character which made them unfit for a humanitarian document. Whereas paragraph 3 focuses on "battlefield crimes," paragraph 4 (with the exception of subparagraph (d)) concentrates on offenses committed against persons under the control of a hostile Power. Thus, for example, included in paragraph 4 are the unjustifiable delay in the repatriation of prisoners of war or civilians and apartheid.

189. See Protocol I, supra note 5, art. 85, para. 5, 16 I.L.M. at 1428, and art. 75, para. 7, 16 I.L.M. at 1424. On the connection between grave breaches and war crimes, see supra note 40 and accompanying text. These provisions do not affect the application or scope of either the Geneva Conventions or Protocol I.

190. See Protocol I, supra note 5, art. 85, para. 1, 16 I.L.M. at 1427.


192. Id. art. 88, 16 I.L.M. at 1429. Also, Article 89 of Protocol I imposes upon the Parties the duty, "in situations of serious violations of the Conventions or of this Protocol," to act in cooperation with the United Nations and in conformity with the U.N. Charter. Id. art. 89, 16 I.L.M. at 1429.

CONCLUSION

International humanitarian law is facing serious challenges. Around the world, violations of the most basic of its norms are perpetrated with an alarming frequency. The manner in which the international community chooses to respond to such violations — in legal and political means — will substantially shape the direction, development, and relevance of international humanitarian law in the years to come. It is in that normative and prospective sense that the developments around the International Tribunal are most significant. Whatever the outcome of the proceedings, their significance goes far beyond the fate of the specific defendants. By establishing the International Tribunal, the international community has made an important step and set the stage for a crucial legal, political, moral, and social precedent. It is yet to be seen what the substantive content of that precedent is going to be.

The International Tribunal presents us with a golden opportunity, which must not be squandered, to bolster the grave breaches system and with it to promote the respect and relevance of the norms of international humanitarian law. This process is one which is not confined to the proceedings before the International Tribunal. Rather, it is incumbent on each and every one of us to contribute to it. Morally, socially, politically, and legally none can afford to say "I wasn’t a Bosnian."