

# The Grave Breaches Regime as Customary International Law

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## Abstract

*The Geneva Conventions were adopted 60 years ago. Today, they are universally ratified. Notwithstanding their universal adherence as treaty law, the customary nature of the provisions of the Geneva Conventions remains relevant. This article examines the claims that the Geneva Conventions, in general, are part of customary international law. Beyond this level of generality, it argues that the grave breaches regime is part of customary international law, including the definition of the grave breaches as well as the procedural rules governing grave breaches. The latter include the obligation to enact effective penal sanctions in domestic law and the obligation to search for and to try or extradite persons suspected of grave breaches on the basis of universal jurisdiction. The article argues that these rules are not simply 'technical' rules but are 'fundamental to the respect of the human person and [humanity]', a phrase used by the International Court of Justice when examining the customary nature of the Geneva Conventions.*

## 1. Introduction

In this article, the term 'grave breaches regime' refers to the definitions of grave breaches and to the 'procedural' rules governing grave breaches. As a matter of treaty law, this regime is set out in the Geneva Conventions of 1949 and has been further expanded in Additional Protocol I of 1977.<sup>1</sup> The grave

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1 Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949 (hereinafter 'First Geneva Convention', 'GC I'), Arts 49–50; Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949 (hereinafter 'Second Geneva Convention', 'GC II'), Arts 50–51; Convention relative to the Treatment of Prisoners of War, 12 August 1949

breaches of the Geneva Conventions have also been incorporated into the Statute of the International Criminal Court (ICC) as war crimes in international armed conflict over which the Court has jurisdiction.<sup>2</sup>

Today, 60 years after their adoption, the Geneva Conventions have been universally ratified. This means that the Conventions are binding on all states and in any armed conflict as a matter of treaty law. Nevertheless, the customary nature of the Conventions remains relevant. For example, while the Geneva Conventions can be denounced as treaty law, their rules would continue to apply to the extent that they are part of customary international law.<sup>3</sup> The denunciation clauses of the Conventions explicitly provide that denunciation 'shall in no way impair the obligations which the Parties to the conflict shall remain bound to fulfil by virtue of the principles of the law of nations, as they result from the usages established among civilized peoples [i.e. customary international law], from the laws of humanity and the dictates of the public conscience'.<sup>4</sup> This is one of the strengths of customary international law: it is created by 'extensive and virtually uniform' practice and, as a result, states cannot opt out unilaterally once a customary rule exists.<sup>5</sup> A change in a customary rule would require the emergence of a new customary rule, modifying the previous one, based in turn on extensive and virtually uniform practice to that effect. While it is possible to be a persistent objector during emergence of a customary rule, it is not possible to be a subsequent objector and opt out once a rule has crystallized.<sup>6</sup> In addition, it is possible that an armed conflict would occur in the future, similar to the armed conflict between Eritrea and Ethiopia from 1998 until 2000, in which a state or states are involved which is/are not a party to the Geneva Conventions. In such a case, the application of the Geneva Conventions as customary international law would remain relevant. Finally, the analysis of practice in order to assess the customary nature of the Geneva Conventions can also assist with the interpretation of the Conventions itself, as treaties have to be interpreted in the light of subsequent practice.<sup>7</sup>

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(hereinafter 'Third Geneva Convention', 'GC III'), Arts 129–130; Convention relative to the Protection of Civilian Persons in Time of War, 12 August 1949 (hereinafter 'Fourth Geneva Convention', 'GC IV'), Arts 146–147; Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977 (hereinafter 'Additional Protocol I', 'AP I'), Art. 85. For a history of the grave breaches regime, see the article by Yves Sandoz in this issue of the *Journal*.

2 ICCSt., Art. 8(2)(a).

3 See the denunciation clauses in GC I, Art. 63; GC II, Art. 62; GC III, Art. 142; GC IV, Art. 158 ('Each of the High Contracting Parties shall be at liberty to denounce the present Convention').

4 *Ibid.*

5 The requirement of 'extensive and virtually uniform' practice has been formulated by the ICJ: *North Sea Continental Shelf Cases*, Judgment, 20 February 1969, ICJ Reports (1969), at 42–43, §§ 73–74.

6 J.-M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law, Volume I: Rules* (Cambridge: Cambridge University Press, 2005), at xlv.

7 Vienna Convention on the Law of Treaties (VCLT) (1969), Art. 31(3)(b).

This contribution will look in particular at the grave breaches regime as customary international law. In doing so, it will try to answer the questions of whether (i) the Geneva Conventions and the grave breaches regime in general are part of customary international law; (ii) whether the definitions of the grave breaches are part of customary international law and (iii) whether the procedural rules applicable to grave breaches are part of customary international law.

## 2. The Geneva Conventions and the Grave Breaches Regime in General

Although the Geneva Conventions formally only represent treaty law, it is not excluded that such treaty law in fact codifies pre-existing customary norms. This is probably the case with the basic rules of the 1949 Geneva Conventions relating to the respect for and protection of the wounded, sick and shipwrecked, of medical personnel, units and transports, as well as prisoners of war, as these rules built upon earlier recognition of such rules.<sup>8</sup> To the extent that the Geneva Conventions set out 'new' rules, it is not excluded that they too can evolve into customary law over time. Indeed, it has long been recognized that treaty law can provide the blueprint for future behaviour and lay the foundation of the development of customary rules. In practice, the drafting of treaty norms helps to focus world legal opinion and has an undeniable influence on the subsequent behaviour and legal conviction of states. The International Court of Justice (ICJ) recognized these two forms of interaction between treaty law and customary law in its judgment in the *Continental Shelf* case when it stated that

It is of course axiomatic that the material of custom is to be looked for in the actual practice and *opinio juris* of States, even though multilateral conventions may have an important role to play in recording and defining rules deriving from custom, or indeed in developing them.<sup>9</sup>

The Court, thus, confirmed that treaties may codify pre-existing customary international law but may also lay the foundation for the development of new customs based on the norms contained in those treaties. It seems that the

8 With respect to the protection of the wounded and sick and medical personnel and units, see Convention for the Amelioration of the Condition of the Wounded in Armies in the Field (1864); Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field (1906) and Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field (1929). With respect to the protection of wounded, sick and shipwrecked, see Convention (III) for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention of 22 August 1864 (1899) and Convention (X) for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention (1907). With respect due to prisoners of wars, see Convention relative to the Treatment of Prisoners of War (1929).

9 *Continental Shelf Case (Libyan Arab Jamahiriya v. Malta)*, ICJ, Judgment, 3 June 1985, ICJ Reports (1985), at 29–30, § 27.

