

2009

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## Citation Details

James G Stewart, "The Future of the Grave Breaches Regime: Segregate, Assimilate or Abandon" (2009) 7:4 J Int'l Crim J 855.

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# The Future of the Grave Breaches Regime: Segregate, Assimilate or Abandon?

James G. Stewart\*

## Abstract

*The grave breaches regime has three possible futures. In the first, the regime remains segregated from other categories of war crimes in deference to the historical development of these crimes. This future, however, is one that will see a relatively dramatic decline in the use of grave breaches in practice, primarily because other offences cover the same acts more efficiently. In the second possible future, the grave breaches are entirely abandoned, but this eventuality seems both improbable and undesirable. Even though judicial pragmatism has diminished aspects of the grave breaches regime that were once unique, grave breaches still offer important features over and above all alternatives. The grave breaches regime is therefore unlikely to disappear entirely. A third possible future involves assimilating the grave breaches with other categories of war crimes, ideally through the promulgation of a more coherent treaty regime. In the short term, this proposition appears politically untenable, leaving judges to unify the stark disparities between grave breaches and other war crimes. A future that continues to adopt this course will nonetheless pose serious problems for the discipline in the years to come. Over the longer term, a treaty creating a more comprehensive code governing all war crimes is therefore inevitable.*

## 1. Introduction

In August 1949, states stunned by a second world war in less than half a century signed four conventions that signaled a veritable revolution for the concept of war crimes. At the end of each of the four Geneva Conventions, three provisions not only designated certain violations of the laws of war as ‘grave breaches’, they also took the unprecedented step of compelling states to pass criminal legislation implementing these breaches into domestic criminal law and obliging signatories to search for and prosecute those responsible ‘regardless of their nationality.’ Relative to earlier notions of war crimes, the grave breaches regime was nothing short of a ‘quantum leap’.<sup>1</sup>

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<sup>1</sup> G. Abi-Saab, ‘The Concept of ‘War Crimes’, in Sienho Yee and Wang Tieya (eds), *International Law in the Post-Cold War World* (Routledge: London, 2001), at 104.

War crimes were prosecuted and punished at Nuremberg and before, but the grave breaches regime enjoyed the distinction of being the first treaty codifying war crimes. It represented a bold determination that the world would no longer tolerate the travesty of sham trials at Leipzig after World War One (WWI),<sup>2</sup> nor hear arguments that post-war justice administered at Nuremberg or Tokyo amounted to little more than novel law selectively visited on a vanquished enemy.<sup>3</sup> From now on, war criminals would be sought everywhere, called to answer to national courts, and dispassionately punished in accordance with pre-existing law.

None of these ambitions were quickly realized. For the better part of a century, the grave breaches regime was not just imperfect, it remained totally inoperative. Several decades after grave breaches were formally adopted, one author explained that '[t]he reasons why there have been no prosecutions for 'grave breaches' are partly technical, born of the legal complexities and uncertainties in the Geneva Conventions, but more substantially, they lie in the area of international politics and the hard facts of military situations.'<sup>4</sup> On the political side of this equation, fear of retribution against nationals detained by the adversary prevented belligerent states from initiating war crimes proceedings against enemies in their custody,<sup>5</sup> and the agenda of third states was generally circumscribed by allegiance to competing superpowers.<sup>6</sup> On a technical level, the Geneva Conventions had failed to define grave breaches with any meaningful degree of precision, such that states had little assistance in navigating an often complex set of rules that must be interpreted to prosecute grave breaches. Arguably, this was intentional. The Geneva Conventions themselves furnished 'only keywords to designate a criminal act, nothing which can be called a definition,'<sup>7</sup> thereby leaving a range of indispensable criminal concepts 'under a cloud of obscurity.'<sup>8</sup> Despite the lofty promise of justice, the grave breaches regime was stymied from the outset.

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<sup>2</sup> For a comprehensive history of the Leipzig Trials, see C. Mullins, *The Leipzig Trials: An Account of the War Criminals' Trials and a Study of German Mentality* (London: HE & G. Witherby, 1921). See also J. Garner, 'Punishment of Offenders against the Laws and Customs of War', 14 *American Journal of International Law (AJIL)* 71 (1920); T. McCormack, 'From Sun Tzu to the Sixth Committee: The Evolution of an International Criminal Law Regime', in T.L.H. McCormack and G.J. Simpson (eds), *The Law Of War Crimes* (Kluwer: The Hague, 1997), at 48-50.

<sup>3</sup> See generally, G. Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (Princeton: Princeton University Press, 2000). For a compelling overview of these tensions at Nuremberg and in subsequent domestic trials, see also M. Koskeniemi, 'Between Impunity and Show Trials', 6 *Max Planck Yearbook of United Nations Law (UNYB)* (2002).

<sup>4</sup> G.I.A.D. Draper, 'The Modern Pattern of War Criminality', in Y. Dinstein and M. Tabory. (eds) *War Crimes in International Law* (The Hague: Kluwer, 1999), at 160.

<sup>5</sup> *Ibid.*, at 161.

<sup>6</sup> A. Cassese, 'On the Current Trends towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law', 9 *European Journal of International Law (EJIL)* (1998), at 5.

<sup>7</sup> M. Bothe, 'War Crimes' in A. Cassese, P. Gaeta and J.R.W.D. Jones (eds) *The ICC Statute of the International Criminal Court: A Commentary* (Oxford: Oxford University Press (OUP), 2002), at 392.

<sup>8</sup> Draper, *supra* note 4, at 158-159.

At the end of the Cold War, courts finally breathed life into a grave breaches regime that had earlier appeared little more than a ‘dead letter’.<sup>9</sup> The rise of a hegemonic global order enabled the establishment of various international criminal courts and tribunals, which in turn stimulated domestic appetite for war crimes prosecutions. This process was not foreseen at the time the Geneva Conventions were signed—during the negotiation of the grave breaches regime, states elected to simply list the names of the various grave breaches on the understanding that ‘[t]he Conference is not making international penal law but is undertaking to insert in the national penal laws certain acts enumerated as grave breaches of the Convention, which will become crimes when they have been inserted in the national penal laws’.<sup>10</sup> But by the turn of the new millennium, international courts and not their domestic counterparts had taken the lead in interpreting, defining and applying almost the full panoply of grave breaches as listed in the Geneva Conventions, from unlawful confinement of civilians to deportation from occupied territory.<sup>11</sup> As a consequence, the grave breaches regime is now complemented by a prodigious body of jurisprudence derived in large part from international courts, even though those assembled at Geneva anticipated that domestic courts would fulfill this function much sooner. Predicting the future of the grave breaches regime is no easier now.

Nonetheless, this article assesses three possible futures for the grave breaches regime in light of current developments within the discipline. The first of these supposes the continued segregation of the grave breaches regime from other categories of war crimes in accordance with the historical development of the laws of war. As the first section of this article shows, a future of this sort accords with the current state of the law, but it inevitably leads to seriously diminished use of the grave breaches regime in practice. The second possible future involves abandoning the grave breaches regime as pragmatic changes in customary law governing other wartime offences and more recent developments in international criminal justice threaten to supersede the grave breaches regime. To a certain extent, this future is already upon us. The third and final possible future involves an assimilation of the various categories of war crimes into a single, coherent and comprehensive body of law governing wartime criminality. In essence, this future involves rewriting war crimes afresh. As the negotiators to the Geneva Conventions would now testify, which of these futures will ultimately prevail is impossible to predict. Nevertheless, we can be sure that the future of the grave breaches regime will represent a tension between the historical origins of the crimes, pragmatic attempts at overcoming the formal technicalities that attach to these

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<sup>9</sup> Cassese, *supra* note 6, at 5. Likewise, at the beginning of the nineties, Geoffrey Best lamented that ‘this noble innovation has achieved nothing’: G. Best, *Law and War Since 1945* (Oxford: Clarendon Press, 1994), at 396.

<sup>10</sup> Final Record of the Diplomatic Conference of Geneva of 1949, Vol. II, Section B, at 116. In fact, Danner confirms that states positively rejected the notion that an international court or tribunal would apply the grave breaches regime. See A.M. Danner, ‘When Courts Make Law: How the International Criminal Tribunals Recast the Laws of War’ 59 *Vanderbilt Law Review* 1 (2008) 12-13.

<sup>11</sup> For an excellent overview of the contributions of the ICTY in particular to the development of the grave breaches regime, see K. Roberts, ‘The Contribution of the ICTY to the Grave Breaches Regime’, in this Issue.

offences and an ongoing quest for greater coherence within the law governing war crimes generally.

