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# UNIVERSAL JURISDICTION:

## The duty of states to enact and enforce legislation - Chapter Three

There is now little doubt that any state may exercise universal jurisdiction over most war crimes, whether committed during international or non-international armed conflict. The prohibition of war crimes is part of *jus cogens* (fundamental norms) and an obligation *erga omnes* (owed by all states to the international community as a whole) on all states to enforce. War crimes subject to universal jurisdiction encompass certain serious violations of international humanitarian law<sup>1</sup> during international armed conflict, including both crimes defined under customary international law and those defined in treaties, such as grave breaches of the Geneva Conventions and Protocol I. Although the term “war crimes” traditionally was limited to wars between states, war crimes are now considered to include certain serious violations of international humanitarian law committed during non-international armed conflict, including serious violations of common Article 3 of the Geneva Conventions, certain serious violations of Protocol II and some other conduct which, if it had been committed during an international armed conflict, would constitute war crimes.

### I. THE *JUS COGENS* AND *ERGA OMNES* NATURE OF WAR CRIMES

#### A. *Jus cogens*

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<sup>1</sup> The term “international humanitarian law” has now largely replaced the term “law of armed conflict”. Both terms include violations of international customary and conventional law governing international and non-international armed conflict. Earlier terms, the “laws and customs of war” and the “laws of war”, traditionally referred to customary and conventional international law governing international armed conflicts between states (and between a state and insurgent forces recognized as belligerents). *See generally Prosecutor v. Tadić*, Case No. IT-94-1-AR72 (Appeals Chamber, 2 October 1995), para. 87.

The prohibition of war crimes - which now include violations of international humanitarian law in non-international armed conflict - is part of *jus cogens*.<sup>2</sup> An eminent authority has explained, “*Jus cogens* refers to the legal status that certain international crimes reach. . . . Sufficient legal basis exists to reach the conclusion that all of these crimes [including war crimes] are parts of the *jus cogens*”.<sup>3</sup> As such, the prohibition is a peremptory norm of general international law which, as recognized in Article 53 of the 1969 Vienna Convention of the Law of Treaties, cannot be modified or revoked by treaty.<sup>4</sup> The prohibition of war crimes is of the same nature as the prohibitions of genocide and crimes against humanity, which are recognized as *jus cogens* (see Chapter Five, Sections II and III and Chapter Seven, Section I) and states do not argue that the prohibition of war crimes is one which can ever be derogated from. Indeed, when genocide and crimes against humanity take place during armed conflict there is a considerable overlap with war crimes.

### B. *Erga omnes*

The International Court of Justice has recognized, the *jus cogens* prohibition in international law of certain conduct is an obligation *erga omnes* (owed by all states to the international community). It is a duty which *all* states have a legal interest in ensuring is fulfilled:

“[A]n essential distinction should be drawn between the obligations of a State toward the international community as a whole, and those arising vis-à-vis another State . . . By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have an interest of a legal nature in their protection; they are obligations *erga omnes*.”

Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the

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<sup>2</sup> Decision of the Constitutional Court of Hungary, Case No. 53/1993 (X.13) (cited in Péter Mohacsi & Péter Polt, *Estimation of War Crimes and Crimes against Humanity According to the Decision of the Constitutional Court of Hungary*, 67 *Revue Internationale de Droit Pénal* 333, 335 (1996).

<sup>3</sup> M. Cherif Bassiouni, *International Crimes: Jus Cogens and Obligatio Erga Omnes*, 59 *Law & Contemp. Prob.* 63, 68 (1996).

<sup>4</sup> Vienna Convention on the Law of Treaties, U.N. Doc. A/CONF. 39/27 (1969), 63 *Am. J. Int'l L.* 875 (1969), Art. 53 (Treaties conflicting with a peremptory norm of general international law (*jus cogens*)). That article provides:

“A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.”

Most of the provisions of the Vienna Convention are considered to reflect customary international law. Robert Jennings & Arthur Watts, 1 *Oppenheim's International Law* 1199 (London: Longman 9th ed. 1992) (paperback edition 1996).

body of general international law; others are conferred by international instruments of a universal or quasi-universal character.”<sup>5</sup>

The prohibitions of war crimes are “rules concerning the basic rights of the human person” which necessarily fall within the category of obligations *erga omnes*. It follows from this legal obligation *erga omnes* with respect to the prohibition of war crimes that any state may exercise universal jurisdiction over persons suspected of committing such crimes when other states are unable or unwilling to take effective steps to repress these crimes.<sup>6</sup>

However, as the extensive state practice, particularly legislation, cited in this memorandum confirms, states may exercise universal jurisdiction over a wide range of crimes under international law which do not violate *jus cogens* prohibitions or implicate *erga omnes* obligations. Indeed, states may exercise universal jurisdiction over ordinary crimes under national law.

### C. Duty not to grant asylum to war crimes suspects

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<sup>5</sup> *Barcelona Traction, Light and Power Company Ltd.*, Judgment, 1972 ICJ Rep., paras 33-34. For further information on the scope of *erga omnes* obligations, see André de Hoogh, *Obligations Erga Omnes and International Crimes: A Theoretical Inquiry into the Implementation and Enforcement of the International Responsibility of States* (Dordrecht: Kluwer Law International 1996); M. Ragazzi, *The Concept of International Obligations Erga Omnes* (Oxford: Clarendon Press 1997). See also Bassiouni, *supra*, n. 3, 68.

<sup>6</sup> Virginia Morris & Michel P. Scharf, 1 *The International Criminal Tribunal for Rwanda* 306-307 (Transnational Publishers Inc. 1998) (“The exceptional conferral of jurisdiction on all States for crimes under international law, which is sometimes referred to as the principle of universal jurisdiction, is consistent with the unique character of the crimes, which are prohibited in the first instance by international law, rather than national law, as well as the *erga omnes* character of the rules which are of concern to all States.”) (footnotes omitted); Bassiouni, *International Crimes, supra*, n. 3, 65-66 (“recognizing certain international crimes as *jus cogens* carries with it a duty to prosecute or extradite . . . and universality of jurisdiction over such crimes irrespective of where they were committed”) (footnotes omitted). See also Shabtai Rosenne, *Some Reflections Erga Omnes*, in A. Anghie & G. Sturgess, eds, *Legal Visions of the 21<sup>st</sup> Century: Essays in Honour of Judge Christopher Weeramantry* 509 (The Hague/London/Boston: Kluwer Law International 1998).

The concept of a duty of states not to shield persons found in their territory suspected of war crimes, but instead either to prosecute them or extradite them is consistent with the duty owed to the entire international community not to accord such persons asylum. States have repeatedly declared at the international level that persons responsible for war crimes may not be given asylum. Article 14 (2) of the 1948 Universal Declaration of Human Rights declares that the right to seek and to enjoy in other countries asylum from persecution “may not be invoked in the cases of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.” In 1951, the UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, convened under General Assembly Resolution 429 (V) of 14 December 1950, adopted the Convention relating to the Status of Refugees, which does not apply to persons suspected of war crimes, who have committed a serious non-political crime prior to admission or who were guilty of acts contrary to the purposes and principles of the UN.<sup>7</sup> In 1967, the General Assembly adopted the Declaration on Territorial Asylum. Article 1 (2) of that Declaration provides:

“The right to seek and to enjoy asylum may not be invoked by any person with respect to whom there are serious reasons for considering that he has committed a crime against peace, a war crime or a crime against humanity in the international instruments drawn up to make provisions in respect of such crimes.”<sup>8</sup>

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<sup>7</sup> Article 1.F states in full:

“The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

(a) He has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;

(b) He has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;

(c) He has been guilty of acts contrary to the purposes and principles of the United Nations.”

U.N. Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons convened under General Assembly Resolution 429 (V) of 14 December 1950, adopted on 28 July 1951, Art. 1 (F). War crimes are not political crimes and it is self evident that they are contrary to the purposes and principles of the UN. For a discussion of the scope of these exclusions, see Guy S. Goodwin-Gill, *The Refugee in International Law* 95-114 (Oxford: Clarendon Press 2<sup>nd</sup> ed. 1996).

<sup>8</sup> U.N. G.A. Res. 2312, 22 U.N. G.A.O.R. Supp. (No. 16) at 81, U.N. Doc. A/67/16 (1967) of 14 December 1967, adopting the Declaration on Territorial Asylum.

The Inter-American Commission on Human Rights (IACHR), in an important statement on this question on 20 October 2000, has declared that states are under a duty not to grant asylum to persons suspected of war crimes and other crimes under international law who flee to avoid criminal responsibility.<sup>9</sup>

It is a necessary corollary of this shared duty that no state may send suspects to a state which will give the person asylum and impunity. Instead, the state must send the suspect to a state able and willing to investigate and prosecute. If no such state can be found, the state where the suspect is located should not let the suspect have *de facto* asylum, but should investigate and, if there is sufficient admissible evidence, prosecute the suspect itself.

## II. UNIVERSAL JURISDICTION OVER WAR CRIMES

### A. War crimes under customary international law in international armed conflict

#### 1. Scope of war crimes under customary international law

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<sup>9</sup> Inter-American Commission on Human Rights, Organization of American States, *Asylum and International Crimes*, 20 October 2000. This statement, which deserves quoting in full, declares:

“Asylum is an institution that provides for the protection of individuals whose life or liberty is threatened or endangered by acts of persecution or violence stemming from the acts or omissions of a State. One form, political asylum, has been especially well-developed in Latin America. States have accepted that there are limits to asylum, based on several sources of international law, including that asylum cannot be granted to persons with respect to whom there are serious indicia that they may have committed international crimes, such as crimes against humanity (which include the forced disappearance of persons, torture, and summary executions), war crimes, and crimes against peace.

According to article 1(1) of the American Convention on Human Rights, the States have an obligation to prevent, investigate, and punish any violation of the rights recognized therein. The IACHR has stated previously that the evolution of the standards in public international law has consolidated the notion of universal jurisdiction, whereby any State has the authority to “prosecute and sanction individuals responsible for such international crimes, even those committed outside of a State’s territorial jurisdiction, or which do not relate to the nationality of the accused or of the victims, inasmuch as such crimes affect all of humanity and are in conflict with public order in the world community.” [IACHR, Recommendations on Universal Jurisdiction and the International Criminal Court, Annual Report 1998, Ch. VII.] The Inter-American Convention to Prevent and Punish Torture and the Inter-American Convention on Forced Disappearance of Persons expressly provide that a State party should take the measures necessary to establish its jurisdiction over the crimes provided for in those instruments when the alleged offender is within its jurisdiction and it does not extradite him/her.

Based on the foregoing considerations, the Inter-American Commission should note that the institution of asylum is totally subverted by granting such protection to persons who leave their country to elude a determination of their liability as the material or intellectual author of international crimes. The institution of asylum presupposes that the person seeking protection is persecuted in his or her state of origin, and is not supported by it in applying for asylum.

In view of the foregoing considerations, the Inter-American Commission on Human Rights, in the exercise of the power conferred on it by Article 41(b) of the American Convention, hereby recommends to the Member States of the OAS that they refrain from granting asylum to any person alleged to be the material or intellectual author of international crimes.”