Geneva Conventions have done just that. As noted by the Eritrea–Ethiopia Claims Commission,

Moreover, treaties, like the Geneva Conventions of 1949, that develop international humanitarian law are, by their nature, legal documents that build upon the foundation laid by earlier treaties and by customary international law. These treaties are concluded for the purpose of creating a treaty law for the parties to the convention and for the related purpose of codifying and developing customary international law that is applicable to all nations. The Geneva Conventions of 1949 successfully accomplished both purposes.<sup>10</sup>

This statement was earlier made by the ICJ in the *Nicaragua* case.<sup>11</sup>

There are several considerations that support the conclusion that the Geneva Conventions, as such, are today part of customary international law. First among these is the fact that the Geneva Conventions have now been universally ratified. After its independence, Montenegro was the latest state to ratify the Geneva Conventions in August 2006. Hence, when the Geneva Conventions entered into force for Montenegro 6 months later, in February 2007, the applicability of the Geneva Convention became universal, with 194 states party.<sup>12</sup>

In the *North Sea Continental Shelf* cases, the ICJ considered the degree of ratification of a treaty to be relevant for the assessment of customary international law. In this case, the Court stated that ‘the number of ratifications and accessions so far secured [with respect to the 1958 Geneva Convention on the Continental Shelf which entered into force only in 1964 and which was ratified by 39 states at the time] is, though respectable, hardly sufficient’, especially in a context where practice outside the treaty was contradictory.<sup>13</sup> Conversely, in the *Nicaragua* case, the Court placed a great deal of weight, when assessing the customary status of the non-intervention rule, on the fact that the Charter of the United Nations was almost universally ratified.<sup>14</sup> It can even be the case that a treaty provision reflects customary law, even though the treaty is not yet in force, provided that there is sufficiently similar practice, including by specially affected states, so that there remains little likelihood of significant opposition to the rule in question.<sup>15</sup>

10 Partial Award, *Prisoners of War, Eritrea’s Claim 17*, Eritrea–Ethiopia Claims Commission (EECC), 1 July 2003, § 39 and Partial Award, *Prisoners of War, Ethiopia’s Claim 4*, EECC, § 30.

11 See *Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)*, ICJ, Judgment on Merits, 27 June 1986, ICJ Reports (1986), at 113, § 218 (‘the Geneva Conventions are in some respects a development, and in other respects no more than the expression of such principles [fundamental general principles of humanitarian law]’).

12 See <http://www.icrc.org/ihl> (last visited on 16 July 2009). The conclusion that the Conventions are currently ‘universally’ ratified does not preclude future ratifications by new states.

13 *North Sea Continental Shelf Cases*, *supra* note 5, at 42, § 73.

14 See *Case concerning Military and Paramilitary Activities in and against Nicaragua*, *supra* note 11, at 99–100, § 188. Another important factor in the decision of the Court was that relevant UN General Assembly resolutions had been widely approved, in particular Resolution 2625 (XXV) on friendly relations between states, which was adopted without a vote.

15 *Continental Shelf Case*, *supra* note 9, at 33, § 34. (The Court considered that the concept of an exclusive economic zone had become part of customary international law, even though the United Nations Convention on the Law of the Sea had not yet entered into force, because the

The Court has even gone so far as to state that 'it might be that, even without the passage of any considerable period of time, a very widespread and representative participation in [a] convention might suffice of itself, provided it included that of States whose interests were specially affected'.<sup>16</sup> The logical outcome of this reasoning would be that *a fortiori* the Geneva Conventions are part of customary law given that (i) a considerable period of time (60 years) has passed since their adoption and (ii) that *all* states are now party to the Conventions. This reasoning is supported by subsequent opinions of the ICJ and the Eritrea–Ethiopia Claims Commission.

In its advisory opinion on the threat or use of nuclear weapons in 1996, the ICJ relied on the broad accession to the Geneva Conventions to conclude their customary character, at a time when there were already 188 ratifications.<sup>17</sup> The Court also emphasized the fact that the denunciation clauses in the Conventions had never been used.<sup>18</sup> Earlier in the *Nicaragua* case, the Court had limited itself to declaring common Article 3 of the Geneva Conventions to be part of customary international law.<sup>19</sup>

More recently, in awards concerning claims related to the treatment of prisoners of war during the armed conflict between Eritrea and Ethiopia (1998–2000), the Eritrea–Ethiopia Claims Commission held that 'The mere fact that they [the Geneva Conventions] have obtained nearly universal acceptance supports this conclusion [that they "have largely become part of customary international law"]'.<sup>20</sup> At the time of the conflict, the Geneva Conventions were ratified by 190 states, but not by Eritrea which became a party in August 2000.

The work of the Ethiopia–Eritrea Claims Commission is a notable example of the relevance of the Geneva Conventions as customary international law. This Commission was set up after the end of the armed conflict between Ethiopia and Eritrea in 2000 to

decide through binding arbitration all claims for loss, damage or injury by one Government against the other, and by nationals (including both natural and juridical persons) of one party against the Government of the other party or entities owned or controlled by the other party that are (i) related to the conflict that was the subject of the Framework Agreement, the Modalities for its Implementation and the Cessation of Hostilities

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number of claims to an exclusive economic zone had risen to 56, which included several specially affected states.)

16 *North Sea Continental Shelf Cases*, *supra* note 5, at 42, § 73.

17 *Legality of the Threat or Use of Nuclear Weapons*, ICJ, Advisory Opinion, 8 July 1996, ICJ Reports (1996), 257, § 79.

18 *Ibid.*, at 258, § 82. The denunciation clauses are contained in GC I, Art. 63; GC II, Art. 62; GC III, Art. 142 and GC IV, Art. 158 ('Each of the High Contracting Parties shall be at liberty to denounce the present Convention.').

19 *Case concerning Military and Paramilitary Activities in and against Nicaragua*, *supra* note 11, at 113–114, § 218.

20 *Prisoners of War, Eritrea's Claim 17*, *supra* note 10, § 40 and *Prisoners of War, Ethiopia's Claim 4*, *supra* note 10, § 31.