## 2. The Continued Segregation of the Grave Breaches Regime

Grave breaches are but one species of war crimes. The first and older category of offences were known as ‘violations of the laws and customs of war.’ Prior to the inception of the grave breaches regime, the term violations of the laws and customs of war referred to the laws of war generally,<sup>12</sup> but the idea that violations of certain of these rules constituted criminal offences derived from custom. As a result, customary law formed the legal basis for ‘violations of the laws and customs of war’ charged after WWI,<sup>13</sup> and again inspired the charters of both the Nuremberg and Tokyo Tribunals a matter of decades later.<sup>14</sup> In the wake of World War Two (WWII), however, the grave breaches regime promulgated a separate but overlapping series of treaty-based war crimes, thereby creating a second category of wartime criminality. Two categories of war crimes then became three when the International Criminal Tribunal for the former Yugoslavia (ICTY) declared that violations of common Article 3 of the Geneva Conventions and Additional Protocol II constitute a separate class of war crime applicable in international and non-international armed conflict alike.<sup>15</sup> Then finally, to complete a relatively sophisticated legal kaleidoscope, treaties governing specific aspects of wartime conduct, such as the protection of cultural property, created a fourth category of war crimes.<sup>16</sup> A future that maintains these categories represents a continuation of the status quo, where groups of war crimes are segregated from one another.

This segregation stems from history. At each stage in the development of war crimes, states simply added layer upon layer of new law without repealing earlier overlapping or redundant

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<sup>12</sup> The official title of the Brussels Declaration of 1874, for instance, was the ‘Project of an International Declaration concerning the Laws and Customs of War. Brussels, 27 August 1874.’ Similarly, The Hague Regulations of 1907 were termed ‘Regulations concerning the Laws and Customs of War on Land.’

<sup>13</sup> According to the Commission of Responsibilities established in the wake of WWI, ‘[t]wo classes of culpable acts present themselves: (a) Acts which provoked the world war and accompanied its inception. (b) Violations of the laws and customs of war and the laws of humanity.’ See Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, reprinted in 14 *AJIL* (1920), at 118.

<sup>14</sup> Art. 6(b) of the Nuremberg Charter stipulated that ‘[t]he following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility: ‘War crimes: ‘namely, *violations of the laws or customs of war.*’ (emphasis added). The equivalent within the Tokyo Tribunal’s Charter mentioned ‘Conventional War Crimes: Namely, violations of the laws or customs of war’. The offences were defined with reference to the Hague Conventions of 1907 and the Geneva Convention of 1929, but neither treaty contemplated criminal liability explicitly. See B. Röling and R. Rüter (eds.), *The Tokyo Judgment: The International Military Tribunal for the Far East (I.M.T.F.E.), 29 April 1946-12 November 1948*, Vol. I, Appendix D (Amsterdam: APA-University Press Amsterdam, 1977).

<sup>15</sup> Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, *Tadić* (IT-94-1), Appeals Chamber, 2 October 1995, (*Tadić Appeal Judgement*), §§ 128-136.

<sup>16</sup> Article 15(2) of the 1999 Second Protocol to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict concerning ‘Serious violations of this Protocol’ provides that ‘Each Party shall adopt such measures as may be necessary to establish as criminal offences under its domestic law the offences set forth in this Article’.

equivalents. States were adamant, for instance, that the grave breaches regime in no way repudiated the ‘violations of laws and customs of war’ punished as war crimes at Nuremberg, even though these earlier war crimes were ‘practically all covered in the Geneva Conventions and Additional Protocol I’<sup>17</sup>. In the same vein, states involved in the codification of the International Criminal Court (ICC) Statute adopted the segregated, compartmentalized, and less than coherent distinction between the various overlapping historical categories of wartime offences, perpetuating what Meron once described as ‘a crazy quilt of norms’.<sup>18</sup> As a consequence of this tendency to continually add layers of law without consolidating the law into a coherent whole, grave breaches are now but one of four disassociated categories of war crime.<sup>19</sup> One possible future for the grave breaches regime involves continued segregation along these historical lines. And yet, maintenance of the current divisions between grave breaches and other war crimes will inevitably lead to a relatively dramatic decline in the use of grave breaches.

Quite simply, other offences are easier to prove. Already, prosecutors choose to charge acts that amount to grave breaches as domestic crimes, violations of military regulations or other war crimes,<sup>20</sup> partly in a bid to avoid a range of technicalities specific to the grave breaches regime. Most importantly, grave breaches only apply during international armed conflict.<sup>21</sup> Where crimes that would constitute grave breaches occur in connection with direct hostilities between two warring states, establishing the international armed conflict is unlikely to prove especially troublesome. The torture at Abu Ghraib, for instance, was undoubtedly a grave breach. And yet a large portion of modern armed conflicts involve so-called internationalized armed conflicts, where foreign governments adopt domestic proxies as their military agents.<sup>22</sup> The now prolific incidence of these internationalized armed conflicts poses special problems for the future of the grave breaches regime, since application of the Geneva Conventions to internationalized warfare requires prosecutors to prove highly complex questions of fact about the relationship between rebel groups and their foreign sponsor. In particular, a foreign state must exercise overall control over a rebel army in order to internationalize an armed conflict, which is only established when a state has ‘a role in organising, coordinating or planning the military actions of the military group, in addition to financing, training and equipping or providing operational support to that group’.<sup>23</sup> In

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<sup>17</sup> Y. Sandoz, ‘Penal Aspects of International Humanitarian Law’, in C. Bassiouni (ed.), *International Criminal Law* (Transnational: New York, 1986), Vol I, at 409-410.

<sup>18</sup> T. Meron, ‘Classification of armed conflict in the former Yugoslavia: Nicaragua’s fallout’, 92 *AJIL* (1998), at 238.

<sup>19</sup> Bassiouni, *supra* note 17, at 232.

<sup>20</sup> See Ferdinandusse, CROSS REFERENCE. For a wider discussion of these issues, see W. Ferdinandusse, *Direct Application of International Criminal Law in National Courts*, (The Hague : TMC Asser Press 2005)

<sup>21</sup> L. Moir, ‘Grave Breaches and Internal Armed Conflicts’, in this Issue, at 9.

<sup>22</sup> According to Detter ‘... most apparently ‘internal’ wars do, in fact, receive some kind of outside support’: I. Detter, *The Law of War* (Cambridge University Press: London, 2002), at 40. See also L. Moir, *The Law of Internal Armed Conflict* (Cambridge University Press: London, 2000), at 46: ‘Even in the post-Cold War international order, outside involvement in internal armed conflicts is still far from uncommon.’

<sup>23</sup> *Tadić Appeal Judgement*, *supra* note 15, § 137.

a wide variety of circumstances, the difficulties associated with proving propositions of this complexity outweigh the benefits of charging grave breaches.

For one reason, states tend to zealously conceal their role in fomenting foreign rebellion, such that merely obtaining the proof necessary to prosecute grave breaches often borders on the impossible. As the government of the Democratic Republic of Congo discovered during the Armed Activities Case before the International Court of Justice, proving that the *Mouvement pour la Liberation de Congo* (MLC) was under the control of the Ugandan government can be demanding<sup>24</sup>, even when this relationship is not the subject of serious political dispute.<sup>25</sup> The need to prove overall control is, of course, even more onerous within criminal proceedings where higher standards of proof apply. Moreover, the rationale for undergoing this burden is weak when overall control is irrelevant to the moral culpability of the accused—acts of pillage, murder or rape perpetrated by the MLC are just as reprehensive regardless of whether or not a foreign state supports them. And yet in order to charge grave breaches in these circumstances, it is ‘necessary to collect evidence and litigate on complex issues, such as the role of third states, when ultimately this has no bearing on the role and liability of the perpetrator.’<sup>26</sup> Thus, in addition to the frequently insurmountable difficulty of obtaining the requisite proof to establish overall control, opting to prosecute wartime offences as grave breaches creates an overriding danger that a wholly culpable accused is acquitted, only because of a failure to establish issues as contentious as foreign control over the perpetrators.