War crimes under customary international law during international armed conflict fall into several categories.<sup>10</sup>

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<sup>10</sup> The brief summaries in this section concerning international humanitarian law may be useful in clarifying the extent to which national legislation gives courts the extraterritorial jurisdiction which they are permitted or required to exercise under international law over war crimes. National legislation sometimes differs in whether courts may exercise jurisdiction over particular war crimes, for example with respect to crimes under customary international law or crimes in particular treaties. Moreover, the definitions in the Rome Statute are not always as comprehensive as the definitions under international humanitarian law and not all violations of international humanitarian law are included in the jurisdiction of the International Criminal Court. These summaries may also be helpful to those working to strengthen national legislation and jurisprudence.

First, many of the prohibitions in the 1907 Hague Convention (Hague Convention IV) and the annexed Regulations (Hague Regulations) (which date to the Hague Convention II of 1899 and its annexed Regulations) have been considered to be war crimes under customary international law at least since the Second World War.<sup>11</sup> These prohibitions include, but are not limited to, harm to family honour and rights, lives of persons, private property and religious convictions and practice (Article 46), collective punishments (Article 50), excessive requisitions and compelling inhabitants to take part in military operations against their own country (Article 52) and seizure, destruction or damage of certain cultural property (Article 56).<sup>12</sup> Other articles of the Hague Regulations which are now considered to reflect international customary law, at least in part, include Articles 4 (humane treatment), 23 (c) (prohibition of killing or wounding enemy who have surrendered), 23 (g) (prohibition of destruction or seizure of enemy property), 23 (h) (declaring legal rights of hostile nationals abolished or suspended), 27 (protection of cultural property), 28 (prohibition of pillaging), 44 (prohibition of compelling inhabitants of occupied territory to supply military information).<sup>13</sup>

<sup>11</sup> As of 1 September 2001, 35 states are parties to the Hague Convention IV (Austria-Hungary, Belarus, Belgium, Bolivia, Brazil, China, Cuba, Denmark, Dominican Republic, El Salvador, Ethiopia, Fiji, Finland, France, Germany, Guatemala, Haiti, Japan, Liberia, Luxembourg, Mexico, the Netherlands, Nicaragua, Norway, Panama, Poland, Portugal, Romania, Russian Federation, South Africa, Sweden, Switzerland, Thailand, the United Kingdom and the United States. English translations in Adam Roberts & Richard Guelf, 69 (Oxford: Oxford University Press 3<sup>rd</sup> ed. 2000); 9 U.K.T.S. (Cmd 5030 1910); 112 United Kingdom Parl. Pap. 59 (1910); 2 Am. J. Int'l L. 90 (Supp. 1908). As of this date, 15 have signed, but not yet ratified, it (Argentina, Bulgaria, Chile, Colombia, Ecuador, Greece, Iran (Islamic Republic of), Italy, Montenegro, Paraguay, Peru, Serbia, Turkey, Uruguay and Venezuela). The low number of ratifications is explained in part because subsequent international humanitarian law treaties have, to a considerable extent, replaced the Hague Convention and its Regulations. The text of the Hague Convention of 1899 and its annexed Regulations in French, together with the changes made in 1907, can be found in Dietrich Schindler & Jiří Toman, *Droit des Conflits Armés : Recueil des conventions, résolutions et autres documents* 65 (Genève : Comité international de la Croix-Rouge et Institut Henri Dunant 1996).

<sup>12</sup> The Nuremberg Tribunal concluded that the proposition that violations of Articles 46, 50, 52 and 56 of the Hague Regulations “constituted crimes for which the guilty individuals were punishable is too well settled to admit of argument” and that “by 1939 these rules laid down in the Convention were recognized by all civilized nations, and were regarded as being declaratory of the laws and customs of war”. Judgment of the International Military Tribunal for the Trial of German Major War Criminals (with the dissenting opinion of the Soviet Member) - Nuremberg 30th September and 1st October 1946 (Nuremberg Judgment), Cmd. 6964, Misc. No. 12, 64, 65 (London: H.M.S.O. 1946). At least one leading authority on international humanitarian law has suggested that the International Military Tribunal at Nuremberg considered that the entirety of the Hague Regulations were part of customary law. Theodor Meron, *Human Rights and Humanitarian Norms* 39 (Oxford: Clarendon Press 1989) (contrasting the views of this Tribunal with that of the International Military Tribunal for the Far East (Tokyo Tribunal)).

The military tribunal in *United States v. Von Leeb (High Command Case)*, 11 *Trials of War Criminals before the Nuernberg Military Triunals under Control Council Law No. 10 (Trials of War Criminals before the Nuernberg Military Tribunals)* 462, 532-533 (Nuernberg, October 1946-April 1949) (Washington, D.C. U.S. Government Printing Office 1949-1953) (15-volume series), reached a similar conclusion to that of the Nuremberg Tribunal.

<sup>13</sup> The Appeals Chamber of the Yugoslavia Tribunal and the UN Secretary-General have also recognized that the Hague Regulations are part of customary international law. *Prosecutor v. Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-AR72, Appeals Chamber, 2 October 1995, para. 87 (citing approvingly the Report of the Secretary-General on the establishment of the Yugoslavia Tribunal indicating that the Hague Regulations are an important part of international humanitarian law); Report of the Secretary-General

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pursuant to paragraph 2 of Security Council resolution 808 (1993), presented 3 May 1993, U.N. Doc. S/25704, para. 35 (“The part of conventional international humanitarian law which has beyond doubt become part of international customary law is the law applicable in armed conflict as embodied in: . . . the Hague Convention (IV) Respecting the Laws and Customs of War on Land and the Regulations annexed thereto of 18 October 1907 . . .”).

The United States considers that the general principles of the 1907 Hague Conventions and the 1929 Geneva Convention relative to the Treatment of Prisoners of War to be “declaratory of the customary law of war to which all States are subject”. U.S. Army, *The Law of Land Warfare* (Field Manual, FM-27-10 18 July 1956, as amended 15 July 1976), Foreword.

Scholars have confirmed that articles of the Hague Regulations in addition to Articles 46, 50, 52 and 56 reflect customary international law. See Christopher Greenwood, *UK War Crimes Act 1991*, in Hazel Fox & Michael A. Meyer, *Effecting Compliance* 215, 226 (Articles 4, 23 (c) and 46); Meron, *Human Rights and Humanitarian Law Norms*, *supra*, n. 12, 46-47 (Articles 23 (g), 23 (h), 27, 28 and 44).

Article 1 of Hague Convention IV requires states to issue instructions to their armed land forces which are in conformity with the Regulations, but it does not expressly require that they enact legislation for the punishment of those responsible for violations. A number of states (identified in Chapter Four, Section II) are known to have enacted legislation giving their courts universal jurisdiction over war crimes, which would necessarily include conduct amounting to violations of Hague Convention IV and its Regulations. A large number of these violations fall within the jurisdiction of the International Criminal Court under Article 8 (2) (b) of the Rome Statute.<sup>14</sup> Many violations of international humanitarian law treaties other than Hague Convention IV and its Regulations, including grave breaches of the Geneva Conventions of 1949 and of Protocol I are considered part of customary international law, but they are often treated independently in legislation and jurisprudence, so they are discussed separately in Section II.B.1 of this chapter.<sup>15</sup> In addition to these provisions, there are a number of important war crimes during international armed conflict which are now widely accepted as part of customary international humanitarian law, as evidenced in part by their inclusion in the Rome Statute, such as rape and other forms of sexual violence (see Section II.C.1 of this chapter).<sup>16</sup>

## 2. Universal jurisdiction over war crimes under customary international law during international armed conflict

Jurisprudence of international criminal courts, statements by expert and political bodies of intergovernmental organizations and their experts, scholarly authority and the ICRC all recognize that war crimes committed during international armed conflict are subject to universal jurisdiction.

**Permissive universal jurisdiction.** The United Nations War Crimes Commission noted in 1948 that a number of the Allied military courts and commissions exercised universal jurisdiction over war crimes committed during the Second World War. In the foreword to the final volume of the Commission's collection of law reports on these trials, its Chairman, Lord Wright of Durley, concluded:

<sup>14</sup> The articles of the Rome Statute which are based, to a greater or lesser extent, on provisions of Hague Regulations include: Rome Statute, Art. 8 (2) (b) (v) (attacking or bombarding undefended civilian places) (Hague Regulations, Art. 25); Rome Statute, Art. 8 (2) (b) (vi) (attacks on persons *hors de combat*) (Hague Regulations, Art. 23 (c)); Rome Statute, Art. 8 (2) (b) (vii) (improper use of insignia and uniforms) (Hague Regulations, Art. 23 (f)); Rome Statute, Art. 8 (2) (b) (ix) (perfidy) (Hague Regulations, Art. 23 (b)); Rome Statute, Art. 8 (2) (b) (xii) (Hague Regulations, Art. 23 (d)); Rome Statute, Art. 8 (2) (b) (xiii) (destruction of enemy property) (Hague Regulations, Art. 23 (g)); Rome Statute, Art. 8 (2) (b) (deprivation of legal rights) (Hague Regulations, Art. 23 (h)); Rome Statute, Art. 8 (2) (b) (xv) (compelling participation in military operations against one's own country) (Hague Regulations, Art. 23, final para.); Rome Statute, Art. 8 (2) (b) (xvi) (pillage) (Hague Regulations, Art. 28); Rome Statute, Art. 8 (2) (b) (xvii) (poison or poisoned weapons) (Hague Regulations, Art. 23 (a)). In addition, some of these prohibitions are recognized in the Rome Statute as applying to non-international armed conflict (see Section II.C.1 of this chapter).

<sup>15</sup> Authorities confirming that the grave breaches provisions of the Geneva Conventions reflect customary international law include: U.S. Army, *The Law of Land Warfare* 181 (Field Manual, FM-27-10 18 July 1956, as amended 15 July 1976); Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law* 45-50 (1989). The full scope of customary international humanitarian law is likely to be known in 2001 when the comprehensive study by the International Committee of the Red Cross of this subject is published by Cambridge University Press.

<sup>16</sup> Rome Statute, Art. 8 (2) (b) (xxii) (rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization or any other form of sexual violence also constituting a grave breach of the Geneva Conventions).

“As to jurisdiction the traditional rule is that a Military Court, whether national or international, derives its jurisdiction over war crimes from the bare fact that the person charged is within the custody of the Court ; his nationality, the place where the offence was committed, the nationality of the victims are not generally material. This has been sometimes described as universality of jurisdiction as being contrary to the general rule that courts have a jurisdiction limited to the national territory or to the nationality of the injured person. In certain trials dealt with in these Reports, the accused came from several different nations and so also did the victims, and in some trials the crimes were committed on the High Seas or in allied or enemy countries.”<sup>17</sup>

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<sup>17</sup> Lord Wright of Durley, *Foreword*, 15 United Nations War Crimes Commission, *Law Reports of Trials of War Criminals* x (London: H.M.S.O. 1949). See also United Nations War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of the Laws of War* 232 (1948) (stating that “a violation of the laws of war constitutes both an international and a national crime, and is therefore justiciable both in a national and international court.”).