Agreement, and (ii) result from violations of international humanitarian law, including the 1949 Geneva Conventions, or other violations of international law.<sup>21</sup>

As mentioned, during its armed conflict with Ethiopia, Eritrea was not a party to the Geneva Conventions. As a result, the Commission could rely on the Conventions only to the extent that they reflected customary international law. The Commission therefore decided that it would work on the assumption that the Geneva Conventions represented customary international law. However, if either party to the arbitration proceedings wished to challenge this assumption that party would have the burden of proof. With respect to prisoner-of-war claims, e.g., the Commission stated

Consequently, the Commission holds that the law applicable to this Claim is customary international law, including customary international humanitarian law, as exemplified by the relevant parts of the four Geneva Conventions of 1949. The frequent invocation of provisions of Geneva Convention III by both Parties in support of their claims and defenses is fully consistent with this holding. Whenever either Party asserts that a particular relevant provision of those Conventions should not be considered part of customary international law at the relevant time, the Commission will decide that question, and the burden of proof will be on the asserting Party.<sup>22</sup>

As Eritrea was not a party to Additional Protocol I either, the Commission also worked on the assumption that it too reflected customary international law, but in case of dispute concerning the customary nature of a rule of Additional Protocol I, the Commission would have the burden of proof.<sup>23</sup>

Second, in addition to the universal ratification of the Geneva Conventions, there is also ample state practice supporting the rules of the Conventions. Most acts and documents reflecting official state practice in the area of international humanitarian law, such as military manuals or national legislation, correspond with the rules in the Geneva Conventions.<sup>24</sup> As a result, there is ‘extensive and virtually uniform’ practice corresponding to the rules of the Geneva Conventions.<sup>25</sup> Hence, the Geneva Conventions are also customary based on actual practice, not merely because of their universal ratification. This conclusion is based on the assumption that the practice of states party to the Conventions counts towards the assessment of their customary nature.

21 Agreement between the Governments of the State of Eritrea and the Federal Democratic Republic of Ethiopia, Algiers, 12 December 2000, Art. 5(1).

22 *Prisoners of War, Eritrea's Claim 17*, *supra* note 10, § 41 and *Prisoners of War, Ethiopia's Claim 4*, *supra* note 10, § 32.

23 *Ibid.*

24 The only exception would be where a rule of the Geneva Conventions would have fallen into desuetude because it is no longer practiced or referred to, or where a practice or custom contrary to a rule in the Conventions has developed. The latter is arguably the case with the practice whereby National Societies of the Red Cross or Red Crescent can freely choose their denomination, as Red Cross or as Red Crescent, whereas Art. 38 of the First Geneva Convention foresees the use of the red crescent only in the case of countries ‘which already use as emblem, in place of the red cross, the red crescent’.

25 The requirements of ‘extensive and virtually uniform’ practice have been formulated by ICJ, see *supra* note 5, at 42–43, §§ 73–74.

If the opposite were true, i.e. if such practice would not count, it would be impossible to assess the customary nature of the Geneva Conventions as there are no states outside this treaty regime. This is quite a unique situation because there are few treaties with such a wide accession, but it shows that the so-called 'Baxter paradox' is just that, a paradox, not a formal obstacle to counting the practice of parties to a treaty as practice in support of the customary nature of the rules in that treaty.<sup>26</sup>

The above considerations do not attempt to answer the question of *when* the Geneva Conventions or the grave breaches regime in general have become part of customary international law. Arguments based on the universal ratification only would confirm the customary status at least in 2007 when universal ratification was achieved. However, as noted, the ICJ already concluded in July 1996 that they were customary when there were 188 ratifications and the Eritrea–Ethiopia Claims Commission concluded the same with respect to the armed conflict between Eritrea and Ethiopia at a time when there were 190 ratifications. As a result, it seems that there exist strong arguments that at least as early as July 1996 the Geneva Conventions were part of customary international law.<sup>27</sup>

### 3. The Definition of Grave Breaches

Today, grave breaches of international humanitarian law are defined in treaty law. However, some of the war crimes codified as grave breaches in the Geneva Conventions were probably already crimes under customary international law before the adoption of the Conventions in 1949. For example, the Charter of the Nuremberg Tribunal defined war crimes as 'violations of the laws and customs of war' and specified that

26 The so-called 'Baxter paradox' was formulated by Richard Baxter who observed in 1970 that 'It is only fair to observe that the proof of a consistent pattern of conduct by non-parties becomes more difficult as the number of parties to the instrument increases. The number of participants in the process of creating customary law may become so small that the evidence of their practice will be minimal or altogether lacking. Hence, the paradox that as the number of parties to a treaty increases, it becomes more difficult to demonstrate what is the state of customary international law *dehors* the treaty'. R.R. Baxter, 'Treaties and Custom', 129 *Recueil des Cours* (1970), at 64.

27 This was the result of a wave of 26 new ratifications in the early-1990s (Andorra (1993), Armenia (1993), Azerbaijan (1993), Bhutan (1991), Bosnia-Herzegovina (1992), Brunei Darussalam (1991), Croatia (1992), Czech Republic (1993), Estonia (1993), Georgia (1993), Kazakhstan (1992), Kyrgyzstan (1992), Latvia (1991), Lithuania (1996), Maldives (1991), Micronesia (1995), Moldova (1993), Myanmar (1992), Namibia (1991), Palau (1996), Slovakia (1993), Slovenia (1992), Tajikistan (1993), The former Yugoslav Republic of Macedonia (1993), Turkmenistan (1992) and Uzbekistan (1993)). The bulk of the ratifications occurred in the 1950s (74 ratifications) and 1960s (48 ratifications), with some in the 1970s (20 ratifications) and 1980s (20 ratifications). Since 2000, there have been an additional seven ratifications (Cook Islands, Eritrea, Marshall Islands, Montenegro, Nauru, Serbia and Timor-Leste).

Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.<sup>28</sup>

From the overlap of some of these war crimes with the grave breaches it must follow that at least some were considered part of customary international law, already in 1945.<sup>29</sup> With respect to the situation today, it is submitted that there can be no doubt that the substantive definitions of the grave breaches, as contained in the Geneva Conventions, are part of customary international law. This is so in the light of the considerations set out above concerning the customary nature of the Geneva Conventions, including in particular their universal ratification and the official state practice reflecting the definition of the grave breaches.<sup>30</sup>

Another development reflecting the acceptance of the grave breaches of the Geneva Conventions as customary international law is their inclusion in the Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY) and later in the Statute of the ICC.<sup>31</sup> The report of the UN Secretary-General submitted pursuant to the Security Council decision to establish the ICTY states that ‘the application of the principle *nullum crimen sine lege* requires that the international tribunal [ICTY] should apply rules of international humanitarian law which are beyond any doubt part of customary law so that the problem of adherence of some but not all States to specific conventions does not arise’.<sup>32</sup> Subsequently, the customary nature of the grave breaches has also been confirmed by the ICTY itself.<sup>33</sup> Finally, the inclusion of the

28 Charter of the International Military Tribunal for Germany, concluded by the Government of the United States of America, the Provisional Government of the French Republic, the Government of the United Kingdom of Great Britain and Northern Ireland, and the Government of the Union of Soviet Socialist Republics, acting in the interests of all the United Nations and by their representatives duly authorized thereto, annexed to the London Agreement, London, 8 August 1945, Art. 6(b). The Charter of the International Military Tribunal for the Far East, approved by an Executive Order, General Douglas MacArthur, Supreme Commander for the Allied Powers in Japan, Tokyo, 19 January 1946, amended on 26 April 1946, also defined war crimes as ‘violations of the laws or customs of war’ but contained no illustrative list of such violations.