Grave breaches are also more politically sensitive than other war crimes, since proving an international conflict often involves exposing the meddling of a powerful foreign state. In some instances, doing so is politically untenable. One might fairly anticipate, for instance, that members of the Angolan rebel group UNITA would not be charged with grave breaches on the theory that their offences occurred within a conflict that was internationalized through American and South African patronage during the Cold War,<sup>27</sup> especially when other crimes allow an assessment of culpability without implicating the rebels’ puppet-masters. One can certainly posit scenarios whereby prosecuting grave breaches might be politically advantageous for certain powers (prosecuting Hariri’s assailants for grave breaches as a means of exposing Syrian implication would be one example), but in a large number of instances the political ramifications of charging

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<sup>24</sup> Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment, 2005 I.C.J., § 160 (December 19). This relationship between the MLC and Uganda is not the subject of serious dispute within the region. For literature reflecting this, see See O. Lanotte, *Republique Democratique Du Congo: Guerres Sans Frontières*, (GRIP: Brussels, 2003); See also T. Turner, *The Congo Wars : Conflict, Myth And Reality* (Zed Books: London, 2007).

<sup>25</sup> See O. Lanotte, *Republique Democratique Du Congo: Guerres Sans Frontières*, (GRIP: Brussels, 2003); See also T. Turner, *The Congo Wars : Conflict, Myth And Reality* (Zed Books: London, 2007).

<sup>26</sup> R. Cryer, H. Friman, D. Robinson and E. Wilmshurst, *An Introduction to International Criminal Law and Procedure* (Cambridge: Cambridge University Press, 2007), at 232.

<sup>27</sup> See T. Hodges, *Angola: Anatomy of An Oil State* (Bloomington: Indiana University Press, 2004), at 176-184; P. Le Billon, ‘Angola’s Political Economy of War: The Role of Oil and Diamonds 1975 – 2000’, 100 *African Affairs* (2001) 55-80.

rebel groups or their adversaries with grave breaches impede rather than promote accountability. These impediments will be just as significant in the future, as increased economic interdependence born of globalization, the development of nuclear capabilities among previously incapable states, the greater incidence of terrorism in Western countries and the increasing scarcity of natural resources, all provide continuing incentives for foreign intervention in domestic conflicts.

The notion of victimhood that is specific to the grave breaches regime will also compel prosecutors to favor simpler criminal offences over the grave breaches. One of the distinctive characteristics of the grave breaches as originally conceived, was the division of victims between wounded and sick, shipwrecked, prisoners of war and ‘protected persons’. As a number of authors in this edition have pointed out, the term ‘protected persons’ was never synonymous with civilians. Article 4 of Geneva Convention IV defines protected person status based on the nationality of the victim, the role of their home state in the surrounding hostilities and the adequacy of diplomatic protections.<sup>28</sup> As is well known, the ICTY interpreted this nationality requirement as implying ‘allegiances’,<sup>29</sup> in order to ensure that the grave breaches regime still applied during internationalized armed conflict, in which rebel perpetrators and their governmental adversaries share the same nationality. But even on the controversial reinterpretation of protected person status offered by the ICTY, prosecutors who prefer to charge offences as grave breaches will still be required to tender evidence about the ‘allegiance’ of the victim, the role of their country of origin in hostilities and whether or not they enjoyed ‘effective and satisfactory diplomatic representation’.<sup>30</sup> Already, the sheer extent and complexity of this law deters use of the grave breaches regime, when comparable categories of war crime, domestic offences or military regulations cover the same acts without requiring proof of protected person status. In the future, prosecutors will prefer these simpler alternatives.

Debates concerning unlawful combatant status are likely to compound the comparative disadvantage of the grave breaches regime as compared with these other overlapping criminal offences, further undermining the value of a segregated grave breaches regime. One of the principal concerns is that based on the United States’ (US) definition, unlawful combatants cannot be victims of grave breaches. To recall, in the wake of terrorist attacks in New York, the US government unveiled a status inaccurately deemed ‘unlawful combatancy’, premised on the notion that ‘technically unlawful combatants do not have any rights under the Geneva Convention [sic]’.<sup>31</sup>

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<sup>28</sup> GC IV, art. 4 states (in relevant part) that ‘[p]ersons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals. Nationals of a State which is not bound by the Convention are not protected by it. Nationals of a neutral State who find themselves in the territory of a belligerent State, and nationals of a co-belligerent State, shall not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are.’

<sup>29</sup> See D. Fleck, ‘Shortcomings of the Grave Breaches Regime’, in this Issue; and Roberts, *supra* note 11.

<sup>30</sup> See Judgment, *Blaškić* (IT-94-14-A), Appeals Chamber, 29 July 2004, § 186.

<sup>31</sup> Secretary of Defense, News Briefing, 11 January 2002, available online at [http://www.defenselink.mil/transcripts/2002/t01112002\\_t0111sd.html](http://www.defenselink.mil/transcripts/2002/t01112002_t0111sd.html) (last visited on 14 June 2005).

Critiques of the legal slight-of-hand that underpins this position are numerous,<sup>32</sup> but there is less recognition that these arguments also imply that unlawful combatants cannot be victims of grave breaches. The logic is simple. If unlawful combatants have no rights under the Geneva Conventions, they technically cannot be victims of the criminal offences enshrined in those Conventions, no matter the gravity of the abuse. Thankfully, war crimes jurisprudence has categorically refuted this reasoning,<sup>33</sup> but prosecuting grave breaches in the future might still require courts to engage a deeply polarized, highly technical and frequently confused debate. When faced with this prospect, many prosecutors will look to alternative offences that avoid these technicalities entirely.

And even absent these sorts of legal or political impediments, the added cost of proving the technicalities associated with grave breaches further undermines the likely that acts amounting to grave breaches will be enforced as such. International criminal justice is, after all, subject to at times justified criticism for the unacceptable length of trials and intense pressure to minimize spending. In both respects, the added elements specific to grave breaches create costs that a nascent system of international justice can ill-afford. These constraints are likely to persist into the future, leading both courts and prosecutors to frame their accusations within less onerous categories of offence. To a certain extent, this situation is already the norm. In more than one instance, judges at the ICTY have openly encouraged the Prosecution to withdraw grave breaches charges with ‘due regard to reducing the amount of trial time needed to address the Defence denial of the international nature of the armed conflict’.<sup>34</sup> As we will observe below, other war crimes are increasingly perceived as better alternatives insofar as they avoid these technicalities. Thus, to the extent that the grave breaches regime remains isolated from other categories of war crimes, fettered by technicalities that are not relevant to the moral culpability of the accused, or plagued by the unlawful combatant debarcle, it appears to face a relatively bleak future. A grave breaches regime that remains segregated from other categories of war crime will suffer a diminished role in practice.

### 3. Abandoning the Grave Breaches Regime

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<sup>32</sup> See in particular, K. Dörmann, ‘The legal situation of ‘unlawful/unprivileged combatants’’, 849 *International Review of the Red Cross (IRRC)* (2003), at 45-74; M. Sassóli, ‘The Status of Persons Held in Guantánamo under International Humanitarian Law’, 2 *Journal of International Criminal Justice* (2004), at 96-106; J. Stewart, ‘Rethinking Guantánamo: Unlawful Confinement as Applied in International Criminal Law’, 3 *Journal of International Criminal Justice (JICJ)* (2005), 6-10.

<sup>33</sup> In the *Delalić* Judgment, for instance, the ICTY specified that ‘[i]f an individual is not entitled to the protections of the Third Convention as a prisoner of war (or of the First or Second Conventions) he or she necessarily falls within the ambit of Convention IV, provided that its article 4 requirements are satisfied’: Judgment, *Delalić et al* (IT-96-21-T), Trial Chamber, 16 November 1998, § 271. See also Judgement, *Brđanin* (IT-99-36-T), 1 September 2004, § 125.

<sup>34</sup> Motion to Withdraw Article 2 Counts, *Krnjelac* (IT-97-24), Prosecution, 27 October 2000, § 2. As Roberts points out, the *Furundžija* case also granted leave to withdraw the grave breaches count for similar reasons: See Roberts, *supra* note 11.

In another possible future, the grave breaches regime could face outright abandonment. A demise of these proportions would not be entirely foreign to the laws of war. The grave breaches regime might, for example, be relegated to a status vaguely reminiscent of the Protecting Powers provisions within the same Conventions, which boldly promised that independent third states and organizations would supervise compliance with the laws of war but ultimately fell into desuetude after an extremely limited application in practice.<sup>35</sup> Elements of the grave breaches regime have already endured a similar fate. The provision within the grave breaches regime that contemplates an enquiry procedure and appointment of an umpire to investigate grave breaches has all but disappeared from even expert discussion,<sup>36</sup> not to mention the inactivity of the fact-finding Commission established by Additional Protocol I for similar purposes.<sup>37</sup> Given the appreciable burden of proving the technicalities associated with grave breaches, it is at least plausible that grave breaches will again become a ‘dead letter’ in the future. And at the risk of sounding slightly alarmist, certain current trends inevitably lead to a partial downfall of this sort.