The International Criminal Tribunal for the former Yugoslavia (Yugoslavia Tribunal) has stated that crimes within its jurisdiction, which include war crimes under customary international law, are subject to universal jurisdiction.<sup>18</sup> The Inter-American Commission on Human Rights has recommended that “the member States of the Organization of American States adopt such legislative and other measures as may be necessary to invoke and exercise universal jurisdiction in respect of individuals in matters of . . . war crimes.”<sup>19</sup> Scholars agree that states may exercise universal jurisdiction over war crimes under customary international law committed in international armed conflict.<sup>20</sup> In July 2000, the

<sup>18</sup> The Trial Chamber of the Yugoslavia Tribunal in the *Tadić* case stated:

“Before leaving this question relating to the violation of the sovereignty of States, it should be noted that the crimes which the International Tribunal has been called upon to try are not crimes of a purely domestic nature. They are really crimes which are universal in nature, well recognized in international law as serious breaches of international humanitarian law, and transcending the interest of any one State. The Trial Chamber agrees that in such circumstances, the sovereign rights of States cannot and should not take precedence over the right of the international community to act appropriately as they affect the whole of mankind and shock the conscience of all nations of the world. There can therefore be no objection to an international tribunal properly constituted trying these crimes on behalf of the international community.”

*Prosecutor v. Tadić*, Decision on the defence motion on jurisdiction, Case No. IT-94-1-T (Trial Chamber 10 August 1995), para. 42. See also *Prosecutor v. Tadić*, Decision on the Prosecutor’s motion requesting protective measures for victims and witnesses, Case No. IT-94-T (Trial Chamber 10 August 1995), para. 28 (“[T]he International Tribunal is adjudicating crimes which are considered so horrific as to warrant universal jurisdiction.”); *Prosecutor v. Tadić*, Decision on the defence motion for interlocutory appeal on jurisdiction, Case No. IT-94-1-AR72 (Appeals Chamber 2 October 1995), para. 58 (“It would be a travesty of law and a betrayal of the universal need for justice, should the concept of State sovereignty be allowed to be raised successfully against human rights. Borders should not be considered as a shield against the reach of the law and as a protection for those who trample underfoot the most elementary rights of humanity.”) (citing approvingly the same point made by the French *Cour de Cassation* in the *Barbie* case).

<sup>19</sup> Inter-Amer. Comm’n Hum. Rts, OAS, Rec. 21, OEA/Ser/L/V/II.101 Doc. 70, 8 December 1998, obtainable from <http://www.iachr.org>.

<sup>20</sup> M. Cherif Bassiouni, *Crimes against Humanity in International Law* 235 (Dordrecht/London/Boston: Kluwer Law International 2d ed.1999) (“War crimes are also among the limited number of offences subject to universal jurisdiction under customary international law.”); Richard R. Baxter, *The Municipal and International Law Basis of Jurisdiction over War Crimes*, 28 Brit. Y.B. Int’l L. 382 (1951); G. Brand, *The War Crimes Trials and the Laws of War*, 26 Brit. Y.B. Int’l L. 414, 416 (1949) (“[T]he doctrine of the universality over war crimes is now generally accepted.”); Ian Brownlie, *Principles of Public International Law* 308 (Oxford: Oxford University Press 5<sup>th</sup> ed.1998) (“It is now generally accepted that breaches of the laws of war, and especially of the Hague Convention of 1907 and the Geneva Conventions of 1949, may be punished by any state which obtains custody of persons suspected of responsibility.”); A.R. Carnegie, *Jurisdiction over Violations of the Laws and Customs of War*, 39 Brit. Y.B. Int’l L. 402, 424 (1963) (“[T]he development of the law in this field seems to be moving towards a recognition of universal jurisdiction over all serious war crimes; and it would not seem unreasonable to conclude that this recognition was already complete.”); Eric David, *Principes de Droit des Conflits Armés* 632 (“*Le droit (et même le devoir . . .) pour les États de poursuivre les auteurs de crimes de guerre leur confère une juridiction ‘universelle’ : ubi te invenero, ibi te judicabo.*”) (“The right (and even the duty . . .) of States to prosecute the perpetrators of war crimes confers upon them a ‘universal’ jurisdiction: *ubi te invenero, ibi te judicabo* [wherever I find you, there I will try you] (English translation by Amnesty International); 633-634 (citing state practice), 701-702 (stating that states have an *aut dedere aut judicare* duty - see below in this section) (Bruxelles: Editions Bruylant 2d ed.1999) (*aut dedere aut judicare* obligation); Yoram Dinstein, *The Universality Principle and War Crimes*, in Michael Schmitt & Leslie Green, eds, *The Law of Armed Conflict: Into the Next Millennium*, 71 Int’l L. Stud. 17, U.S. Naval War College (1998) (“Patently, war crimes can be assimilated to piracy in the frame of reference of universality of jurisdiction.”) (footnote omitted); Nguyen Quoc Dinh, Patrick Daillier & Alain Pellet, *Droit International Public* 632-633 (Paris: Librairie Générale de Droit et de Jurisprudence 5<sup>th</sup> ed. 1994) (citing examples); Bernard Graefrath, *Universal Criminal Jurisdiction and an International Criminal Court*, 1 Eur. J. Int’l L., 67, 68 (1990); L.C. Green, *The Contemporary Law of Armed Conflict*, 269 (Manchester: Manchester University Press 1993); *Greenspan’s Modern*

International Law Association endorsed the conclusion of its Committee on Human Rights Law and Practice that “[g]ross human rights offences in respect of which states are *entitled* under international customary law to exercise universal jurisdiction include . . . war crimes [as defined in Article 8 of the Rome Statute]”.<sup>21</sup>

*Law of Land Warfare* 420 (1959); Christopher Greenwood, *UK War Crimes Act 1991*, in Hazel Fox & Michael A. Meyer, *Effecting Compliance* 215, 222 (London: British Institute of International and Comparative Law 1993) (“The Hetherington Report made clear that the laws of war were already well established by the time of World War II, that it was generally accepted that individuals who committed violations of those laws were liable to punishment as war criminals and that, under international law, war crimes were crimes of universal jurisdiction by 1939, so that any state was entitled to try someone for violations of the laws of war.”); Rosalyn Higgins, *Problems and Processes: International Law and How We Use it* 59 (Oxford: Oxford University Press 1992) (“from the perspective of international law, there is clear universal jurisdiction to try and punish war crimes”); Christopher Joyner, *Arresting Impunity: The Case for Universal Jurisdiction in Bringing War Criminals to Accountability*, 59 *Law & Contemp. Prob.* 153, 165, 168 (“Every state may prosecute violations of modern fundamental norms of international law, particularly those relating to war crimes and crimes against humanity”), 169 (1996); F.A. Mann, *The Doctrine of Jurisdiction in International Law*, 113-1 *Recueil des Cours*, 9, 95 n. 188 (1964) (accepting that Israel could exercise universal jurisdiction over Eichmann, who had been charged with war crimes, as well as other crimes); Peter Malanczuk, *Akehurst’s Modern Introduction to International Law* 113 (London and New York: Routledge 7th ed. 1997) (war crimes “are a violation of international law, directly punishable under international law itself (and thus universal crimes), and they may be dealt with by national courts or by international tribunals”); Theodor Meron, *International Criminalization of Internal Atrocities*, 89 *Am. J. Int’l L.* 554, 573 (1995) (“Universal jurisdiction over war crimes means that all states have the right under international law to exercise criminal jurisdiction over the offenders.”); Kenneth C. Randall, *Universal Jurisdiction under International Law*, 66 *Tex. L. Rev.* 785, 814 (1988) (“[T]he *Eichmann* judgments persuasively demonstrate the legitimacy of universal jurisdiction over war crimes”); Steven R. Ratner & Jason S. Abrams, *Accountability for Human Rights Atrocities in International Law* 162 (the list of crimes subject to universal jurisdiction “would appear to include at least . . . war crimes”), 165 (“[C]ustomary law would seem to recognize universal jurisdiction over a broader range of war crimes than those listed as grave breaches of the conventions or Protocol I.”) (footnote omitted) (Oxford: Clarendon Press 2<sup>nd</sup> ed. 2000); *Restatement (Third) of the Foreign Relations Law of the United States* (1987), § 404 (“A state has jurisdiction to define and prescribe punishment for certain offences recognized by the community of nations as of universal concern, such as . . . war crimes . . .”); Nigel S. Rodley, *The Treatment of Prisoners under International Law* 121 (universal jurisdiction permissible over war crimes which amount to grave breaches of the Geneva Conventions), 195 (concluding that extra-legal executions would open the perpetrators to trial or extradition under general international law wherever they may be when the killings amounted to serious violations of the laws and customs of war) (Oxford: Clarendon Press 2<sup>nd</sup> ed. 1999); Michael P. Scharf, *The ICC’s Jurisdiction over the Nationals of Non-Party States: A Critique of the U.S. Position*, 63 *Law & Contemp. Probs* 67, 91 (2000) (“Since Nuremberg, it has been uniformly recognized that war crimes are crimes of universal jurisdiction under customary law.”) (footnote omitted); Georg Schwarzenberger, *The Eichmann Judgment: An Essay in Censorial Jurisprudence*, 15 *Curr. Leg. Probs* 248, 256 (1962) (stating with respect to Eichmann’s crimes, which included war crimes, “It would, be hard to point to evidence of a rule of international law prohibiting the assumption of criminal jurisdiction against an accused actually present in the territory of a sovereign State for crimes he is accused of having committed against foreign nationals abroad.”); Malcolm N. Shaw, *International Law*, 471 (4th ed. 1997) (“War crimes are now accepted by most authorities as subject to universal jurisdiction.”); Rüdiger Wolfrum, *The Decentralized Prosecution of International Offences through National Courts*, 24 *Isr. Y.B. Int’l L.* 183, 190 (1994).

<sup>21</sup> International Law Association, Res. 9/2000, adopted at the 69<sup>th</sup> Conference, London, 25-29 July 2000 (emphasis in original). For the text, see Introduction, footnote 6.

The International Law Commission has indicated that war crimes are subject to universal jurisdiction. In its 1996 Draft Code of Crimes against the Peace and Security of Mankind (1996 Draft Code of Crimes), Article 8 provides that, “[w]ithout prejudice to the jurisdiction of an international criminal court, each State Party shall take such measures as may be necessary to establish its jurisdiction over [war crimes], irrespective of where or by whom those crimes were committed.”<sup>22</sup> It explained that the 1996 Draft Code of Crimes provides that “the national courts of States Parties would be entitled to exercise the broadest possible jurisdiction over . . . war crimes under the principle of universal jurisdiction.”<sup>23</sup> Article 20 of the 1996 Draft Code of Crimes includes a broad range of war crimes in international armed conflict. Principle 5 of the draft UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of International Human Rights and Humanitarian Law (Van Boven-Bassiouni Principles) provides that “States shall incorporate within their domestic law appropriate provisions providing for universal jurisdiction over crimes under international law.”<sup>24</sup>

The International Committee of the Red Cross (ICRC) has frequently stated that states may exercise universal jurisdiction over some war crimes under customary international law committed during international armed conflict.<sup>25</sup>

***Extradite or prosecute obligation.*** A number of authorities have concluded that states not only *may* exercise universal jurisdiction over war crimes under customary international law during international armed conflict, but also that under the principle of *aut dedere aut judicare* (extradite or prosecute) they *must* exercise such jurisdiction or extradite persons suspected of such crimes to a state able and willing to do so or surrender the suspect to an international criminal court with jurisdiction over the crime and suspect.