29 See, e.g., the overlap between ‘murder’ and ‘plunder of public or private property, wanton destruction of cities, towns or villages or devastation not justified by military necessity’ in the Charter of the Nuremberg Tribunal and ‘wilful killing’ and ‘extensive destruction of property, not justified by military necessity and carried out unlawfully and wantonly’ as grave breaches of the Geneva Conventions.

30 See, e.g., the extensive list of national legislation referred to in Henckaerts and Doswald-Beck, *supra* note 6, at 574–575, fn. 35.

31 ICTYSt., Art. 2; ICCSt., Art. 8(2)(a).

32 UN Secretary-General, Report submitted pursuant to paragraph 2 of Security Council Resolution 808 (1993), UN Doc. S/25704, 3 May 1993, § 34.

33 Decision on the Defence Motion on Jurisdiction, *Tadić* (IT-94-1-T), Trial Chamber, 10 August 1995, § 52 (‘In the case of what are commonly referred to as “grave breaches”, this conventional law has become customary law ...’).

grave breaches in the ICC Statute is particularly relevant because when the Statute was negotiated, there was a 'general agreement that the definitions of crimes in the ICC Statute were to reflect existing customary international law, and not to create new law'.<sup>34</sup> The adoption of the Statute has generated additional state practice recognizing the grave breaches as war crimes.<sup>35</sup>

Therefore, it is submitted that the definition of the grave breaches in the 1949 Geneva Conventions has passed into customary international law. Whether the same can be said about all the grave breaches under Additional Protocol I require further research into state practice.<sup>36</sup> In particular, three grave breaches under Additional Protocol I are not included in the Statute of the ICC:

- (a) 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;<sup>37</sup>
- (b) unjustified delay in the repatriation of prisoners of war or civilians<sup>38</sup> and
- (c) practices of apartheid and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination.<sup>39</sup>

34 P. Kirsch, 'Foreword', in K. Dörmann (ed.), *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary* (Cambridge: Cambridge University Press, 2003), at xiii; see also Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol. I, Proceedings of the Preparatory Committee during March–April and August 1996, *UN General Assembly Official Records*, UN Doc. A/51/22, 13 September 1996, § 54.

35 See, e.g., Australia, An Act to facilitate compliance by Australia with obligations under the Rome Statute of the International Criminal Court, and for related purposes, Act No. 41 of 2002, assented to on 27 June 2002; Denmark, Act No. 342 of 16 May 2001 concerning the International Criminal Court; Finland, Act on the implementation of a legislative nature of the Rome Statute of the International Criminal Court and on the application of the Statute, Act No. 1284/2000; Germany, Act to Introduce the Code of Crimes against International Law, 26 June 2002; Netherlands, Act of 19 June 2003 containing rules concerning serious violations of international humanitarian law (International Crimes Act); New Zealand, International Crimes and International Criminal Court Act 2000, Act No. 26 of 2000, 6 September 2000; Norway, Act No. 65 of 15 June 2001 relating to the implementation of the Statute of the International Criminal Court of 17 July 1998 (the Rome Statute) in Norwegian Law; South Africa, Bill to provide for the incorporation of the Rome Statute of the International Criminal Court into South African law; the implementation and enforcement of the Rome Statute of the International Criminal Court in South Africa; cooperation with the International Criminal Court; the arrest of persons and their surrender to the International Criminal Court; and to provide for matters connected therewith, Bill No. 42 of 2001; United Kingdom, An Act to give effect to the Statute of the International Criminal Court; to provide for offences under the law of England and Wales and Northern Ireland corresponding to offences within the jurisdiction of that Court; and for connected purposes (Chapter 17), 11 May 2001.

36 It should be noted that, contrary to the GCs, AP I has not been universally ratified. At the time of writing, AP I was ratified by 168 states. For a continuous update, see <http://www.icrc.org/ihl> (last visited on 16 July 2009).

37 AP I, Art. 85(3)(c).

38 *Ibid.*, Art. 85(4)(b).

39 *Ibid.*, Art. 85(4)(c).

While it is generally accepted that all war crimes included in the ICC Statute are part of customary international law, this does not mean that the Statute exhaustively codified all war crimes under customary international law. In other words, there may still be war crimes under customary international law outside the Statute of the ICC. For example, in its commentary, the International Committee of the Red Cross (ICRC) study on customary international humanitarian law lists several war crimes in international armed conflict that are not, as such, set out in the Statute such as, e.g. 'collective punishments' and 'despoliation of the wounded, sick, shipwrecked or dead'.<sup>40</sup> It further lists several war crimes in non-international armed conflicts, not included in the ICC Statute such as 'making civilian objects the object of attack' and 'using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including by impeding relief supplies'.<sup>41</sup> Nevertheless, because the ICRC study lists these war crimes in its commentary only, and not as part of the black letter rules, additional research into practice in this area would be needed to confirm the customary nature of each of these war crimes.

The study of practice in this area is not only of interest to ascertain the customary nature of the rules or definitions concerned. It can also assist in the interpretation of treaty law itself, as treaties have to be interpreted in the light of subsequent practice.<sup>42</sup> Therefore, the ICRC has initiated a project, together with the British Red Cross, to update the practice underlying the ICRC study on customary international humanitarian law.<sup>43</sup> The future online publication of this update will greatly facilitate the analysis of practice in this area.

40 'Commentary to Rule 156', in Henckaerts and Doswald-Beck, *supra* note 6, at 586–590. The list includes: Slavery and deportation to slave labour; collective punishments; despoliation of the wounded, sick, shipwrecked or dead; attacking or ill-treating a *parlementaire* or bearer of a flag of truce; unjustifiable delay in the repatriation of prisoners of war or civilians; the practice of apartheid or other inhuman or degrading practices involving outrages on person dignity based on racial discrimination; launching an indiscriminate attack resulting in loss of life or injury to civilians or damage to civilian objects and launching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive incidental loss of civilian life, injury to civilians or damage to civilian objects.