Recent developments in the law governing other categories of war crimes supersede aspects of the grave breaches regime. In particular, courts have extended the application of common Article 3 of the Geneva Conventions to a point where it threatens to almost single-handedly eclipse the grave breaches regime. Originally, common Article 3 was codified as a ‘convention within a convention’, creating a list of prohibitions one author famously described as ‘affectionate generalities’.<sup>38</sup> Several decades later, the International Court of Justice (ICJ) declared that common Article 3 formed ‘a minimum yardstick’ applicable in all armed conflicts, based principally on the premise that these prohibitions constituted ‘elementary considerations of humanity’.<sup>39</sup> International criminal tribunals then embraced the same reasoning, precisely in order to bypass the technicalities that plague the grave breaches regime. Early in the tenure of the ICTY, the *Tadić* Jurisdiction Decision declared that ‘at least with respect to the minimum rules in common Article 3, the character of the conflict is irrelevant.’<sup>40</sup> As a result, a single provision within the Geneva Conventions that was not originally intended to apply in international armed conflict, let alone give rise to individual criminal responsibility, is now poised to overshadow the once revolutionary criminal regime explicitly enshrined within the Geneva Conventions.

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<sup>35</sup> For an explanation of the limited instances where the protecting powers provisions were exercised, see R. Wolfrum, ‘Enforcement of International Humanitarian Law’, in D. Fleck and M. Bothe (eds), *The Handbook of Humanitarian Law in Armed Conflicts* (Oxford: OUP, 1995), at 543.

<sup>36</sup> GC IV, art. 149 states that ‘[a]t the request of a Party to the conflict, an enquiry shall be instituted, in a manner to be decided between the interested Parties, concerning any alleged violation of the Convention. If agreement has not been reached concerning the procedure for the enquiry, the Parties should agree on the choice of an umpire who will decide upon the procedure to be followed. Once the violation has been established, the Parties to the conflict shall put an end to it and shall repress it with the least possible delay.’

<sup>37</sup> AP I, art. 90.

<sup>38</sup> T. Farer, ‘The Laws of War 25 Years After Nuremberg’, 39 *International Conciliation* (1970-1972), at 32.

<sup>39</sup> The ICJ found that ‘[t]here is no doubt that, in the event of international armed conflicts, these rules also constitute a minimum yardstick, in addition to the more elaborate rules which are also to apply to international conflicts’: *Nicaragua v. U.S.*, Merits, ICJ Reports (1986), § 218.

<sup>40</sup> *Tadić Appeal Judgement*, *supra* note 15, § 97.

The consequences for the future of the grave breaches regime are marked. Common Article 3 offers many of the benefits of grave breaches without the drawbacks. In terms of coverage, the two categories of war crimes share important commonalities — both criminalize wilful killing and murder, torture and inhuman treatment, hostage-taking, and unfair trial. Rape could also be prosecuted as torture under both regimes. In other respects, however, one of the two categories of war crimes offers distinct advantages. Whereas a grave breach presupposes proof of an international armed conflict, the extended conception of common Article 3 simply demands evidence of a ‘protracted armed conflict.’ By charging wartime offences as violations of Common Article 3, courts can therefore dispense with the imprecise, convoluted, and woefully inefficient process of qualifying international armed conflicts. Furthermore, Common Article 3 neatly overcomes the complexity of proving protected person status by substituting a simpler assessment of whether the victims were ‘not taking active part in hostilities.’ Quite understandably, domestic courts and international tribunals now charge war crimes as violations of common Article 3 rather than grave breaches as a matter of course.<sup>41</sup> In the future, at least a portion of the grave breaches regime is likely to be eclipsed by these practices.

Other jurisprudential developments are likely to have similar effects. Other categories of war crimes are now considered applicable in international and non-international armed conflict alike, which also allows courts to dispense with the need to qualify the character of the surrounding armed conflict. Once again, the logic is compelling in its simplicity — courts reason that if the content of war crimes is identical in both types of war, undergoing the arduous process of characterizing the nature of the conflict is superfluous. So in the trial of Naser Orić, the accused was charged with ‘wanton destruction of cities, towns or villages not justified by military necessity’, which formally derives from the Hague Regulations of 1907 and therefore international armed conflict, but the Tribunal summarily dispensed with the need to determine the status of the conflict by merely repeating the mantra that ‘[u]nder Article 3 of the [ICTY] Statute, it is immaterial whether the crimes alleged in the Indictment occurred within an internal or international armed conflict.’<sup>42</sup> The assertion, which in this particular case remained implicit, was that the offence shares a common legal meaning in customary international law within both species of armed conflict. Consequently, citing the existence of the offence in the two contexts alleviated the need to characterize the surrounding war. As a result, a future without grave breaches is not just a fanciful hypothetical; to a certain extent it is already upon us. Why, after all, would a prosecutor charge the grave breach of ‘extensive destruction ... not justified by military necessity

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<sup>41</sup> This position has been consistently adopted ever since. For a selection of the most recent judgments affirming this approach, see Judgement, *Naletilic et al*, (IT-98-34-T), Trial Chamber, 31 March 2003, § 228; Judgement, *Mrškić et al*, (IT-95-13/1-A), Appeals Chamber, 5 May 2009, § 70; Judgement, *Orić* (IT-03-68-T), Trial Chamber, 30 June 2006, § 261; Judgement, *Krajišnik* (IT-00-39-T), Trial Chamber, 27 September 2006, § 843. For domestic practice, see *Prosecution v. Refik Saric*, Eastern Division of the High Court, Third Chamber, 25 November 1994; Netherlands Supreme Court Decision in the matter of the appeal against a decision of the Arnhem Court of Appeal, Military Chamber, dated 19 March 1997. See also In the penal case against Darko Knesevic, 11 November 1997, Criminal Court, No 3717 Decision, AB translated at 1 *Yearbook of International Humanitarian Law* (1998), at 599-606.

<sup>42</sup> *Orić*, *supra* note 40, § 252.

and carried out unlawfully and wantonly’, when the analogous offence of ‘wanton destruction of cities, town or villages’ now achieves exactly the same ends without subjecting the prosecution to the rigors of conflict qualification required by the grave breaches regime?

In the past, enforcement obligations unique to the grave breaches regime might have explained a preference for prosecuting grave breaches<sup>43</sup>, but recent experience suggests that the value of these enforcement obligations has also declined in significance. Take, for instance, the obligation to enact legislation providing for ‘effective penal sanctions’ of grave breaches. The received wisdom is that this obligation does not require states to criminalize grave breaches as such — torture can be criminalized as assault, extensive appropriation not justified by military necessity as theft and hostage taking as kidnapping. Even war crimes jurisprudence opines that ‘there is no rule, either in customary or in positive international law, which obligates States to prosecute acts which can be characterized as war crimes solely on the basis of international humanitarian law, completely setting aside any characterizations of their national criminal law.’<sup>44</sup> While strong arguments of both law and policy might be leveled against this interpretation, the exceedingly lenient reading of the obligation represents prevalent views. And even though this obligation is so easy to satisfy, most surveys show that states have failed miserably in enacting criminal legislation that meets even this lax standard.<sup>45</sup> On all accounts, abandoning such a conceptually weak and practically ineffectual obligation to enact legislation would probably not constitute a legal calamity, especially when the markedly more effective obligations contained in the ICC Statute compel domestic implementation of all international crimes.<sup>46</sup>

Similarly, recent developments in international criminal law at least partially overshadow the obligation to search for and prosecute grave breaches. As Kress points out in his erudite contribution to this symposium, the obligation to search for and prosecute grave breaches cannot reasonably be read as absolute. In a number of situations (consider an insane perpetrator), the obligation gives way to established criminological principles. It is presumably in response to these types of limitations, that the International Committee of the Red Cross (ICRC)’s Customary Study stipulates that ‘States must investigate war crimes ... over which they have jurisdiction and, *if*

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<sup>43</sup> Bassiouni, for instance, argues that ‘a normative gap exists with respect to the enforcement consequences that rise out of transgressions of these two regimes’, referring to discrepancies between grave breaches and war crimes in non-international armed conflicts: C. Bassiouni, *The Normative Framework of International Humanitarian Law: Overlaps, Gaps and Ambiguities*, in M.C. Bassiouni (ed.), *International Criminal Law* (3<sup>rd</sup> edn, The Hague: Martinus Nijhoff, 2008), at 510.