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<sup>22</sup> International Law Commission, Report of the International Law Commission on the Work of its Forty-Eighth Session (1996 ILC Report), U.N. Doc. A/51/50, 1996 Draft Code of Crimes, Art. 8.

<sup>23</sup> *Ibid.*, Commentary to Article 9.

<sup>24</sup> UN Commission on Human Rights Independent Expert on the right to restitution, compensation and rehabilitation for victims of grave violations of human rights and fundamental freedoms, Draft Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of International Human Rights and Humanitarian Law (Final Draft), 18 January 2000, U.N. Doc. E/CN.4/2000/62 (2000), Principle 5.

<sup>25</sup> See, for example, ICRC, *International Criminal Court: State consent regime v. universal jurisdiction* 2-3 (1998); ICRC, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, 1011 (Yves Sandoz, Christophe Swinarski & Bruno Zimmerman, eds 1987) (*ICRC Commentary on the Additional Protocols*), ; ICRC, Statement to the Sixth Committee, General Assembly, 28 October 1996, 3. The XXVIth International Conference of the Red Cross and Red Crescent has also recalled “the obligation of States to repress violations of international humanitarian law” and urged states “to increase international efforts” and “to bring before courts and punish war criminals and those responsible for serious violations of international humanitarian law”.



The international community has made clear on a number of occasions that states have a duty to investigate war crimes wherever they have been committed and, where there is sufficient evidence, to prosecute. In 1973, the General Assembly declared that “war crimes . . . , wherever they are committed, shall be subject to investigation and the persons against whom there is evidence that they have committed such crimes shall be subject to tracing, arrest, trial and if found guilty, to punishment”.<sup>26</sup> On 17 July 1998, the international community reaffirmed the fundamental obligation of every state to bring to justice at the national level those responsible for war crimes by exercising its jurisdiction over those responsible for these crimes. In the Preamble of the Rome Statute, the states parties: (1) affirm “that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation”; (2) determine “to put an end to impunity for the perpetrators of these crimes”; and (3) recall “that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes”.<sup>27</sup> In addition, the fundamental principle of complementarity incorporated in Article 17 envisages that states retain the primary responsibility to investigate and prosecute crimes under international law. Nothing in the General Assembly resolutions or the Preamble to the Rome Statute limits this duty to the exercise of territorial jurisdiction.<sup>28</sup> Other authorities have come to the same conclusion.<sup>29</sup> Indeed, as

<sup>26</sup> UN Principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity, adopted by the General Assembly in Resolution 3074 (XXVIII) of 3 December 1973. This resolution spells out an extensive list of obligations of states to cooperate in the investigation and prosecution of war crimes (See discussion in Chapter Five, Section III.C). In 1971, the General Assembly had urged all states “to take measures in accordance with international law to put an end to and prevent war crimes and crimes against humanity and to ensure the punishment of all persons guilty of such crimes, including their extradition to those countries where they have committed such crimes.” G.A. Res. 2840 (XXVI) of 31 October 1971. Although the focus was on extradition of persons taking refuge in other countries, the wording clearly suggests that extradition to territorial states was only one option for bringing persons to justice for such crimes.

<sup>27</sup> Rome Statute, Preamble, paras. 4-6. The phrase “its criminal jurisdiction” includes not only a state’s jurisdiction under its own national law, but also its jurisdiction under international law.

<sup>28</sup> As the editor of the leading commentary on the Rome Statute has concluded, this paragraph “was deliberately left ambiguous”. Otto Triffterer, *Preamble*, in Otto Triffterer, ed., *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article* 1, 13 (Baden-Baden, Germany: Nomos Verlagsgesellschaft 1999). He cited the description by the delegate of Samoa, Roger S. Clark, who participated in the drafting of this paragraph, of paragraph 6 as “a sort of Martens clause which insists that just because the others are not expressly dealt with this does not mean that there is now impunity for them”. *Id.*

<sup>29</sup> See, for example, David, *supra*, n. 20, 632, 701-702 (“*L’obligation de répression des crimes de guerre prend la forme, comme pour bien d’autres infractions internationales, de l’alternative aut dedere aut judicare ou aut prosequi. Elle oblige tout Etat à rechercher les auteurs de crimes de guerre ou de crimes contre l’humanité et, soit à les poursuivre pénalement pour ces faits quels que soient la nationalité des auteurs, celles des victimes et le lieu où les faits ont été commis, soit à extraditer les auteurs, selon le droit de l’Etat requis, vers tout Etat qui les réclame aux fins de poursuites. L’Etat doit donc exercer une compétence pénale dite universelle à l’égard de l’auteur d’un crime de guerre ou d’un crime contre l’humanité, ou à défaut, il doit l’extraditer dans les conditions prévues par sa législation vers un Etat intéressé.*”); Dinstein, *Univerality Principle*, *supra*, n. 20, 30 (stating with respect to the universal jurisdiction to prescribe concerning war crimes: “Every State has a right - and indeed a duty - to enact any enabling legislation to lay the foundation for the domestic prosecutor and punishment of international offenders.”); L. C. Green, *Political Offences, War Crimes and Extradition*, 11 Int’l & Comp. L. Q. 329 (1962); Robert G. Neumann, *Neutral States and the Extradition of War Criminals*, 45 Am. J. Int’l L. 495 (1951). In addition, the International Law Association in 1985 declared that states had an *aut dedere aut judicare* obligation with respect to war crimes. International Law Association, Rec. 7, *Report of the Sixty-First Conference* (London 1985) (“No state may refuse to try or extradite a person accused of [a] . . . war crime. . .”).

Amnesty International has concluded, it is fully consistent with the purposes of the Statute, as outlined in the Preamble, to read this as an affirmation of a duty of every state to exercise its jurisdiction to the extent permitted by international law, rather than as limited by current national legislation.

Two years before the adoption of the Rome Statute, the International Law Commission in Article 9 of the 1996 Draft Code of Crimes provided: “Without prejudice to the jurisdiction of an international criminal court, the State Party in territory of which an individual alleged to have committed a crime set out in [Article 20 on war crimes] is found shall extradite or prosecute that individual.” The International Law Commission explained that Article 9 established “the general principle that any State in whose territory an individual alleged to have committed [a war crime] is present is bound to extradite or prosecute the alleged offender”.<sup>30</sup> It added that the “fundamental purpose” of the *aut dedere aut judicare* principle reflected in Article 9 “is to ensure that individuals who are responsible for particularly serious crimes are brought to justice by providing for the effective prosecution and punishment of such individuals by a competent jurisdiction.”<sup>31</sup>

As demonstrated below in Chapter Four, Section II, there is extensive state practice at the national level concerning universal jurisdiction over war crimes under international customary law committed during international armed conflict.

## **B. Grave breaches of the Geneva Conventions and Protocol I**

The 189 states parties to the Geneva Conventions, 1 September 2001, and 158 states, as of the same date, which are parties to Protocol I *may* exercise universal jurisdiction over a particularly serious class of war crimes in international armed conflict - grave breaches of those treaties.<sup>32</sup> Grave breaches of

<sup>30</sup> 1996 Draft Code of Crimes, Art. 9, Commentary, para. 2. International Law Commission, Report of the International Law Commission on the Work of its Forty-Eighth Session, 51 U.N. G.A.O.R. Supp. (N.10) at 9, U.N. Doc. A/51/10 (1996).

<sup>31</sup> *Ibid.*

<sup>32</sup> All but two of the 189 UN Members (Marshall Islands and Nauru are the only exceptions) and both UN Observer states, the Holy See and Switzerland, were parties to the Geneva Conventions of 1949 as of 1 September 2001. The following states were parties to Protocol I as of the same date: Albania, Algeria, Angola, Antigua and Barbuda, Argentina, Armenia, Australia, Austria, Bahamas, Bahrain, Bangladesh, Barbados, Belarus, Belgium, Belize, Benin, Bolivia, Bosnia and Herzegovina, Botswana, Brazil, Brunei Darussalam, Bulgaria, Burkina Faso, Burundi, Cambodia, Cameroon, Canada, Cape Verde, Central African Republic, Chad, Chile, China, Colombia, Comoros, Congo, Costa Rica, Côte d’Ivoire, Croatia, Cuba, Cyprus, Czech Republic, Denmark, Democratic People’s Republic of Korea, Democratic Republic of the Congo, Djibouti, Dominica, Ecuador, Egypt, El Salvador, Equatorial Guinea, Estonia, Ethiopia, Finland, France, Gabon, Gambia, Georgia, Germany, Ghana, Greece, Grenada, Guatemala, Guinea, Guinea-Bissau, Guyana, Holy See, Honduras, Hungary, Iceland, Ireland, Italy, Jamaica, Jordan, Kazakhstan, Kenya, Kuwait, Kyrgyzstan, Lao People’s Democratic Republic, Latvia, Lebanon, Lesotho, Liberia, Libyan Arab Jamahiriya, Liechtenstein, Lithuania, Luxembourg, Madagascar, Malawi, Maldives, Mali, Malta, Mauritania, Mauritius, Mexico, Micronesia (Federated States of), Republic of Korea, Monaco, Mongolia, Mozambique, Namibia, Netherlands, New Zealand, Nicaragua, Niger, Nigeria, Norway, Oman, Palau, Panama, Paraguay, Peru, Poland, Portugal, Qatar, Republic of Moldova, Romania, Russian Federation, Rwanda, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Samoa, San Marino, Sao Tome and Principe, Saudi Arabia, Senegal, Seychelles, Sierra Leone, Slovakia, Slovenia, Solomon Islands, South Africa, Spain, Suriname, Swaziland, Sweden, Switzerland, Syrian Arab Republic, Tajikistan, The former Yugoslav Republic of Macedonia, United Republic of Tanzania, Togo, Tunisia, Turkmenistan, Uganda, Ukraine, United Arab Emirates, United Kingdom, Uruguay, Uzbekistan, Vanuatu,

the Geneva Conventions and Protocol I are war crimes.<sup>33</sup> Moreover, as explained below, they also have an *aut dedere aut judicare obligation* either to exercise jurisdiction over suspects in their territories or to extradite them to states parties able and willing to do so or to surrender suspects to an international criminal court.

## **1. The scope of grave breaches**

### **a. The scope of grave breaches of the Geneva Conventions**

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Venezuela, Viet Nam, Yemen, Yugoslavia (Federal Republic of), Zambia and Zimbabwe.

<sup>33</sup> Article 85 (5) of Protocol I expressly states: “Without prejudice to the application of the Conventions and of this Protocol, grave breaches of these instruments shall be regarded as war crimes.”