41 *Ibid.*, at 597–603. The list includes: making civilian objects the object of attack; using prohibited weapons; launching an indiscriminate attack resulting in death or injury to civilians, or an attack in the knowledge that it will cause excessive incidental civilian loss, injury or damage; making non-defended localities and demilitarised zones the object of attack; using human shields; slavery; collective punishments and using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including by impeding relief supplies.

42 VCLT, Art. 31(3)(b).

43 See <http://www.icil.cam.ac.uk/projects/cihlproject.php> (last visited on 16 July 2009).

## 4. Procedural Rules Applicable to Grave Breaches

While some of the substantive aspects of the grave breaches were probably already part of customary international law in 1949, the development of the 'procedural' or 'technical' rules applicable to the grave breaches seems to have been possible only through the adoption of detailed provisions of treaty law.<sup>44</sup> Three procedural, technical rules will be looked at, in particular:

- (a) the obligation to enact effective penal sanctions;
- (b) the obligation to search and try or extradite and
- (c) the obligation to establish universal jurisdiction over grave breaches.

The question poses itself whether such procedural, technical rules of a treaty can become part of customary international law? It is often assumed that only the 'substantive' rules of a treaty can be part of customary international law, not the procedural or technical rules.

This question will be examined with respect to the three listed procedural, technical rules applicable to grave breaches in the Geneva Conventions.

### A. *Obligation to Enact Effective Penal Sanctions*

The first procedural, technical rule to be examined is the undertaking to 'enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention'.<sup>45</sup>

An argument against the customary nature of this obligation could be that this is a technical aspect of a treaty that cannot as such be part of customary international law. This argument would consider such a 'technical' treaty rule and other rules related thereto to operate like a 'self-contained' regime, only applicable within the context of that treaty. The term 'self-contained' is used here in the sense that a strict wall of separation would exist between the treaty rules in question and customary international law. However, is such a strict separation possible? And on what basis would the distinction be made between the 'substantive' rules that can become part of customary international law and the 'technical' rules that cannot be part of customary international law? The ICJ deduced the customary nature of the Geneva Conventions in general from the broad accession to the Conventions and considered that broad accession had been achieved because 'a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and "elementary considerations of humanity" as the Court put it in its judgment of 9 April 1949 in the *Corfu Channel* case'.<sup>46</sup> Hence, it seems

<sup>44</sup> GC I, Art. 49; GC II, Art. 50; GC III, Art. 129; GC IV, Art. 146.

<sup>45</sup> GC I, Art. 49(1); GC II, Art. 50(1); GC III, Art. 129(1); GC IV, Art. 146(1). For further discussion on the obligation to enact legislation, see the article by Knut Dörmann and Robin Geiß in this issue of the *Journal*.

<sup>46</sup> *Legality of the Threat or Use of Nuclear Weapons*, *supra* note 17, at 258, § 79.

that the Court did not consider each and every provision of the Geneva Conventions to be part of customary international law.

If this is true, it is suggested that a proper criterion, at least for treaties of international humanitarian law, to distinguish between rules that can become part of customary international law and those that cannot would be the ‘fundamental’ nature of the rule for ‘the respect of the human person and elementary considerations of humanity’. The result would be that technical rules, purely related to the operation of the treaty itself (‘self-contained’), would not be able to become part of customary international law, such as rules on the authenticity of different language versions or entry into force.<sup>47</sup> In application of such a distinction, it is submitted that the rule requiring states to enact effective penal sanctions is not a technical rule, purely related to the operation of the Geneva Conventions and ‘self-contained’ within the treaty regime of the Geneva Conventions. On the contrary, it is a rule that is ‘fundamental to the respect of the human person and [humanity]’ because it aims to prevent and punish the commission of grave breaches.

Obviously, the wording of such a customary rule would be slightly different from the treaty text. The customary rule would require, e.g., that ‘States enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of international humanitarian law’. Alternatively, this could be phrased more tersely as ‘States must implement the grave breaches of international humanitarian law in their domestic law’. Such a rule should apply in any regime that foresees crimes under international law, including war crimes and grave breaches, i.e. they must be implemented and impunity must be avoided as far as possible. A state’s obligation to implement a proper national legislative framework is, therefore, embedded within the concept of war crimes and *a fortiori* grave breaches.

Looking at it from another angle, this conclusion also flows from customary international law itself. Pursuant to customary international law, states have an obligation to investigate war crimes allegedly committed by their nationals or armed forces, or on their territory, and, if appropriate, prosecute the suspects.<sup>48</sup> In order to discharge this obligation, it is submitted that states need a proper legislative framework concerning war crimes, and *a fortiori* grave

<sup>47</sup> Examples of such technical rules could include the final provisions of the GCs, dealing with languages, signature, ratification, coming into force, relation to other conventions, accession, notification on accessions, immediate effect, denunciation and registration with the United Nations. See GC I, Arts 55–64; GC II, Arts 54–63; GC III, Arts 133–143; GC IV, Arts 150–159. This article leaves in the middle whether procedures established by treaty, such as the enquiry procedure in the GCs, or institutions created by treaty, such as the International Humanitarian Fact-Finding Commission created by AP I, can become part of customary international law. Concerning the enquiry procedure, see GC I, Art. 52; GC II, Art. 53; GC III, Arts 132; GC IV, Art. x. Concerning the International Humanitarian Fact-Finding Commission, see AP I, Art. 90. The same question applies to rules such as Art. 6 of the GC IV that defines the beginning and end of application of the Convention as treaty law and specifies that in the case of occupied territory, the application of the Convention ‘shall cease one year after the general close of military operations’.

<sup>48</sup> See Henckaerts and Doswald-Beck, *supra* note 6, Rule 158.

breaches, regardless of whether or not they are party to treaties requiring the adoption of war crimes legislation, such as the Geneva Conventions and Additional Protocol I.<sup>49</sup>

A question that can be raised is whether specific legislation is necessary to give effect to this requirement, or whether ordinary criminal law would be sufficient? It is probably too early to draw definitive conclusions but recent developments seem to indicate that states tend to adopt specific legislation.<sup>50</sup> This is often the outcome of ratification of the ICC Statute, but not always.<sup>51</sup> Under the principle of complementarity, the ICC will only prosecute a suspect if the state concerned is either unable or unwilling to do so.<sup>52</sup> In order for a state to show that it is able to prosecute suspected war criminals, it will be required to have proper war crimes legislation. Also, the fact that the UN Security Council can refer situations to the Court,<sup>53</sup> including situations in states, which are not party to the Statute, implies that all states are potentially concerned by the jurisdiction of the ICC. Therefore, all states should adopt national war crimes legislation, regardless of whether or not they are a party to a specific treaty, including the ICC Statute. While this could thus be said to be purely the impact of treaty law, it should be emphasized that the ICC Statute does not require the adoption of national legislation.