<sup>44</sup> Judgement, *Hadžihasanović et al.* (IT-01-47-T), Trial Chamber, 15 March 2006, § 260.

<sup>45</sup> According to Geiss and K. Dörmann, States as diverse as France, Turkey, Israel and Austria still maintain the manifestly flawed position that their normal domestic code satisfies the obligation to enact effective penal sanctions covering grave breaches. CROSS-REF, at X. Geiss and Dörmann, CROSS-REF, at X and R. Geiß, ‘The Implementation of Grave Breaches into Domestic Legal Orders’, in this Issue; See also E. La Haye, *War Crimes in Internal Armed Conflicts* (Cambridge: Cambridge University Press (CUP), 2008); R. Elst, ‘Implementing Universal Jurisdiction Over Grave Breaches of the Geneva Conventions’, 13 *Leiden Journal of International Law* (836); A. Eser, U. Sieber, H. Kreicker (eds), *National Prosecution of International Crimes* (Berlin: Max Planck Institute, 2006).

<sup>46</sup> J. Kleffner, ‘The Impact of Complementarity on National Implementation of Substantive International Criminal Law’, 1 *Journal of International Criminal Justice* (2003).

*appropriate*, prosecute the suspects.’<sup>47</sup> Regrettably, the term ‘if appropriate’ goes undefined. In the absence of clear definition, the discretion created by the term almost dilutes the obligation to vanishing point. We witness, for example, a plethora of extra-judicial considerations in determining whether to initiate charges for grave breaches, some of which reflect the legitimate concerns of a criminal justice system while others simply allow politics to hinder justice. Moreover, the complementarity regime within the ICC Statute is likely to achieve much more. Already the ICC’s complementarity regime has coerced British authorities into prosecuting their own soldiers for grave breaches perpetrated in Iraq,<sup>48</sup> thereby evidencing an arguably greater influence on the enforcement of grave breaches within a single decade than the obligation to search for and prosecute these crimes achieved over the course of the preceding half-century. In all these respects, enforcement mechanisms within the grave breaches regime also face a future of declining value.

Despite these relative declines in significance, outright abandonment remains improbable. For one reason, certain grave breaches simply have no equivalent in other categories of war crimes. One prime example is the grave breach of ‘unlawful confinement’, which was codified as a war crime for the first time in the grave breaches regime, soon after the massive incidence of illicit detention during WWII. As international criminal justice currently stands, unlawful confinement is only an offence in inter-state armed conflict. In an attempt to bridge this arbitrary normative divide, the Prosecution in the Limaj case argued that ‘unlawful seizure’ and ‘unlawful detention for prolonged periods’ during the Kosovo Liberation Army’s (KLA) non-international armed conflict with Serbian forces was subsumed within the war crime of ‘cruel treatment’.<sup>49</sup> In dismissing this argument, the Trial Chamber concluded that ‘at least in the circumstances of this case, these acts in and of themselves do not amount to a serious attack on human dignity within the meaning of cruel treatment’.<sup>50</sup> The Tribunal’s conclusion is certainly open to substantive critique (that unlawful confinement is a grave breach in international armed conflict is the most blatant retort), but the decision does highlight how creative charging is sometimes necessary in an attempt to counter the fact that certain grave breaches have no direct equivalent elsewhere in the laws of war. Unlawful confinement is far from alone in this regard, meaning that abandoning the grave breaches regime would result in a marked diminution of established categories of international criminal responsibility. Certain states will surely oppose a regulatory regression of this type.

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<sup>47</sup> J.-M. Henkaerts and L. Doswald-Beck, (eds), *Customary International Humanitarian Law*, Vol. I (Cambridge: CUP, 2005), at XX (emphasis added). The obligation within the ICRC study reads ‘States must investigate war crimes allegedly committed by their nationals or armed forces, or on their territory, and, if appropriate, prosecute the suspects. They must also investigate other war crimes over which they have jurisdiction and, if appropriate, prosecute the suspects.’

<sup>48</sup> N. Rasiyah, ‘The Court-martial of Corporal Payne and Others and the Future Landscape of International Criminal Justice’, 7 *JICJ* (2009), at 177-199.

<sup>49</sup> Judgement, *Limaj et al* (IT-03-66-T), Trial Chamber, 30 November 2005, § 232.

<sup>50</sup> *Ibid.*

The mere fact that grave breaches are formally codified and universally ratified is another reason why these war crimes will survive. As the infamous history of the US Military Commissions Act 2006 (MCA) confirms, grave breaches are less easily manipulated than other war crimes. In 2006, the US Congress hurriedly passed the MCA in response to the US Supreme Court's decision in *Hamdan*, which ruled that the first incarnation of military commissions established by President Bush transgressed common Article 3 of the Geneva Conventions.<sup>51</sup> After *Hamdan*, the then US Administration suddenly realized that by implication they were perpetrating war crimes — the US War Crimes Act of 1996 render violations of common Article 3 federal crimes. Thus, in an attempt to minimize their exposure to potentially serious criminal liability, the Administration surreptitiously used the MCA to amend the portion of the US War Crimes Act that criminalized the relevant aspects of common Article 3.<sup>52</sup> To feint legitimacy, the MCA created the concept of 'grave breaches of common Article 3', which marked an unprecedented collapse of two categories of war crimes that had epitomized the discipline's segregated history.

The marriage of the two categories of war crime was not fortuitous — the novel notion of 'grave breaches of common Article 3' excluded precisely the components of common Article 3 that actors within the 'war on terror' had unquestionably violated as a matter of routine, namely the 'denial of the right to a fair trial' and the prohibition against 'outrages upon personal dignity, in particular humiliating and degrading treatment'.<sup>53</sup> And yet strangely, Congress failed to simultaneously amend aspects of the US War Crimes Act that also criminalize grave breaches.<sup>54</sup> The oversight was perplexing since grave breaches not only cover precisely those aspects of Common Article 3 that the US government repealed,<sup>55</sup> they also criminalizes a wider array of practices synonymous with the 'War on Terror'.<sup>56</sup> In short, the attempt to repeal offences the US

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<sup>51</sup> *Hamdan v. Rumsfeld*, Secretary of Defense, et al. No. 05-184, 29 June 2006, available at <http://www.supremecourtus.gov/opinions/05pdf/05-184.pdf> (visited 3 December 2006).

<sup>52</sup> For a more thorough review of the Act, see J.G. Stewart, 'The Military Commissions Act's Inconsistency with the Geneva Conventions: An Overview', 5 *JICJ* (2007), at 26-38.

<sup>53</sup> For a harrowing account of acts that at the very least amount to degrading treatment, see *Al Odah, et al. v. United States Of America*, Brief of Amici Curiae Retired Federal Jurists in Support of Petitioners', Supplemental Brief Regarding The Military Commissions Act Of 2006, available at [http://www.pegc.us/archive/In\\_re\\_Gitmo/CAD\\_judges\\_amicus\\_20061101.pdf](http://www.pegc.us/archive/In_re_Gitmo/CAD_judges_amicus_20061101.pdf); For accounts establishing unfair trial, see UN Expert Report on the Situation of Detainees at Guantanamo Bay, UN Doc. E/CN.4/2006/120, 15 February 2006, §§ 34- 40 and L. Lasry QC, *United States v David Mathew Hicks, First Report of the Independent Legal Observer for the Law Council of Australia* (Melbourne, 30 August 2004), available at [http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file\\_uuid=CDF9FC6F-1E4F-17FA-D252-457B6909B05A&siteName=lca](http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=CDF9FC6F-1E4F-17FA-D252-457B6909B05A&siteName=lca) (visited 15 August 2009).

<sup>54</sup> As amended, the US War Crimes Act stipulates that 'whoever, whether inside or outside the United States, commits a war crime', such be criminally punished. § 2441(c) stipulates that 'the term "war crime" means any conduct— (1) defined as a grave breach in any of the international conventions signed at Geneva 12 August 1949, or any protocol to such convention to which the United States is a party'. See US Code, Part I, Title 18, Chapter 118, § 2441.

<sup>55</sup> The grave breaches regime also prohibits 'wilfully causing great suffering or serious injury to body or health' and 'wilfully depriving a protected person of the rights of fair and regular trial' in terms that are largely identical in scope to the provisions of common Article 3 that were repealed by the MCA. See GC IV, Art 147.

<sup>56</sup> Grave breaches such as 'deportation' and 'unlawful confinement' create the potential for serious criminal liability for the rendition program of terror suspects and the widespread incidence of detention at Guantanamo and elsewhere that does not comport with the laws of war.