Grave breaches involve any of the following acts if committed in connection with an international armed conflict against persons or property protected by the relevant Geneva Convention: wilful killing; torture or inhuman treatment, including biological experiments; wilfully causing great suffering or serious injury to body or health; extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly; compelling a prisoner of war or a protected person to serve in the forces of the hostile power; wilfully depriving a prisoner of war of the rights of fair and regular trial prescribed by the Third Geneva Convention or a protected person of such rights prescribed in the Fourth Geneva Convention; unlawful deportation or transfer or unlawful confinement of a protected person; and taking of hostages.<sup>34</sup> All of the grave breaches of the Geneva Conventions are war crimes within the jurisdiction of the International Criminal Court.<sup>35</sup>

### **b. The scope of grave breaches of Protocol I**

Article 85 (2) of Protocol I, which had been ratified by 158 states as of 1 September 2001, provides that acts which would constitute grave breaches of the Geneva Conventions are grave breaches of the Protocol if committed against certain other protected persons:

“Acts described as grave breaches in the Conventions are grave breaches of this Protocol if committed against persons in the power of an adverse Party protected by Articles 44 [concerning combatants and prisoners of war], 45 [concerning persons who have taken part in hostilities] and 73 [concerning refugees and stateless persons] of this Protocol, or against the wounded, sick and shipwrecked of the adverse Party who are protected by this Protocol, or against those medical or religious personnel, medical units or medical transports which are under the control of the adverse Party and are protected by this Protocol.”<sup>36</sup>

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<sup>34</sup> Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, August 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31, Art. 50; Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, August 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85, Art. 51; Convention Relative to the Treatment of Prisoners of War, August 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, Art. 130; Convention Relative to the Protection of Civilian Persons in Time of War, August 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287, Art. 147.

<sup>35</sup> Rome Statute, Art. 8 (2) (a).

<sup>36</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, Art. 85 (2), *opened for signature* 12 December 1977, *entered into force* 7 December 1978, 1125 U.N.T.S. 3.

Protocol I contains three groups of other grave breaches. First, Article 11 defines as grave breaches harming the physical or mental health or integrity of persons protected by the Protocol.<sup>37</sup> Second, Article 85 (3) contains a more extensive list of types of conduct amounting to

<sup>37</sup> Article 11 (Protection of persons) provides:

“1. The physical or mental health and integrity of persons who are in the power of the adverse Party or who are interned, detained or otherwise deprived of liberty as a result of a situation referred to in Article 1 shall not be endangered by any unjustified act or omission. Accordingly, it is prohibited to subject the persons described in this Article to any medical procedure which is not indicated by the state of health of the person concerned and which is not consistent with generally accepted medical standards which would be applied under similar medical circumstances to persons who are nationals of the Party conducting the procedure and who are in no way deprived of liberty.

2. It is, in particular, prohibited to carry out on such persons, even with their consent:

(a) physical mutilations;

(b) medical or scientific experiments;

(c) removal of tissue or organs for transplantation, except where these acts are justified in conformity with the conditions provided for in paragraph 1.

3. Exceptions to the prohibition in paragraph 2 (c) may be made only in the case of donations of blood for transfusion or of skin for grafting, provided that they are given voluntarily and without any coercion or inducement, and then only for therapeutic purposes, under conditions consistent with generally accepted medical standards and controls designed for the benefit of both the donor and the recipient.

4. Any wilful act or omission which seriously endangers the physical or mental health or integrity of any person who is in the power of a Party other than the one on which he depends and which either violates any of the prohibitions in paragraphs 1 and 2 or fails to comply with the requirements of paragraph 3 shall be a grave breach of this Protocol.

5. The persons described in paragraph 1 have the right to refuse any surgical operation. In case of refusal, medical personnel shall endeavour to obtain a written statement to that effect, signed or acknowledged by the patient.

6. Each Party to the conflict shall keep a medical record for every donation of blood for transfusion or skin

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grave breaches, when they cause death or serious injury to body or health, than in the Geneva Conventions.<sup>38</sup> Third, Article 85 (4) provides that transfers and deportation by an occupying power, unjustified delay in repatriation of prisoners of war, *apartheid*, attacks on cultural property and depriving protected persons of the right to a fair trial are all grave breaches.<sup>39</sup> A number of

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<sup>38</sup> Article 85 (3) of Protocol I reads:

“In addition to the grave breaches defined in Article 11 [prohibiting harm to the physical and mental health and integrity of protected persons], the following acts shall be regarded as grave breaches of this Protocol, when committed wilfully, in violation of the relevant provisions of this Protocol, and causing death or serious injury to body or health:

- (a) making the civilian population or individual civilians the object of attack;
- (b) launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects, as defined in Article 57, paragraph 2 (a) (iii);
- (c) launching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects, as defined in Article 57, paragraph 2 (a) (iii);
- (d) making non-defended localities and demilitarized zones the object of attack;
- (e) making a person the object of attack in the knowledge that he is *hors de combat*;
- (f) the perfidious use, in violation of Article 37, of the distinctive emblem of the red cross, red crescent or red lion and sun or other protective signs recognized by the Conventions or this Protocol.

<sup>39</sup> Article 85 (4) of Protocol I states:

“In addition to the grave breaches defined in the preceding paragraphs and in the Conventions, the following shall be regarded as grave breaches of this Protocol, when committed wilfully and in violation of the Conventions or the Protocol:

the definitions of war crimes within the jurisdiction of the International Criminal Court are based upon grave breaches of Protocol I, although some of the definitions in the Rome Statute are closer to those in the Hague Regulations.<sup>40</sup>

## 2. Universal jurisdiction over grave breaches

In addition to universal jurisdiction over war crimes under customary international law, each of the 189 state parties to the Geneva Conventions is *required* to search for persons suspected of grave breaches and either: (1) to bring such persons before its own courts, (2) to extradite such persons to any state party willing to do so or (3) to surrender such persons to an international criminal court with jurisdiction to try persons for these crimes:

“Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided that such High Contracting Party has made out a *prima facie* case.”<sup>41</sup>

(a) the transfer by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory, in violation of Article 49 of the Fourth Convention;

(b) unjustifiable delay in the repatriation of prisoners of war or civilians;

(c) practices of *apartheid* and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination;

(d) making the clearly-recognized historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples and to which special protection has been given by special arrangement, for example, within the framework of a competent international organization, the object of attack, causing as a result extensive destruction thereof, where there is no evidence of the violation by the adverse Party of Article 53, sub-paragraph (b) [prohibiting the use of cultural objects in support of the military effort], and when such historic monuments, works of art and places of worship are not located in the immediate proximity of military objectives;

(e) depriving a person protected by the Conventions or referred to in paragraph 2 of this Article of the rights of fair and regular trial.”

<sup>40</sup> The articles of the Rome Statute which provide for jurisdiction over crimes which are also, to a greater or lesser extent, grave breaches of Protocol I include: Rome Statute, Art. 8 (2) (b) (i) (intentionally directing attacks against civilians not taking direct part in hostilities) (Protocol I, Arts. 51 (2); 85 (3) (a)); Rome Statute, Art. 8 (2) (b) (iv) (intentionally launching an attack in the knowledge of its consequences to civilians or the environment) (Protocol I, Art. 85 (3) (b)); Rome Statute, Art. 8 (2) (b) (vii) (improper use of distinctive insignia and uniforms) (Protocol I, Art. 85 (2) (f)); Rome Statute, Art. 8 (2) (b) (viii) (unlawful deportations and transfers) (Protocol I, Art. 85 (4) (a)); Rome Statute, Art. 8 (2) (b) (x) (prohibition of physical mutilation) (Protocol I, Art. 11).

<sup>41</sup> First Geneva Convention, Art. 49; Second Geneva Convention, Art. 50, Third Geneva Convention, Art. 129; Fourth Geneva Convention, Art. 146. The official ICRC Commentary explains that

“[e]xtradition is, moreover to be subject to a special condition: the Contracting Party who requests that an accused person be handed over to it, must furnish evidence that the charges against the accused are ‘sufficient’. We find a clause to that effect in most extradition laws and in the international treaties dealing with the subject. But what exactly is meant by ‘sufficient charges’? The answer will as a rule rest with national legislation; but in general it may be assumed to mean a case in which the facts would justify proceedings being taken in the country to which application is made for extradition. Legal authorities in the Anglo-Saxon countries speak in such cases of a ‘*prima facie* case’ being made out against the accused; and



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this term is used in the English text of the Article.”  
International Committee of the Red Cross, 1 *Commentary on the Geneva Conventions* 366 (Geneva: International Committee of the Red Cross 1952) (Jean S. Pictet ed.).

That grave breaches of the Geneva Conventions are subject to universal jurisdiction by any state seems to be beyond any doubt. According to a leading expert:

“According to the Geneva Conventions of 1949, signatory States are not only empowered to punish war crimes, but also are obliged to do so, unless the accused is extradited to a signatory State (*aut dedere aut punire*). The duty to punish attaches not only to the States to which the accused owes his allegiance or to the injured State, but to all the signatory States; this duty even extends to neutrals in an armed conflict, and exists without regard to the nationality of the perpetrator or victim or to the place where the crime took place. Hence the Geneva Conventions provide universal jurisdiction for the punishment of war crimes coupled with a duty to prosecute, since the goal is the protection of common and universal interests.”<sup>42</sup>

<sup>42</sup> Hans-Heinrich Jeschek, *War Crimes*, 4 *Encyclopedia of Public International Law* 294, 297 (1982) (Bernardt, ed.). The authority for this point is vast and it should be necessary only to cite a few examples. See Dinstein, *supra*, n. 20, 21 (“In the opinion of the present writer, the text of the common clause of the Geneva Conventions constitutes a pellucid expression of the universality principle”); Menno T. Kamminga, *Final Report on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences*, Committee on International Human Rights Law and Practice, International Law Association, London Conference 2000, 6 (“The exercise of universal jurisdiction is not permissive, but clearly mandatory.”); Rodley, *The Treatment of Prisoners* (2nd ed.), *supra*, n. 20, 121 (“The Geneva Conventions . . . which encompass a codification of war crimes, do make it clear that such crimes may be prosecuted on the basis of universality of jurisdiction.”); 195 (“There is no doubt that extra-legal executions, committed in international armed conflict in violation of the Geneva Conventions of 12 August 1949 open the perpetrators to trial or extradition wherever they may be, since these are grave breaches of the Conventions.”) (footnote omitted). The official ICRC commentary describes the original ICRC draft common article on jurisdiction, which is essentially the same as the text finally adopted on this point, “based on the principle *aut dedere aut punire*, the validity of which is often admitted in cases of extradition”. See International Committee of the Red Cross, 1 *Commentary on the Geneva Conventions* 358, 359-360; 3 *Ibid.*, 619; 4 *Ibid.*, 585 (Geneva: International Committee of the Red Cross 1952-1960) (Jean S. Pictet ed.). It noted that in the opinion of the body of experts which met in 1948 to revise the ICRC draft, “universality of jurisdiction in cases of grave breaches would justify the hope that such offences would not remain unpunished”. 3 *Ibid.* 619.