The focus on grave breaches in this article should not detract, however, from the requirement to 'suppress' all violations of the Geneva Conventions, and not just the grave breaches.<sup>54</sup> This implies that states should equally provide adequate penal sanction for violations of the Conventions other than grave breaches, at least those that would be considered war crimes under customary international law.<sup>55</sup> These would include, e.g., the prohibition to use civilians as human shields, collective punishments, measures of intimidation and of terrorism, pillage and reprisals against persons and property protected by the Fourth Geneva Convention.<sup>56</sup>

49 See also J.-M. Henckaerts, 'The Development of International Humanitarian Law and the Continued Relevance of Custom', in H.M. Hensel (ed.), *The Legitimate Use of Military Force: The Just War Tradition and the Customary Law of Armed Conflict* (Aldershot: Ashgate Publishing, 2008), at 128.

50 See, e.g., the examples of legislation referred to *supra* note 35.

51 See, e.g., Armenia, Criminal Code, adopted on 18 April 2003; Rwanda, Law No. 33 bis/2003 repressing the crime of genocide, crimes against humanity and war crimes. At the time of the adoption of these laws, as well as at the time of writing, neither Armenia nor Rwanda is a party to the ICCSt.

52 ICCSt., Art. 17.

53 *Ibid.*, Art. 13(b).

54 According to *Black's Law Dictionary* (5th edn., West Publishing, 1979), 'suppress' means 'to put a stop to a thing actually existing; to prohibit, put down; to prevent, subdue, or end by force'.

55 See Henckaerts and Doswald-Beck, *supra* note 6, Rule 156 which defines war crimes under customary international law as 'serious violations of international humanitarian law'. The commentary to this rule states that a violation is considered serious if the conduct endangers protected persons or objects or if the conduct breaches important values: *Ibid.*, at 569–570.

56 See GC IV, Arts 28 and 33.

## B. *Obligation to Search For and Try or Extradite*

Second, pursuant to the Geneva Conventions, each of the High Contracting Party 'shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts'. Alternatively, '[such High Contracting Party] may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a *prima facie* case'.<sup>57</sup> This is an obligation to search for suspects, followed by a further obligation to try or extradite suspects on the basis of universal jurisdiction. The latter obligation has two aspects: the obligation to try or extradite and the principle of universal jurisdiction, which will be examined separately below.

The Special Rapporteur of the International Law Commission on the topic of the obligation to extradite or prosecute (*aut dedere aut judicare*), Professor Galicki notes that there is a large and growing number of scholars supporting 'the concept of an international legal obligation "*aut dedere aut judicare*" as a general duty based not only on provisions of particular international treaties but also on generally binding customary norms, at least as it concerns certain categories of crimes'.<sup>58</sup> It is submitted, in agreement, that this category of crimes would include at least the most serious crimes under international law, including war crimes and *a fortiori* grave breaches. This conclusion also seems to be supported by some states in their comments on the work of the International Law Commission.<sup>59</sup> China, e.g., stated that while the obligation to try or extradite stems from treaty law, it might become an obligation under customary international law if the crime to which it is applied is 'a crime under the customary law universally acknowledged by the international community'.<sup>60</sup> Sweden, on behalf of the Nordic countries, considered that the obligation to try or extradite was already part of customary international law, or was acquiring customary status, with regard to crimes such as genocide,

57 GC I, Art. 49(2); GC II, Art. 50(2); GC III, Art. 129(2); GC IV, Art. 146(2).

58 International Law Commission, Preliminary report on the obligation to extradite or prosecute ('*aut dedere aut judicare*') by Mr Zdzislaw Galicki, Special Rapporteur, UN Doc. A/CN.4/571, 7 June 2006, § 40 (referring to M. Cherif Bassiouni and E.M. Wise, *Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law* (Dordrecht/Boston/London: Martinus Nijhoff Publishers, 1995); N. Roht-Arriaza, 'State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law', 78 *California Law Review* (1990), at 466; M. Henzelin, *Le principe de l'universalité en droit pénal: droit et obligation pour les Etats de poursuivre et juger selon le principe de l'universalité* (Bâle/Genève/Munich: Helbing and Lichtenhahn, Bruxelles: Bruylant, 2000); and to C. Enache-Brown and A. Fried, 'Universal Crime, Jurisdiction and Duty: The Obligation of *Aut Dedere Aut Judicare* in International Law', 43 *McGill Law Journal* (1998), at 628–629.

59 See International Law Commission, Third report on the obligation to extradite or prosecute (*aut dedere aut judicare*) by Zdzislaw Galicki, Special Rapporteur, UN Doc. A/CN.4/603, 10 June 2008, § 98.

60 See Statement by China before the Sixth Committee of the UN General Assembly, 1 November 2007, UN Doc. A/C.6/62/SR.22, 4 December 2007, § 62.

crimes against humanity and war crimes. In doing so, Sweden referred to the adoption of the ICC Statute as a reflection of 'the practical commitment of States to ending impunity for those crimes' and which was built on the principle of complementarity.<sup>61</sup> It should also be noted that the ICRC study on customary international humanitarian law in 2005 found that the obligation to investigate alleged war crimes and to prosecute the suspects was part of customary international law.<sup>62</sup> This conclusion would apply *a fortiori* to the grave breaches under the Geneva Conventions.

Furthermore, the considerations set out in the previous section concerning the customary nature of the 'technical' rule requiring the enactment of effective penal sanctions apply *mutatis mutandis* to the obligation to search and try or extradite. The obligation to search and try or extradite persons suspected of grave breaches is not a purely technical aspect of the Geneva Conventions. It is submitted that is fundamental for the protection of the human person and, as such, has become part of customary international law through extensive and virtually uniform practice, including universal ratification of the Geneva Conventions. It is also inherent in the recognition of the grave breaches as crimes under international law that states must act to ensure that suspects do not enjoy impunity. As stated by Professor Schabas, 'The result of the recognition of an offence as an international crime is that it imposes duties upon States with respect to investigation, prosecution and extradition. This is sometimes expressed with the Latin expression *aut dedere aut iudicare*'.<sup>63</sup>

A development in this area is what may be called a 'third alternative', in addition to prosecution by national courts or extradition to a third State. This 'alternative' consists in the surrender for trial by an international or 'mixed' court or tribunal.<sup>64</sup> Practice shows that states may discharge their obligation to investigate war crimes and prosecute the suspects by setting up international or mixed tribunals to that effect, a fact commented upon in military manuals, national case law and official statements.<sup>65</sup> This is evidenced in particular by the creation of the International Military Tribunals at Nuremberg and at Tokyo after the Second World War and, more recently, by the establishment by

61 See Statement by Sweden, *ibid.*, § 33.

62 Henckaerts and Doswald-Beck, *supra* note 6, at 607–610.

63 W. Schabas, *The UN Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone* (Cambridge: Cambridge University Press, 2008), at 158.