Government was perpetrating was only partially achieved. One might speculate about the rationale for this half-measure, but the explicit codification of grave breaches within the Geneva Conventions, as opposed to the customary nature of criminal liability for violations of common Article 3, arguably narrowed the opportunity for further legal distortion.

The explicit nature of the grave breaches regime is equally valuable in other contexts, again highlighting grounds for resisting calls to discard grave breaches in the future. In the Basson case, amnesties and jurisdictional barriers impeded various attempts at prosecuting a doctor who had directed South Africa's secret chemical and biological warfare project during the apartheid era.<sup>57</sup> As Ferdinandusse highlights, the South African Constitutional Court made explicit reference to the obligation to search for and prosecute in the grave breaches regime by declaring that these barriers raised constitutional issues.<sup>58</sup> Although Prosecutors ultimately decided not to proceed with a retrial, the case does demonstrate how explicit wording in a universally agreed treaty contributes to the likelihood of accountability in the face of trenchant political opposition. The lesson is important for the future. If the history of the grave breaches regime has reaffirmed anything about war crimes prosecutions, it is surely that we must expect the type of political resistance to accountability epitomized by apartheid South Africa or a US government responsible for various grave breaches at Guantánamo. As these two examples reveal, the causes and extent of a regime's responsibility for war crimes can be radically different from one context to the next, but the underlying resistance to accountability is relatively predictable. The grave breaches regime, therefore, retains important value over and above other international and domestic offences. And if the past is any guide, every obligation capable of leveraging prosecutions will be vital in counteracting the culture of impunity future generations will inherit.

Universal jurisdiction within the grave breaches regime is similar. As numerous authors in this symposium have shown, the grave breaches regime contains an important provision demanding that states party 'enact any legislation necessary to provide effective penal sanctions' for grave breaches, and compels these same states to search for and prosecute those responsible 'regardless of their nationality, before its own courts.'<sup>59</sup> O'Keefe's exhaustive assessment of this somewhat ambiguous language confirms that the provision creates a truly universal jurisdiction.<sup>60</sup> This result undeniably contrasts with the opinions of certain ICJ judges who are openly less enthused,<sup>61</sup> but even if the language contained in the Geneva Conventions is less than clear in this regard, those responsible for drafting the provision unambiguously intended that 'the principal of

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<sup>57</sup> Constitutional Court of South-Africa, *S. v. Basson*, 10 March 2004, Case CCT 30/03, available online at <http://www.saflii.org/za/cases/ZACC/2004/13.html> (last visited July 8, 2009). For a much more detailed analysis see W. Ferdinandusse, 'The Prosecution of Grave Breaches in National Courts', in this Issue.

<sup>58</sup> *Ibid.*

<sup>59</sup> GC I, art. 49; GC II, Art. 50.

<sup>60</sup> R. O'Keefe, 'The Grave Breaches Regime and Universal Jurisdiction', in this Issue.

<sup>61</sup> As O'Keefe's article shows, at least two ICJ judges in the *Arrest Warrants Case* openly opposed the notion that the grave breaches regime entails universal jurisdiction, although their position was conspicuous in its absence of justification. For more detail, see O'Keefe, *ibid.*

universality should be applied here.’<sup>62</sup> At least as regards international armed conflict, the notion of mandatory universal jurisdiction over grave breaches is therefore unavoidable.

By contrast, the existence and scope of a customary equivalent applicable to all categories of war crimes is less clear. A public interchange between the US State Department and the ICRC on these issues bears out this proposition in practice. While the US government’s detailed response to the ICRC’s Customary Study acknowledged that the grave breaches regime creates universal jurisdiction,<sup>63</sup> it retorted that ‘State practice does not support the contention that States, as a matter of customary international law, have the right to vest universal jurisdiction in their national courts over the full set of actions defined by the study as ‘war crimes.’’<sup>64</sup> As we see from this position, grave breaches continue to serve an important declaratory function within the modern architecture of international criminal law—whereas one can question the customary nature of particular provisions in the laws of war, the explicit codification of the grave breaches regime precludes serious debate. As powerful states continue to pressure countries like Belgium, Spain and others to repudiate domestic codifications of universal jurisdiction in years to come, the grave breaches regime will therefore act as one source of continued resistance.

So for all these reasons, the grave breaches regime appears destined to endure, albeit as part of an increasingly complex mosaic of law governing war crimes. Only the need for greater coherence and clarity within and between the various categories of war crimes will lead to the abolition of grave breaches.

#### **4. Assimilating the Grave Breaches Regime with Other War Crimes**

The third possible future is one where the grave breaches regime is assimilated with other categories of wartime offence to produce a clearer, unified and coherent body of law organized around principle not history. In essence, this future involves rewriting the law of war crimes afresh. Changes would be legion. A more systematic taxonomy would avoid the frequent duplication of war crimes that share identical meanings, such as inhuman treatment and cruel treatment.<sup>65</sup> Along the same lines, a unified law governing war crimes would dispense with antiquated language that has no bearing on the content of the modern criminal offence, instead of repeating confusing

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<sup>62</sup> When the Italian delegate to the conference proposed to limit the obligation to search for and prosecute to countries engaged in the armed conflict, the Dutch delegate responsible for drafting the provision responded that ‘[t]he principle of universality should be applied here’. See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol II, Section B, at 116.

<sup>63</sup> John B. Bellinger III and William J. Haynes II, ‘A US government response to the International Committee of the Red Cross study Customary International Humanitarian Law’, 89 *IRRC* (2007), at 466.

<sup>64</sup> *Ibid.*, at 467.

<sup>65</sup> As a reflection of this overlap, see the *Jelisić* Trial Judgement’s declaration that cruel treatment as a violation of common Article 3, inhuman treatment as a grave breach and inhumane acts as crimes against humanity ‘carr[y] an equivalent meaning’: Judgement, *Jelisić* (IT-95-10), Trial Chamber, 14 December 1999, § 52

phraseology like ‘pillaging a town or place even when taken by assault’.<sup>66</sup> But most fundamentally, a unified law of war crimes would discard unduly complex and morally irrelevant categories of victimhood (like protected persons status), and part with the discredited divide between international and non-international armed conflict most commentators condemn as ‘retrograde’.<sup>67</sup> War crimes should be organized around their substantive content, not their historical genesis.<sup>68</sup> Ideally, a new multilateral treaty will fulfill this function, but this eventuality appears politically implausible in the short term. The fear that renegotiating the Geneva Conventions in the present political climate will result in less humanitarian protections than are presently the case, coupled with the difficulties of amending the ICC Statute, are likely to inhibit the formal codification of new laws that supersede the grave breaches regime. As a consequence, at least in the near future, judges will give effect to the commonly-held desires for greater simplicity and coherence in the law governing war crimes.

Predictably, this will pose problems. One of the most obvious difficulties in leaving courts to affect legal change within a body of criminal law is that the admirable desire for coherence risks jeopardizing fair trial rights, especially the prohibition against retroactive criminal law. The law governing deportation illustrates this tension. As things presently stand, deportation must occur within occupied territory in order to constitute a grave breach, whereas the equivalent in non-international armed conflict is limited to ‘ordering the displacement of the civilian population’.<sup>69</sup> The distinction is hugely important in practice. As a simplistic illustration, members of the Gestapo

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<sup>66</sup> Arts 8(2)(b)(xvi) and 8(2)(b)(e)(v) criminalize ‘Pillaging a town or place, even when taken by assault’. The term ‘pillaging a town and place even when taken by assault’ derives verbatim from art. 28 of the Hague Regulations. The reference to ‘even when taken by assault’, is reflective of a period of history when it was lawful to pillage a town as retribution for local resistance to siege. See Norman Bentworth, *The Law of Private Property in War* (London: Sweet & Maxwell, 1907), at 8. When the Brussels Declaration of 1864 was confronted with this practice, it elected to do away with even the exception by prohibiting pillage categorically. The Hague Regulations of 1907 adopted this same language. That the ICCSt. chose to adopt this archaic language speaks to a failure to consider the substance of war crimes or the realities of modern warfare, especially when art. 47 of the same Hague Regulations also stipulates that ‘pillage is formally forbidden’. As things stand, the reference to town, place and assault within the definition are highly confusing, legally redundant, and historically passé. Here, and elsewhere, the drafters of the ICCSt. privileged history over coherence.