Nevertheless, although this point would appear to be uncontrovertible, there are a handful of dissenters. For example, senior officials in the French Ministries of Foreign Affairs and Defence are reported to have argued that these provisions do not require states parties to exercise universal jurisdiction. Similarly, one British authority asserted: “The view that the 1949 Geneva Conventions of 1949 provide for universal jurisdiction, though sometimes asserted, is probably incorrect.” D.W. Bowett, *Jurisdiction: Changing Patterns of Authority over Activities and Resources*, 53 *Brit. Y.B. Int’l L.* 1, 12 (1982). He claimed, citing only Röling, that “the obligation imposed on all contracting Parties to enact municipal legislation so as to make grave breaches of the Conventions punishable is *not* the assertion of a universal jurisdiction but merely the provision of the legislative basis for jurisdiction in the event that the contracting Party is involved in hostilities as a belligerent.” *Ibid.* (footnote omitted).

However, there is no basis in the text or the *travaux préparatoires* for this assertion. The official ICRC commentary details the history of the provision cited, which is essentially unchanged from the original ICRC proposal, and makes clear that it was designed to impose the *aut dedere aut judicare* principle on each state party and there is no indication that this duty was limited to belligerents. See International Committee of the Red Cross, 1 *Commentary on the Geneva Conventions* 357-366; 2 *Ibid.*, 262-265; 3 *Ibid.*, 618-624; 4 *Ibid.*, 584-593 (Geneva: International Committee of the Red Cross 1952-1960) (Jean S. Pictet ed.). The Italian delegate is reported to have “proposed to limit the obligation of the Parties to the conflict, to search for persons alleged to have committed any of the grave breaches and to bring them before the courts”; the Netherlands delegate is reported to have answered that “each Contracting Party should be under this obligation, even if neutral in a the conflict. The principle of universality should be applied here. The Contracting Party in whose power the accused is, should either try him or hand him over to another Contracting Party.” Fourth Report drawn up by the Special Committee of the Joint Committee (*Fourth Report*), 12 July 1949, in 2-B Final Record of the Diplomatic Conference of Geneva of 1949, 116. The President is reported to have observed that “a neutral State did not violate its neutrality by trying or

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handing over an accused, under an international obligation”; there is no record of a dissenting view and the Italian proposal was withdrawn. *Ibid.*

Indeed, even Röling conceded that that nothing in the wording of the universal jurisdiction provisions of the Geneva Conventions supported the narrow reading he advocated and that it was not the intention of the drafters to read the jurisdictional provisions of the Convention so restrictively. He argued:

“It is necessary for there to be some special link with the national legal order (place, or agent, who may be a national, an ally of an enemy, or a victim). In short: notwithstanding the wording of the pertinent articles of the four Geneva Conventions of 1949, a neutral State has not the duty to prosecute and punish a war criminal who has come into its power. The principle of universal application of national legal provisions dealing with war crimes (art. 49 of Convention I), is only applicable if the State participates in the war. This was apparently not the intention of those who drafted the Conventions, but it follows from the fact that only specific articles (such as art. 4 of Convention I) are applicable to neutral States. Consequently, the Conventions did not impose on neutral States the duty to extradite alleged war criminals.”

Bert V.A. Röling, *Criminal Responsibility for Violations of the Laws of War*, 12 *Revue Belge de Droit International* 8, 11 (1976). However, he also recognized that “it is now generally recognized that a neutral State should have the duty to extradite alleged war criminals”. *Ibid.* The *travaux préparatoires* indicate that the drafters rejected the idea of any link to the state seeking extradition to the suspect, the victim or the place of the crime by simply requiring that the requesting state have sufficient evidence to make out a *prima facie* case. In the Special Committee the Greek delegate is reported to have proposed that “the Contracting Party asking for an accused person to be handed over should give proof of its interest and competence to try the accused person in question”; the proposal was rejected. *Fourth Report, supra*, 117.

The obligation to search for persons suspected of grave breaches is not limited to the territory of the state party.<sup>43</sup> It includes territory occupied by the state party; territory within which its peace-keeping forces are operating (such as national forces in the multinational International Force (IFOR) and its successor, the multinational Stabilization Force (SFOR), in Bosnia and Herzegovina and the multinational Kosovo Force (KFOR)); and the high seas.<sup>44</sup> Thus, under the Geneva Conventions courts of states parties would have jurisdiction over suspects found outside the territory of the state party.

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<sup>43</sup> Menno T. Kamminga, *The Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences, First Report of Special Rapporteur of the Committee on Human Rights Law and Practice*, in International Law Association, *Report of the Sixty-Eighth Conference held at Taipei, Taiwan, Republic of China, 24-30 May 1998* (London: International Law Association 1998) (1998 ILA Report), 563, 568.

<sup>44</sup> See Amnesty International, *Bosnia-Herzegovina: The international community's responsibility to ensure human rights*, June 1996 (AI Index: EUR 63/14/99), 64-71.

Although the Geneva Conventions do not expressly state that a state party may satisfy its obligation to extradite or prosecute persons suspected of grave breaches by surrendering a person to an international criminal court with jurisdiction, the drafters of the Conventions intended this result.<sup>45</sup>

The obligation to extradite or prosecute persons suspected of grave breaches applies with equal force to grave breaches of Protocol I. Article 85 (1) of Protocol I states: “The provisions of the Conventions relating to the repression of breaches and grave breaches, supplemented by this Section [Articles 85 to 91], shall apply to the repression of breaches and grave breaches of this Protocol.”<sup>46</sup>

The Netherlands explained when it introduced the compromise proposal concerning the *aut dedere aut judicare* provisions of the Geneva Conventions why they were included. After noting that many countries before the Second World War had not even defined violations of the 1929 Geneva Convention on relative to the Protection of Prisoners of War as crimes under national law, it is reported to have stated:

“The absence of such provisions resulted in many violations in the second World War and brings in the danger of possible reprisals. Furthermore, some Contracting Parties had made provisions which would allow their tribunals to try only their own nationals and nothing could be done in respect of nationals of another country where these offences had not been made punishable or against persons which had ordered such offences to be committed. Hence the necessity for stronger wording.”<sup>47</sup>

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<sup>45</sup> *The ICRC Commentary makes clear that the drafters of the Geneva Conventions envisaged that states could satisfy their duty to bring to justice those responsible for grave breaches by transferring suspects to an international criminal tribunal: “[T]here is nothing in the paragraph (First Geneva Convention, Art. 49, para. 2) to exclude the handing over of the accused to an international penal tribunal, the competence of which is recognized by the Contracting Parties. On this point the Diplomatic Conference declined expressly to take any decision which might hamper future developments of international law”. ICRC, I Commentary on the Geneva Conventions of 12 August 1949, 366 (1952). See also ICRC Commentary on the Protocols 975 n. 10 (“The Conventions do not exclude handing over the accused to an international criminal court whose competence has been recognized by the Contracting Parties . . .”).*

<sup>46</sup> *ICRC Commentary* 992 (“The system of repression in the Conventions is not to be replaced, but reinforced and developed by this Section [Articles 85 to 91], so that in future it will apply to the repression of breaches of both the Protocol and the Conventions.”) (footnotes omitted).

<sup>47</sup> *Fourth Report, supra*, n. 42, 114. See also 2-B Final Record of the Diplomatic Conference of Geneva of 1949, 85 (29<sup>th</sup> mtg., 27 June 1949).

## C. War crimes during non-international armed conflict

### 1. The three main categories of war crimes in non-international armed conflict

The three major categories of war crimes in non-international armed conflict are: (1) violations of common Article 3 of the Geneva Conventions,<sup>48</sup> (2) serious violations of Protocol II<sup>49</sup> and (3) certain conduct which, if committed during an international armed conflict, would be a war crime.<sup>50</sup> The Rome Statute defines the jurisdiction of the International Criminal Court to include each of these three types of war crimes in non-international armed conflict.<sup>51</sup> In addition, the Appeals Chamber

<sup>48</sup> Common Article 3 of the Geneva Conventions prohibits the following acts when committed during a non-international armed conflict against “[p]ersons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause”:

- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (b) taking of hostages;
- (c) outrages upon personal dignity, in particular humiliating and degrading treatment;
- (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.”

<sup>49</sup> Protocol II requires: respect for certain fundamental guarantees of protected persons (Article 4); humane treatment of persons whose liberty has been restricted (Article 5); respect for the right to fair trial with respect to crimes related to the armed conflict (Article 6); humane treatment of wounded, sick and shipwrecked persons (Article 7); searching for wounded, sick and shipwrecked persons (Article 8); protection of medical and religious personnel and medical units and transports (Articles 9, 10 and 11); respect for the Geneva emblems (Article 12); protection of the civilian population and individual civilians (Article 13); protection of objects indispensable to the survival of the civilian population (Article 14); protection of works and installations containing dangerous forces (Article 15); protection of cultural objects and places of worship (Article 16); and no forced movement of civilians (Article 17).

<sup>50</sup> Principles of international humanitarian law which apply in all conflicts, whether international or non-international, include the following:

- the right of the parties to a conflict to adopt means of injuring the enemy is not unlimited (XXth International Conference of Red Cross and Red Crescent Societies, Res. XXVIII (1965); U.N. G.A. Res. 2444(XXIII) (1968);
- it is prohibited to launch attacks against the civilian population as such (XXth International Conference of Red Cross and Red Crescent Societies, Res. XXVIII (1965); U.N. G.A. Res. 2444(XXIII) (1968); U.N. G.A. Res. 2675(XXV) (1970));
- in the conduct of military operations during armed conflicts, a distinction must be made between persons actively taking part in the hostilities and civilian populations (XXth International Conference of Red Cross and Red Crescent Societies, Res. XXVIII (1965); U.N. G.A. Res. 2444(XXIII) (1968); U.N. G.A. Res. 2675(XXV) (1970));
- in the conduct of military operations, every effort should be made to spare civilian populations from the ravages of war, and all necessary precautions should be taken to avoid injury, loss or damage to the civilian populations (U.N. G.A. Res. 2675(XXV) (1970));
- dwellings and other installations that are used only by civilian populations should not be the object of military operations (U.N. G.A. Res. 2675(XXV) (1970));
- places or areas designated for the sole protection of civilians, such as hospital zones or similar refuges, should not be the object of military operations (U.N. G.A. Res. 2675(XXV) (1970));
- civilian populations, or individual members thereof, should not be the object of reprisals, forcible transfers or other assaults on their integrity (U.N. G.A. Res. 2675(XXV) (1970)); and

of the Yugoslavia Tribunal discusses in further detail the scope of war crimes in non-international armed conflict which fall within Article 3 of its Statute.<sup>52</sup> Indeed, the Statute of the International Criminal Tribunal for Rwanda (Rwanda Tribunal Statute) expressly provides for jurisdiction over serious violations of common Article 3 and of Protocol II.<sup>53</sup> A fourth group of war crimes in non-international armed conflict, attacks on cultural property, is discussed below in Chapter Three, Section II.D.1.