64 See also the term 'triple alternative' used by the International Law Commission, *supra* note 58, §§ 52–54.

65 This part is taken from Henckaerts and Doswald-Beck, *supra* note 6, at 610. See the military manuals of Argentina (cited in 'Chapter 44', J.-M. Henckaerts and L. Doswald-Beck (eds), *Customary International Humanitarian Law, Volume II: Practice* (Cambridge: Cambridge University Press, 2005), § 355), Australia (*ibid.*, § 144), France (*ibid.*, § 148) South Korea (*ibid.*, § 149), Switzerland (*ibid.*, §§ 156 and 381), United Kingdom (*ibid.*, § 157), United States (*ibid.*, §§ 159–160 and 369) and Yugoslavia (*ibid.*, §§ 162 and 388); United Kingdom, House of Lords, *Pinochet Extradition case* (Opinion of Lord Phillips of Worth Matravers) (*ibid.*, §§ 270); United States, Military Tribunal at Nuremberg, *Altstötter (The Justice Trial) case* (*ibid.*, § 272); statements of Egypt (*ibid.*, § 613), Iran (*ibid.*, § 613), Pakistan (*ibid.*, § 613), Saudi Arabia (*ibid.*, § 613), Senegal (*ibid.*, § 613), Turkey (*ibid.*, § 613) and United Kingdom (*ibid.*, § 287).

the UN Security Council of the ICTY and for Rwanda. The Special Court for Sierra Leone and the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea were established pursuant to an agreement between the United Nations and Sierra Leone and Cambodia, respectively. The ICC is the first international tribunal to be established by an international treaty, which bears no relation to war crimes committed in a specific armed conflict. The statutes of the ICC, of the ICTY and of the Extraordinary Chambers for Cambodia expressly include within their jurisdiction the grave breaches under the Geneva Conventions.<sup>66</sup>

### C. *Obligation to Establish Universal Jurisdiction*

Pursuant to the Geneva Conventions, each of the High Contracting Party 'shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, *regardless of their nationality*, before its own courts'.<sup>67</sup> The qualifier 'regardless of their nationality' has been interpreted as requiring that states must exercise universal jurisdiction over grave breaches and, therefore, that they must vest universal jurisdiction in their courts over grave breaches, including through the adoption of appropriate legislation.<sup>68</sup>

While the concept of *aut dedere aut judicare* and the concept of universal jurisdiction are related, the two concepts are distinct and should not be confused.<sup>69</sup> The grave breaches regime of the Geneva Conventions links the two concepts by requiring that states exercise the duty to try or extradite *on the basis of universal jurisdiction*.

It has long been recognized that under customary international law, states have the right to vest universal jurisdiction in their courts over war crimes.<sup>70</sup> This right in no way diminishes the obligation existing under the Geneva Conventions to vest universal jurisdiction over grave breaches.<sup>71</sup> This is not optional, but obligatory. Numerous states have given effect to this obligation in their legislation.<sup>72</sup> Several suspected war criminals have been prosecuted

66 ICCSt., Art. 8(2)(a); ICTYSt., Art. 2; Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea, as adopted by the National Assembly on 2 January 2001, approved by the Senate on 15 January 2001 and promulgated on 10 August 2001, Art. 6.

67 GCI, Art. 49(2); GCII, Art. 50(2); GCIII, Art. 129(2); GCIV, Art. 146(2) (emphasis added).

68 See, e.g., Y. Sandoz, C. Swinarksi and B. Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Geneva: ICRC and Martinus Nijhoff Publishers, 1987), § 3403.

69 See, e.g., Amnesty International, *Universal Jurisdiction: The Duty of States to Enact and Implement Legislation*, London, September 2001, at 11; International Law Commission, *supra* note 58, §§ 31–34; Schabas, *supra* note 63, at 158.

70 Henckaerts and Doswald-Beck, *supra* note 6, at 604–605, Rule 157.

71 This part is taken from *ibid.*, at 606–607.

72 For example, the legislation of the following countries is based on, or refers to, the grave breaches regime of the GCs (and AP I where applicable): Australia (cited in 'Chapter 44',

for grave breaches on the basis of universal jurisdiction.<sup>73</sup> Furthermore, the considerations set out in the first section concerning the customary nature of the 'technical' rule requiring the enactment of effective penal sanctions apply *mutatis mutandis* to the obligation to establish universal jurisdiction. The obligation to establish universal jurisdiction over the grave breaches is not a purely technical aspect of the Geneva Conventions. This obligation is fundamental for the protection of the human person as it seeks to avoid safe havens for persons suspected of grave breaches. Its primary purpose is thus to combat impunity for grave breaches. On the basis of the existing state practice, including the universal ratification of the Geneva Conventions and the consideration that this is a 'fundamental' rule of the Geneva Convention, it is submitted that it too reflects customary international law.

In addition to the Geneva Conventions, a number of other treaties oblige states party to provide for universal jurisdiction over certain crimes, including when they take place during armed conflict. These are, in particular, the Convention against Torture, the Inter-American Convention on Forced Disappearances, the Convention on the Safety of UN Personnel and the Second Protocol to the Hague Convention for the Protection of Cultural Property.<sup>74</sup>

Practice is not uniform with respect to whether the principle of universal jurisdiction requires a particular link to the prosecuting state.<sup>75</sup> The requirement that some connection exist between the accused and the prosecuting state, in particular that the accused be present in the territory or has fallen into the hands of the prosecuting state, is reflected in the military manuals, legislation and case law of many states.<sup>76</sup> There is also legislation and case