<sup>67</sup> A. Cassese, ‘The Statute of the International Criminal Court: Some Preliminary Reflections’, 10 *European Journal of International Law* (1999), at 50; Ratner and co-authors argue that ‘there ought to be no distinction between the criminality of offenses committed in civil wars and those committed in interstate wars.’ S. Ratner, J. Abrams and J. Bischoff, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy* (3<sup>rd</sup> edn, Oxford: OUP, 2009), at 106. See also C. Warbrick and P. Rowe, ‘The International Criminal Tribunal for Yugoslavia: The Decision of the Appeals Chamber on the Interlocutory Appeal on Jurisdiction in the Tadić Case’, 45 *International and Comparative Law Quarterly* (1996), at 698, arguing that it is ‘difficult to justify, on the grounds of logic, a different regime of criminal liability for an act depending solely on whether it was committed in an international or non-international armed conflict.’

<sup>68</sup> Werle, for instance, argues that ‘[i]t makes more sense to categorize the different crimes from a substantive point of view’. G. Werle, *Principles of International Criminal Law* (The Hague: T.M.C. Asser, 2003), at 286.

<sup>69</sup> ICCSt., art. 8(2)(e)(viii) criminalizes ‘[o]rdering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand.’ It is clear that ‘[t]his was drafted to implicate the individual giving the order, not someone who simply carries out the displacement’: K. Dörmann, L. Doswald-Beck, R. Kolb, *Elements of War Crimes under the ICC Statute of the ICC: Sources and Commentary* (Cambridge: CUP, 2002).

who forcibly evicted Jews from occupied territories throughout Western Europe perpetrated what now amounts to a grave breach, but only those political or military leaders who ordered the displacement could be criminally culpable had the events occurred in a civil war. The illustration is, of course, facile insofar as it obscures the fact that the two offences came into force approximately half a century apart—the grave breach of deportation was codified in 1949 whereas the equivalent in non-international armed conflict was only criminalized for the first time within the ICC Statute. Thus, it might be safe to conclude that the forcible eviction of civilian populations from strategic areas adjacent to Vietnam during the US-led carpet bombing of Cambodia was a grave breach,<sup>70</sup> but it is less clear that even ordering displacement during the Biafran civil conflict within Nigeria at the same time was a war crime. A future that uses jurisprudence to harmonize these discrepancies is certainly intellectually attractive on one level, but it will also mark a potentially unconscious and philosophically troubling regression to Nuremberg, where the principle of *nullem crimen sine lege* was reduced to a mere ‘principle of justice’.<sup>71</sup>

In a similar sense, assimilating the grave breaches regime with other categories of war crime through jurisprudence might lead to a kind of legal stalemate in concrete cases. This is particularly true of the new practice of dispensing with the qualification of the armed conflict when the content of the offence is perceived as identical in both contexts.<sup>72</sup> Milan Martić, for example, was convicted of cruel treatment for the injuries sustained by seven members of Croatian Armed Forces during an indiscriminate rocket attack he launched against the city of Zagreb.<sup>73</sup> The Trial Chamber found that these seven victims were ‘off-duty’,<sup>74</sup> and that Martić could therefore be criminally responsible for injuries they sustained during the attack. Unfortunately, this approach overlooks the fact that soldiers ‘off duty’ are legitimate targets in one type of conflict but not the other.<sup>75</sup> A terrible impasse arises. In accordance with the new hybrid approach to qualification, the

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<sup>70</sup> See N. Barrett, ‘Holding Individual Leaders Responsible for Violations of Customary International Law: The U.S. Bombardment of Cambodia and Laos’, 32 *Columbia Human Rights Law Review* (2001).

<sup>71</sup> ‘Nuremberg Judgment’, 1 *Trial of the Major War Criminals before the International Military Tribunal* (1947), at 219. The famous edict was that ‘[t]o assert that it is unjust to punish those who in defiance of treaties and assurances have attacked neighboring states without warning is obviously untrue, for in such circumstances the attacker must know that he is doing wrong, and so far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished.’

<sup>72</sup> See also the example from the Oric Trial Judgement, *supra* note X.

<sup>73</sup> Judgment, *Martić* (IT-95-11), Trial Chamber, 12 June 2007 (*Martić Trial Judgement*), § 471.

<sup>74</sup> According to the Trial Chamber ‘7 wounded and killed were ‘MUP.HV.’ The document states that all of these ‘MUP.HV’ were ‘out of service’, the Trial Chamber interprets this, in light of the principle of *in dubio pro reo* as meaning that they were off-duty and not that they were no longer enlisted in the army or police.’ *Ibid.*, fn 971.

<sup>75</sup> In non-international armed conflict the test is whether the soldiers were ‘not taking an active part in hostilities’. In international criminal law, ‘active participation in hostilities’ is defined as ‘acts of war which by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces’. See *Tadić Appeal Judgement*, *supra* note 15, § 616: A soldier on leave does not satisfy this definition, and therefore cannot be attacked. In international armed conflict, however, the relevant inquiry is whether the soldiers were ‘*hors de combat*’. AP I, Art 41(2) states that ‘[a] person is hors de combat if: (a) he is in the power of an adverse Party; (b) he clearly expresses an intention to surrender; or (c) he has been rendered unconscious or is otherwise incapacitated by wounds or sickness, and therefore is incapable of defending himself; provided that in any of these cases he abstains from any hostile act and does not attempt to escape.’ Soldiers on leave do not satisfy these requirements, meaning that they remain legitimate targets.

Martić Trial Chamber reasoned that the offence of ‘cruel treatment’ applies in both types of armed conflict, then dispensed with the need to qualify the nature of the surrounding hostilities. But without a determination of armed conflict’s character, it was analytically impossible to determine which of these competing legal standards applied to the ‘off-duty’ soldiers, and therefore whether or not the acts in question were criminally reprehensible. The consequences, for both Milan Martić and international criminal justice, were grave. The former was convicted of a war crime in the face of irreconcilable legal ambiguity, while the later championed a simpler hybrid conception of armed conflict without recognizing the potentially sobering consequences. Courts minded to assimilate war crimes in the future risk reproducing the oversight.

Apart from the threat of wrongful conviction, assimilating war crimes through jurisprudence also risks infidelity to the underlying law of war. These trends too, have already manifest in practice. The hybrid approach of conflict qualification, for instance, disregards whether the conflict is international or otherwise in the name of simplicity, by demanding only that ‘(i) the armed violence is protracted and (ii) the parties to the conflict are organized’.<sup>76</sup> But by requiring that armed conflicts are protracted, the unified standard imposes an intensity requirement derived from the definition of non-international armed conflict on the law governing international armed conflict, even though inter-state warfare has never depended on a similar degree of intensity.<sup>77</sup> In addition, the unified standard also overlooks divergent definitions of non-international armed conflict. Additional Protocol II explicitly stipulates that organized armed groups must ‘exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol’, and a range of modern courts still insist on this requirement when dealing with war crimes derived from Additional Protocol II.<sup>78</sup> Dispensing with these types of incongruities is undoubtedly essential for a simpler, more coherent understanding of war crimes, but achieving this coherence through jurisprudence rather than treaty leads to a future where international criminal law only approximately comports with the laws of war upon which they depend.

Interpretative difficulties are, likewise, highly probable in a future where courts harmonize the various categories of war crimes. Commentators are presently split, for instance, on whether

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<sup>76</sup> Judgment, *Haradinaj et al.* (IT-04-84-T), Trial Chamber, 3 April 2008, § 38.

<sup>77</sup> See for instance, R. Baxter, ‘The Duties of Combatants and the Conduct of Hostilities (Law of the Hague)’ in *International Dimensions of Humanitarian Law* (Paris: UNESCO, 1988), at 98, pointing out that ‘[t]he proper view would seem to be that ‘any other armed conflict which may arise between two or more of the High Contracting Parties’ should be taken as referring to any outbreak of violence between the armed forces of two states, regardless of the geographical extent and intensity of the force employed...’. See also M. Cottier, W. Fenrick, P. Viseur Sellers and A. Zimmermann, ‘Article 8, War Crimes’, in O. Triffterer (ed.), *Commentary on the ICC Statute of the International Criminal Court, Observers Notes, Article by Article* (Baden-Baden: Nomos, 1999), at 182.