## 2. Universal jurisdiction over war crimes in internal armed conflict

A wide range of violations of international humanitarian law committed during non-international armed conflict are now widely recognized as war crimes and, therefore, are, like other war crimes, subject to universal jurisdiction.

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· the Declaration of principles for international humanitarian relief to the civilian population in disaster situations in Resolution XXVI of the XXIst International Conference of the Red Cross and Red Crescent Societies (1969) shall apply in situations of armed conflict (U.N. G.A. Res. 2675(XXV) (1970).

Violation of some of these principles, as well as others, are expressly recognized as war crimes in Article 8 (2) (e) of the Rome Statute (see following footnote).

<sup>51</sup> Article 8 (2) (c) of the Rome Statute gives the International Criminal Court jurisdiction over violations of common Article 3 of the Geneva Conventions as war crimes and Article 8 (2) (e) gives it jurisdiction over several violations of Protocol II (in particular, Article 8 (2) (e) (i), (ii), (iii), (iv), (vii), (viii) and over certain conduct which would be war crimes if committed during an international armed conflict (in particular, Article 8 (2) (e) (iii), (v), (vi), (ix), (x), (xi) and (xii)). Similarly, Article 3 of the Statute of the Yugoslavia Tribunal has been interpreted to include serious violations of common Article 3 and Protocol II as war crimes. *Prosecutor v. Tadić*, Decision on the Defence Motion for Interlocutory Appeal, Case No. IT-94-1-AR72 (Appeals Chamber 2 October 1995), para. 134. Article 4 of the Statute of the Rwanda Tribunal expressly gives the Tribunal jurisdiction over serious violations of common Article 3 and Protocol II as war crimes.

<sup>52</sup> *Prosecutor v. Tadić*, Decision on defence motion for interlocutory appeal on jurisdiction, Case No. 94-1-AR72, (Appeals Chamber 2 October 1995), paras 96-137; *Prosecutor v. Delalić (elibić)* case, Judgment, Case No. IT-96-21-A (Appeals Chamber 20 February 2001), para. 168 (noting national legislation and jurisprudence). For further information on the scope of war crimes in non-international armed conflict, see Djamchid Momtaz, *War Crimes in Non-International Armed Conflicts under the Statute of the International Criminal Court*, 1999 Y.B. Int'l Hum. L. 177.

<sup>53</sup> Rwanda Tribunal Statute, Art. 4 (Violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II).

As recently as 1994, some observers doubted that international law imposed individual criminal responsibility for violations of international humanitarian law during non-international armed conflict.<sup>54</sup> In a remarkable shift, however, which came with the establishment of the Yugoslavia and Rwanda Tribunals and the adoption of the Rome Statute, it has now been generally recognized that violations of international humanitarian law during international armed conflict are war crimes entailing individual criminal responsibility.<sup>55</sup> As documented in Section II of Chapter Four, states have enacted legislation permitting their courts to try persons for war crimes in non-international armed conflicts and their courts have done so.

**Permissive universal jurisdiction.** One of the consequences of the recognition that violations of international humanitarian law in non-international armed conflicts are war crimes is that, like any other war crime, they are subject to universal jurisdiction.<sup>56</sup> Leading scholars in the field have concluded that war crimes during non-international armed conflict are subject to universal jurisdiction. For example, Theodor Meron, who was a member of the United States government delegation at the Rome Diplomatic Conference, concluded in 1995:

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<sup>54</sup> See, for example, Denise Plattner, *The Penal Repression of Violations of International Humanitarian Law Applicable in Non-international Armed Conflict*, Int'l Rev. Red Cross 409, 414 (1990); William J. Fenrick, *The Prosecution of War Criminals in Canada*, 12 Dalhousie L. J. 256, 259 n. 9 (1989); International Committee of the Red Cross, *Some Preliminary Remarks by the International Committee of the Red Cross on the Setting-up of an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed on the Territory of the Former Yugoslavia*, DDM/JUR/422b, 25 March 1993, para. 4, reprinted in Virginia Morris & Michael P. Scharf, 2 *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia* 391, 392 (Irvington-on-Hudson: Transnational Publishers, Inc. 1995) (“[T]he ICRC wishes to underline the fact that, according to International Law as it stands today, the notion of war crimes is limited to situations of international armed conflict.”) (as noted below, however, the ICRC now recognizes that war crimes can occur during non-international armed conflict); Final Report of the Commission of Experts established pursuant to Security Council Resolution 780 (1992), U.N. Doc. S/1994/674 (Annex), 27 May 1994, para. 52 (“There does not appear to be a customary international law applicable to international armed conflicts which includes the concept of war crimes.”). The Commission also contended that “the only offences committed in internal armed conflicts for which universal jurisdiction applies are ‘crimes against humanity’ and genocide”). *Ibid.*, para. 42.

<sup>55</sup> Jan E. Aldykiewicz & Geoffrey S. Corn, *Authority to Court-Martial Non-U.S. Military Personnel for Serious Violations of International Humanitarian Law Committed During Internal Armed Conflicts*, 167 Mil. L. Rev. 74, 101-143 (2001); Michael Bothe, *War Crimes in Non-International Armed Conflicts*, 24 Israel Y.B. Hum. Rts 241, 251 (1994) (stating that “there is ample basis, both under international and national law, for the punishment of violators of international humanitarian law, as far as it relates to non-international armed conflicts”); Bruno Simma & Andreas L. Paulus, *The Responsibility of Individuals for Human Rights Abuses in Internal Armed Conflicts: A Positivist View*, 93 Am. J. Int'l L. 302, 313 (2000) (accepting, in accordance with modern positivism, “the practice of international institutions and accepting as *opinio juris* the legal views expressed by states in international organizations”, and, therefore, concluding, “on the basis of a combination of developing and customary law and existing general principles”, that individual criminal responsibility exists for war crimes in non-international armed conflict). See also Sonja Boelaert-Suominen, *Grave Breaches, Universal Jurisdiction and Internal Armed Conflicts: Is Customary Law Moving Towards a Uniform Enforcement Mechanism for all Armed Conflicts?*, 5 J. Conflict and Security L. 63 (2000).

<sup>56</sup> As Kamminga has observed, once it was recognized that violations of international humanitarian law were war crimes, “[a] corollary then is that these offences are covered by the principle of universal jurisdiction.” *Final ILA Report, supra*, n. 42, 7 (footnote omitted). Similarly, Dinstein has concluded that one of the essential characteristics of a violation of the laws of war which is a war crime is that it entails universal jurisdiction: “Once violations of the laws of war qualify as war crimes, all come under the sway of the universality principle.” Dinstein, *Universality Principle, supra*, n. 20, 21.



“Many serious violations of common Article 3 and Geneva Protocol II, as well as other significant norms of the Geneva Conventions, though not explicitly listed as grave breaches, are of universal concern and subject to universal condemnation. These are crimes *jure gentium* [under the law of nations] and therefore all states have the right to try the perpetrators. This right can be seen as an analogue, *mutatis mutandis*, of the prerogative of all states to invoke obligations *erga omnes* against states that violate the basic rights of the human person.”<sup>57</sup>

These views were confirmed in 1995, when the Security Council urged states to exercise universal jurisdiction over violations of international humanitarian law during non-international armed conflict over which the Rwanda Tribunal had jurisdiction. In Resolution 978, it

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<sup>57</sup> Theodor Meron, *International Criminalization of Internal Atrocities*, 89 Am. J. Int'l L. 554, 576 (1995) (footnote omitted); see also Aldykiewicz & Corn, *supra*, n. 55; Thomas Graditzky, *Individual Criminal Responsibility for Violations of International Humanitarian Law Committed in Non-International Armed Conflict*, Int'l Rev. Red Cross, No. 322, 29-56 (1998) (concluding, after reviewing state practice, that “it does not seem unreasonable to assert that serious violations of humanitarian law applicable in internal conflict do in fact constitute ‘war crimes’ under international law as it stands today, the corollary to this change in status being the principle of universal jurisdiction”); Mary Griffin, *Ending the impunity of perpetrators of human rights atrocities: A major challenge for international law in the 21st century*, Int'l Rev. Red Cross, No. 338, 369 (2000), obtainable from <http://www.icrc.org> (“It might be said that States have a right to exercise universal jurisdiction in respect of violations in internal armed conflicts and certainly a number of examples of State practice tend to support this.”); Kamminga, *Final ILA Report*, *supra*, n. 42, 6 (citing increasing support for view that violations of international humanitarian law in non-international armed conflict are subject to universal jurisdiction); Christa Meindersma, *Violations of Common Article 3 of the Geneva Conventions as Violations of the Laws or Customs of War under Article 3 of the Statute of the International Criminal Tribunal for the former Yugoslavia*, 42 Neth. Int'l L. Rev. 375, 396 (1995) (concluding that violations of common Article 3 are subject to individual criminal responsibility); Rodley, *Treatment of Prisoners* (2<sup>nd</sup> ed.), *supra*, n. 20, 195 (now apparent that serious violations of common Article 3 permit trial or extradition of the perpetrators no matter where they may be), 123 (serious violations of the laws and customs of war committed in non-international armed conflict “are cognizable by an international penal court and would be expected to be amenable to universal jurisdiction”); Scharf, *supra*, n. 20, 91-93 (rejecting contentions that permissive universal jurisdiction over violations of international humanitarian law did not exist in non-international armed conflict).

“[u]rges states to arrest and detain, in accordance with their national law and relevant standards of international law, pending prosecution by the International Tribunal for Rwanda or by the appropriate national authorities, persons found within their territory against whom there is sufficient evidence that they were responsible for acts within the jurisdiction of the International Tribunal for Rwanda.”<sup>58</sup>

Trial Chamber 1 of the Rwanda Tribunal in 1999 called upon all states to exercise universal jurisdiction over grave violations of international humanitarian law within its jurisdiction, which include war crimes in non-international armed conflict.<sup>59</sup>

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<sup>58</sup> S.C. Res. 978 (1995) of 27 February 1995. Since the phrase “appropriate national authorities” is not limited to Rwandan authorities, it is clear that the Security Council envisaged prosecution by the courts of other states based on universal jurisdiction.

<sup>59</sup> It stated in the context of approving a request to withdraw an indictment, that “the Tribunal wishes to emphasize, in line with the General Assembly and the Security Council of the United Nations, that it encourages all States, in application of the principle of universal jurisdiction, to prosecute and judge those responsible for serious crimes such as genocide, crimes against humanity and other grave violations of international humanitarian law . . . .” *Prosecutor v. Ntuyahaga*, Decision on the Prosecutor’s Motion to Withdraw the Indictment, Case No. ICTR-98-40-T (Trial Chamber I, 18 March 1999). The Trial Chamber also noted that “the Tribunal does not have exclusive jurisdiction over crimes included in its mandate and that its criminal proceedings are complementary to those of national jurisdictions.” *Ibid.*

The Security Council also called upon all parties to the conflict in the Democratic Republic of the Congo, which has both international and non-international dimensions, to bring those responsible for war crimes to justice.<sup>60</sup> As documented in Section II of Chapter Four, states have enacted legislation providing for universal jurisdiction over crimes in non-international armed conflict and have conducted criminal investigations and prosecutions for such crimes.