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Henckaerts and Doswald-Beck, *supra* note 65, § 166), Austria (*ibid.*, § 167), Azerbaijan (*ibid.*, § 168), Bangladesh (*ibid.*, § 169), Barbados (*ibid.*, § 170), Belarus (*ibid.*, § 171), Belgium (*ibid.*, § 172), Botswana (*ibid.*, § 174), Bulgaria (*ibid.*, § 175), Canada (*ibid.*, § 176), Cook Islands (*ibid.*, § 181), Cuba (*ibid.*, § 184), Cyprus (*ibid.*, §§ 185–186), Denmark (*ibid.*, § 187), Finland (*ibid.*, § 191), France (*ibid.*, § 194), Germany (*ibid.*, § 197), Guatemala (*ibid.*, § 199), Israel (*ibid.*, § 203), Kenya (*ibid.*, § 204), Luxembourg (*ibid.*, § 209), Malawi (*ibid.*, § 210), Malaysia (*ibid.*, § 211), Mauritius (*ibid.*, § 212), New Zealand (*ibid.*, § 216), Nigeria (*ibid.*, § 220), Papua New Guinea (*ibid.*, § 221), Paraguay (*ibid.*, § 222), Poland (*ibid.*, § 223), Russia (*ibid.*, § 224), Seychelles (*ibid.*, § 226), Singapore (*ibid.*, § 227), Spain (*ibid.*, § 229), Switzerland (*ibid.*, § 233), Uganda (*ibid.*, § 236), United Kingdom (*ibid.*, § 237), Vanuatu (*ibid.*, § 244) and Zimbabwe (*ibid.*, § 245).

73 See, e.g., *Sarić*, Denmark, High Court (*ibid.*, § 251); *Djajić*, Germany, Supreme Court of Bavaria (*ibid.*, § 254); *Jorgić*, Germany, Higher Regional Court of Düsseldorf (*ibid.*, § 255); *Sokolović*, Germany, Higher Regional Court of Düsseldorf (*ibid.*, § 256); *Kusljic*, Germany, Supreme Court of Bavaria (*ibid.*, § 257); *Eichmann*, Israel, District Court of Jerusalem and Supreme Court (*ibid.*, §§ 243–244); *Grabež*, Switzerland, Military Tribunal at Lausanne (*ibid.*, § 252).

74 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Art. 5; Convention on the Safety of United Nations and Associated Personnel, Art. 10; Inter-American Convention on the Forced Disappearance of Persons, Art. 4 and Second Protocol for the Protection of Cultural Property in the Event of Armed Conflict, Art. 16(1).

75 This part is taken from Henckaerts and Doswald-Beck, *supra* note 6, at 605–606.

76 See the military manuals of Canada (cited in 'Chapter 44', Henckaerts and Doswald-Beck, *supra* note 65, § 146), Ecuador (*ibid.*, § 147), Netherlands (*ibid.*, § 151), New Zealand (*ibid.*, § 152) and United States (*ibid.*, § 161); the legislation of Australia (*ibid.*, § 165), Bosnia and Herzegovina

law, however, that does not require such a link.<sup>77</sup> Importantly, the Geneva Conventions do not require such a link either.

In 2000, the Democratic Republic of the Congo instituted proceedings before the ICJ challenging an international arrest warrant issued by a Belgian judge against the Congolese Minister of Foreign Affairs. In its pleadings before the Court in 2001, the Democratic Republic of the Congo did not object in principle to the existence of states' right to vest universal jurisdiction in their national courts over war crimes, but argued that the indicted person needed to be in the territory of the state exercising such jurisdiction. The judgement of the ICJ turned on the question of immunity of heads of state and foreign ministers and, therefore, no decision was taken on the extent of universal jurisdiction. In their separate and dissenting opinions, the judges were divided on the issue of whether universal jurisdiction could be exercised when the accused was not present in the territory of the prosecuting state, but the majority did not contest the right to try a suspected war criminal on the basis of universal jurisdiction.<sup>78</sup>

## 5. Conclusion

This article has argued that the definitions of the grave breaches are now part of customary international law. This means that the crimes defined as grave breaches are also crimes under customary international law. It has further argued that the 'procedural' or 'technical' rules applicable to the grave breaches are part of customary international law, based on extensive and virtually uniform practice, as well as the universal ratification of the Geneva Conventions. It has been argued that these rules are not simply 'technical' rules but are 'fundamental to the respect of the human person and [humanity]', a phrase used by the ICJ.<sup>79</sup> In considering the customary nature of the Geneva Convention, the Court even went so far as to conclude that a great many rules of humanitarian law applicable in armed conflict codified in the Geneva Conventions

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(*ibid.*, §173), Canada (*ibid.*, §§ 177–178), Colombia (*ibid.*, § 180), France (*ibid.*, §§ 194–195), Germany (*ibid.*, § 196), India (*ibid.*, § 201), Switzerland (*ibid.*, §§ 232–233), United Kingdom (*ibid.*, §§ 239–240) and United States (torture) (*ibid.*, § 242); *Finta*, Canada, High Court of Justice (*ibid.*, § 250); *Javor* (torture), France, Tribunal de Grande Instance de Paris (*ibid.*, § 252); *Djajić*, Germany, Supreme Court of Bavaria (*ibid.*, § 254); *Jorgić*, Germany, Higher Regional Court at Düsseldorf (*ibid.*, § 255); *Kusljic*, Germany, Supreme Court of Bavaria (*ibid.*, § 257); *Rohrig and Others*, Netherlands, Special Court of Cassation (*ibid.*, § 263).

77 For explicit references to the possibility of commencing (extradition) proceedings against a suspected war criminal who is not present in the territory of the prosecuting State, see the legislation of Canada (*ibid.*, § 176), Luxembourg (*ibid.*, §§ 207–209) and New Zealand (*ibid.*, §§ 217); *Sokolović*, Germany, Higher Regional Court at Düsseldorf (*ibid.*, § 256); *Demjanjuk*, United States, Court of Appeals (*ibid.*, § 273).

78 Case concerning the Arrest Warrant issued against the Minister for Foreign Affairs of the Democratic Republic of the Congo by a Belgian Court (*Democratic Republic of the Congo v. Belgium*), Judgment of 14 February 2002, ICJ Reports (2002), at 3, summarized in *ibid.*, § 305.

79 See *supra* note 46 and accompanying text.

are so fundamental to the respect of the human person that they constitute 'intransgressible principles of international customary law', in other words, *jus cogens*.<sup>80</sup> However, the identification of the rules of international humanitarian law that are part of *jus cogens* is a task that still remains to be done, 60 years after the adoption of the Geneva Conventions.

80 *Legality of the Threat or Use of Nuclear Weapons*, *supra* note 17, at 257–258, § 79 ('It is undoubtedly because a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and 'elementary considerations of humanity' as the Court put it in its Judgment of 9 April 1949 in the Corfu Channel case (ICJ Report 1949, p. 22), that the Hague and Geneva Conventions have enjoyed a broad accession. Further, these fundamental rules are to be observed by all states whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law').