<sup>78</sup> AP I, art. 2. Courts also insist on this requirement when prosecuting war crimes derived from AP II. See Judgment, *Sesay, Kallon and Gbao* (‘RUF case’) (SCSL-04-15-T), Trial Chamber I, 25 February 2009, § 97; Judgment, *Brima, Kamara and Kanu* (‘AFRC Case’) (SCSL-04-16-T), Trial Chamber II, 20 June 2007, § 243 (not discussed on appeal); Judgment, *Fofana and Kondewa* (‘CDF Case’) (SCSL-04-14-T), Trial Chamber I, 2 August 2007 (where the Trial Chamber says they will apply the AP II standard but actually apply common Article 3); Judgment, *Boškovski*, (IT-04-82-T), Trial Chamber, 10 July 2008, § 126-127.

universal jurisdiction attaches to war crimes perpetrated within non-international armed conflict. Some argue that no rule of international law enables universal jurisdiction over war crimes in non-international armed conflict,<sup>79</sup> whereas others assert that states enjoy *a discretion* to exercise universal jurisdiction over war crimes perpetrated in non-international armed conflict.<sup>80</sup> Neither position is entirely satisfying. On the one hand, those who deny the right to exercise universal jurisdiction over war crimes in non-international armed conflict reaffirm a stark disparity between the criminal regimes governing war crimes in international and non-international armed conflict. On the other, those who argue for a discretionary right to exercise universal jurisdiction do not go far enough, since they contradict the *mandatory* system of universal jurisdiction contained in the grave breaches regime. The dissonance creates intractable interpretative dilemmas. The ICRC, for example, stipulates that '[s]tates *have the right* to vest universal jurisdiction in their national courts over war crimes',<sup>81</sup> tacitly obfuscating the positive duty to exercise universal jurisdiction within the grave breaches regime. A future that involves incremental assimilation through interpretation rather than a new negotiated treaty is prone to create more of these sorts of anomalies.

Arguing that the entire grave breaches regime applies in non-international armed conflict is not likely to improve matters. In a highly influential separate opinion within the *Tadić Jurisdiction Decision*, Judge Abi-Saab argued that either a teleological interpretation of the Geneva Conventions or a new parallel customary rule could render the entire grave breaches regime applicable in both types of conflict.<sup>82</sup> The reasoning laudably embraced the need for 'rationalisation' of the law governing war crimes and 'a modicum of order among the categories of crimes'.<sup>83</sup> As Moir points out in his convincing appraisal of this argument,<sup>84</sup> the approach is intuitively attractive but substantively problematic. Most fundamentally, the reasoning ignores that several of the grave breaches could not function in non-international armed conflicts. For example, the grave breach of deportation must originate from occupied territory, which does not exist in civil wars. Likewise, the grave breach of unlawful confinement is predicated on provisions in the

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<sup>79</sup> After an extensive appraisal of state practice, La Haye concludes that there is as yet no right to exercise universal jurisdiction over war crimes in non-international armed conflicts. See La Haye, *supra* note 45, at 234-235; Christian Tomuschat also takes the view that 'to date, there is no sufficient evidence showing that war crimes committed in non-international armed conflict partake of the regime of universal jurisdiction': in C. Tomuschat, ' ', 71(1) *Yearbook of the Institute of International Law* (2005), at 387. The United States government concurs. See Bellinger and Haynes, *supra* note 63, at 466.

<sup>80</sup> See in particular T. Meron, 'International Criminalization of Internal Atrocities', in *War Crimes Law Comes of Age* (Oxford: OUP, 1998), at 251. See also Institut de droit international, Krakow Session – 2005, Resolution of 26 August 2005. Available online at [http://www.idi-iil.org/idiE/resolutionsE/2005\\_kra\\_03\\_en.pdf](http://www.idi-iil.org/idiE/resolutionsE/2005_kra_03_en.pdf) (last visited 8 July 2009), stating that universal jurisdiction 'may be exercised' over international crimes including 'grave breaches of the 1949 Geneva Conventions for the protection of war victims or other serious violations of international humanitarian law committed in international or non-international armed conflict.' (emphasis added). See also Henkaerts and Doswald-Beck, *supra* note 48.

<sup>81</sup> *Ibid.*, Rule 157 (emphasis added). See also the resolution of the Institut de droit international in 2005, stating that universal jurisdiction 'may' be exercised over international crimes. *Ibid.*

<sup>82</sup> *Tadić Appeal Judgement*, *supra* note 15, Separate Opinion Of Judge Abi-Saab On The Defence Motion For Interlocutory Appeal On Jurisdiction.

<sup>83</sup> *Ibid.*, at 4.

<sup>84</sup> See Moir, *supra* note 20.

Geneva Convention IV allowing administrative detention without trial, but the law governing non-international armed conflict contains no equivalents. In fact, some grave breaches would be lawful if perpetrated in a civil war.<sup>85</sup> As a result, importing the entire grave breaches regime into non-international armed conflict would then require courts to decipher which grave breaches could apply in non-international armed conflict and which could not. In all likelihood, this merely adds a new layer of analytical complexity to a body of law that already risks serious over-complication. As a result, this and the other anecdotal examples highlighted, show how achieving coherence through jurisprudence rather than a treaty is fused with ongoing challenges for the future.

## 5. Conclusion

During the negotiation of the Geneva Conventions, state representatives unanimously agreed that ‘the aim was not to produce a penal code.’<sup>86</sup> Promulgating a new consolidated treaty that produces a comprehensive code governing war crimes generally is politically inopportune in the near future, but the greatest legacy of the grave breaches regime is one where it is viewed as a bold catalyst for a much more structurally coherent, comprehensive and simply drafted treaty regime governing war criminality. All other futures are flawed. Abandoning the grave breaches regime, for example, would lead to loss of certain grave breaches that have no equivalent in other categories of war crimes, not to mention the fact that discarding the regime entirely leads to the disappearance of the explicit enforcement obligations that are not paralleled elsewhere. At the same time, maintaining the status quo also has serious shortcomings—continuing to segregate grave breaches from other categories of war crimes will result in the decreased application of grave breaches as prosecutors substitute other offences that cover the same acts more efficiently. Perhaps more importantly, continued segregation leaves courts to give effect to the widely-held desire for greater clarity, coherence and simplicity in the law governing war crimes generally. Commentators, after all, are virtually unanimous that ‘there ought to be no distinction between the criminality of offenses committed in civil wars and those committed in interstate wars,’<sup>87</sup> and there is also increasing recognition that ‘[i]t makes more sense to categorize the different crimes from a substantive point of view.’<sup>88</sup>

At least in theory, jurisprudence could slowly achieve these desires, but allowing courts to create a new unified law governing war crimes risks violating fair trial rights, creating a body of

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<sup>85</sup> Sassòli and Olsen rightly point out that the grave breach of ‘compelling a protected person to serve in the forces of a hostile Power’ is conscription within a domestic conflict: M. Sassòli and L. Olson, ‘The Judgment of the ICTY Appeals Chamber on the Merits in the Tadić case’ 82 *IRRC* (2000), at 736. See also Fleck, *supra* note 28: ‘the different legal regulation of the two types of armed conflict which remains visible in the status of fighters, release of detainees, and use of public property belonging to an adverse party, thus finds a continued expression in the applicability of the grave breaches system in international, but not in non-international armed conflicts.’

<sup>86</sup> Final Aecord of the Diplomatic Conference of Geneva of 1949, vol. II section B, (Berne: Federal Political Department, 1949), at 87 (representative for Netherlands).

<sup>87</sup> Ratner p. 106

<sup>88</sup> Werle, p. 286.

international criminal law that only superficially corresponds with the underlying laws of war, and distorting understandings of an already overly-complicated discipline. The proliferation of courts prepared to hear these cases, and the inevitable fragmentation of interpretations risk substantiating Baxter's fears that 'the whole of the law of war ... is becoming too complex and too much a lawyer's providence.'<sup>89</sup> As we have seen, only assimilation of the various categories of war crimes within a new treaty regime adequately responds to these concerns. And although consolidating the laws of war within a single new treaty regime might seem politically ambitious, the shift is surely inevitable over the longer term. Admittedly, civilization has had to undergo tremendous humanitarian catastrophes in order to achieve regulatory advances of this magnitude in the past, but perhaps a spirit of frank criticism, open debate and political engagement in this generation might spare our sons and daughters a future that is as violent as our past.

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<sup>89</sup> R.R. Baxter, 'Humanitarian Law or Humanitarian Politics? The 1974 Diplomatic Conference on Humanitarian Law', 16 *Harvard Journal of International Law* (1975). Mégret makes the same point when he argues that 'le droit de la guerre a développé au fil des décennies une lexicographie de sa transgression qui n'a pas pour beaucoup contribué a sa claret': F. Mégret 'Les crimes de guerres' in G. Carlizzi, G. Della Morte and S. Laurenti (eds) *La Corte Penale Internazionale: Problemi e Prospettive* (Napoli: Vivarium, 2003), at 126.