In 1996, the International Law Commission provided in Article 9 of the Draft Code of Crimes that there would be universal jurisdiction over certain war crimes in non-international armed conflict, in particular, violations of common Article 3 of the Geneva Conventions, as identified in Article 20 (f).<sup>61</sup> In July 2000, the International Law Association endorsed the conclusion of its Committee on Human Rights Law and Practice that “[g]ross human rights offences in respect of which states are *entitled* under international customary law to exercise universal jurisdiction include . . . war crimes [as defined in Article 8 of the Rome Statute]”.<sup>62</sup>

***Duty to extradite or prosecute.*** To the extent that all war crimes in *international* armed conflict are increasingly recognized as subject not only to permissive universal jurisdiction, but also to an extradite or prosecute obligation, there is no convincing reason why war crimes in *non-international* armed conflict should not be treated the same way. Indeed, the International Law Commission provided in Article 9 of the 1996 Draft Code of Crimes for an extradite or prosecute obligation over certain war crimes committed in non-international armed conflict, in particular, violations of common Article 3 of the Geneva Conventions. One writer has recently argued that the Rome Statute is evidence of an *erga omnes* obligation to exercise universal jurisdiction over war crimes committed during internal armed conflict:

“But if indeed Article 3 and Protocol II and the other laws and customs of war encompass obligations *erga omnes*, do States not have a corresponding obligation *erga omnes* to enforce these rules? That there is an obligation to exercise universal jurisdiction with respect to violations committed in internal armed conflicts finds support in the Rome Statute. Without distinguishing between the crimes over which the International Criminal Court will have jurisdiction, the Preamble to the Statute recalls ‘that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes (. . .)’. If this is the case, then all States have a duty to prosecute and punish all violations of international humanitarian law, including those committed in internal armed conflicts. In view of the way the law has developed, it may be argued that the express application of mandatory universal jurisdiction

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<sup>60</sup> On 24 February 2000, the Security Council in Resolution 1291 (2000) called on “all parties to the conflict in the Democratic Republic of the Congo . . . to refrain from or cease any support to, or association with, those suspected of . . . war crimes, and to bring to justice those responsible, and facilitate measures in accordance with international law to ensure accountability for violations of international humanitarian law.”

Since the conflict includes a rebellion by certain of the parties against the government and since some of the other parties are foreign states, the Security Council necessarily was calling upon those foreign states to exercise universal jurisdiction over war crimes in a non-international armed conflict. *See also* S.C. Res. 1304 (2000) of 16 June 2000.

<sup>61</sup> International Law Commission, *supra* n. 30

<sup>62</sup> International Law Association, Res. 9/2000, adopted at the 69<sup>th</sup> Conference, London, 25-29 July 2000. For the text, see Introduction, footnote 6, above.

only to grave breaches does not exclude the possibility of a similar obligation for other breaches.”<sup>63</sup>

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<sup>63</sup> Griffin, *supra*, n. 57.

Similarly, the UN Commission on Human Rights in 1999 reminded all parties to the armed conflict in Sierra Leone, which was largely a non-international one at the time, that all countries were under an obligation to search for persons alleged to have committed or to have ordered to be committed certain violations of international humanitarian law (hostage-taking, wilful killing and torture or inhuman treatment of persons not taking an active part in hostilities) and to bring such persons, regardless of their nationality before their own courts.<sup>64</sup>

#### **D. Other war crimes**

Two other war crimes are the subject of treaties which contain universal jurisdiction provisions: attacks on cultural property and attacks on UN and associated personnel.

##### **1. Attacks on cultural property**

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<sup>64</sup> UN Comm'n Hum. Rts Res. 1999/1 of 6 April 1999. In that resolution, the Commission reminded "all factions and forces in Sierra Leone that in any armed conflict, including an armed conflict not of an international character, the taking of hostages, wilful killing and torture or inhuman treatment of persons taking no active part in the hostilities constitute grave breaches of international humanitarian law, and that all countries are under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches and to bring such persons, regardless of their nationality, before their own courts[.]"

Although the characterization of such violations in a non-international armed conflict as "grave breaches" in the English text is not correct, this resolution is further evidence that states believe that they now have the same duty under international law to exercise universal jurisdiction over such violations as they do with respect to grave breaches of the Geneva Conventions during international armed conflict. No state is known to have objected to this statement concerning their duties under international law.

Attacks on cultural property in either international or non-international armed conflict - part of a broader emerging concept of crimes against culture or civilization - to the extent that they are not covered by other conventions, are now subject to universal jurisdiction under the 1999 Second Hague Protocol for the Protection of Cultural Property in the Event of Armed Conflict.<sup>65</sup> The Second Hague Protocol was adopted after a 1993 review of the 1954 Hague Convention for the Protection of Cultural Property concluded that the 1954 Hague Convention did not adequately extend to non-international armed conflicts and that “in many recent cases the destruction of the physical evidence of the existence of the national, ethnic and/or religious community under attack has been an integral part of the various types and levels of humanitarian abuse”.<sup>66</sup> The 1954 Hague Convention did not expressly provide for universal jurisdiction and the parties simply undertook “to take, within the framework of their ordinary criminal jurisdiction, all necessary steps to prosecute and impose penal or disciplinary sanctions upon those persons, of whatever nationality, who commit or order to be committed a breach of the present Convention”.<sup>67</sup> Although this provision would necessarily include the jurisdiction of states parties under customary international law, as well as national law, there is the risk that it could also be read restrictively to include only their ordinary criminal jurisdiction under national law.<sup>68</sup>

Article 16 of the Second Hague Protocol expressly requires states parties to provide for universal jurisdiction over violations of the Convention in international and non-international armed conflict:

“(1) “Without prejudice to paragraph 2, each Party shall take the necessary legislative measures to establish its jurisdiction over offences set forth in Article 15 [identifying what conduct must be made crimes under national law] in the following cases:

...

(c) in the case of offences set forth in Article 15 sub-paragraphs (a) to (c), when the alleged offender is present in its territory.”<sup>69</sup>

<sup>65</sup> Second Hague Protocol for the Protection of Cultural Property in the Event of Armed Conflict, *reprinted in* Adam Roberts & Richard Guelff, *Documents on the Laws of War 700* (Oxford: Oxford University Press 2000). As of 1 September 2001, six states had ratified the Second Hague Protocol (Cyprus, Panama and Qatar) and a further 35 states had signed but not yet ratified it (Albania, Armenia, Austria, Belgium, Cambodia, Colombia, Côte d’Ivoire, Croatia, Ecuador, Egypt, Estonia, Finland, the former Yugoslav Republic of Macedonia, Germany, Ghana, Greece, Holy see, Hungary, Indonesia, Italy, Luxembourg, Madagascar, Morocco, Netherlands, Nigeria, Oman, Pakistan, Peru, Romania, Slovakia, Spain, Sweden, Switzerland, Syrian Arab Republic and Yemen).

<sup>66</sup> Patrick J. Boylan, *Review of the Convention for the Protection of Cultural Property in the Event of Armed Conflict*, UNESCO Doc. CLT-93/WS/12, Paris, 1993, *cited in* Roberts & Guelff, *supra*, n. 64, 699.

<sup>67</sup> 1954 Hague Convention, Art. 28 (Sanctions).

<sup>68</sup> Some commentators have suggested that Article 28 “appears to provide for mandatory universal jurisdiction, though the treaty contains no other penal provisions”. Ratner & Abrams, *supra*, n. 20, 165. Another leading expert, while not ruling out the possibility that Article 28 recognizes permissive universal jurisdiction, states that it is not clear and does not include an *aut dedere aut judicare* provision. Marc Henzelin, *Le Principe de l’Universalité en Droit Pénal International: Droit et obligation pour les Etats de poursuivre et juger selon le principe de l’universalité* 357 (Bâle/Genève/Munich: Helbing & Lichtenhahn and Bruxelles: Bruylant 2000).

<sup>69</sup> 1999 Second Hague Protocol, Art. 16 (1) (c). Article 16 (1) (a) provides for territorial jurisdiction and (c) provides for active personality jurisdiction. Article 16 (2) provides that the “Protocol does not preclude the incurring of individual criminal responsibility or the exercise of jurisdiction under national and international law that may be applicable, or affect the exercise of jurisdiction under customary international law”.

Article 17 (1) imposes an *aut dedere aut judicare* obligation when persons suspected of violating the Convention are found in their territory. It states in part:

“The Party in whose territory the alleged offender of an offence set forth in Article 15 sub-paragraphs 1 (a) to (c) is found to be present shall, if it does not extradite that person, submit, without exception whatsoever and without undue delay, the case to its competent authorities, for the purpose of prosecution, through proceedings in accordance with its domestic law or with, if applicable, the relevant rules of international law.”<sup>70</sup>

## **2. Attacks on UN and associated personnel**

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<sup>70</sup> 1999 Second Hague Protocol, Art. 17 (1). Article 17 (2) requires fair trial.

Certain attacks on UN and associated personnel in the context of peace-keeping operations were made the subject of a treaty in 1994 with universal jurisdiction provisions.<sup>71</sup> This treaty, the Convention on the Safety of United Nations and Associated Personnel, was adopted at a time when these attacks were not defined *per se* as war crimes, although most or all such attacks would then have violated international humanitarian law at the time if they had taken place in armed conflict. Most such attacks are now considered war crimes, whether they occur during international or non-international armed conflict, and have been included in the Rome Statute.<sup>72</sup> The inclusion of such attacks in the Rome Statute is strong evidence that they are war crimes under customary international law, as states now are beginning to recognize this status in government statements or by including such attacks in national legislation in the category of war crimes.<sup>73</sup> However, given the history of this crime and that the Convention also includes attacks not in the context of armed conflict, the Convention is discussed in Section IV.B of Chapter Thirteen, dealing with ordinary crimes under national law of international concern.

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<sup>71</sup> Convention on the Safety of United Nations and Associated Personnel, U.N. G.A. Res. 49/59 of 9 December 1994.

<sup>72</sup> Rome Statute, Art.8 (2) (b) (3) (iii) and (e) (iii).

<sup>73</sup> Canada, New Zealand and the United Kingdom have included these attacks as war crimes in their legislation and other states plan to do so, including Germany and Switzerland (see Chapter Four, Section II). At the close of the fifth session of the Preparatory Commission for the International Criminal Court in June 2000, Lt. Col. William Leitzau, a member of the United States delegation, stated that the Elements of Crimes document, which are designed to assist the International Criminal Court in interpreting the Rome Statute, “correctly reflects international law” (quoted in Christopher Keith Hall, *The First Five Sessions of the UN Preparatory Commission for the International Criminal Court*, 94 Am. J. Int’l L. 773, 778 (2000)). Similarly, the United States Ambassador-at- Large for War Crimes Issues stated a few months later: “We strongly believe the Elements of Crimes and the Rules of Procedure will stand the test of time, as they are consistent with customary international law and international standards of due process.” David J. Scheffer Ambassador-at-Large for War Crimes Issues, Statement Before the Sixth Committee of the UN General Assembly, New York City, October 18, 2000 (*obtainable from* <http://www.state.gov>).