

'GRAVE BREACHES' AS WAR CRIMES: MUCH ADO ABOUT ... 'SERIOUS VIOLATIONS'?

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Abstract: *In the literature and jurisprudence of international humanitarian law, there is a tendency to view 'grave breaches' as a special genus of international violations. With this special treatment comes the concomitant temptation to suggest that they are violations which merit recognizance only in international armed conflicts, to the exclusion of non-international armed conflicts. As this paper suggests, there is reason to question these views.*

Introduction

This is an essay about 'grave breaches' and 'serious violations', two phrases often encountered in discussions on war crimes. Purely from the perspective of imagery and the 'optics' of sound, 'grave breaches' is arguably larger than 'serious violations'. 'Grave breaches' has an ominously rumbling feel about it. It evokes the imagery of a big, bad, g-g-r-r-r-owling b-r-rute rolling by and bringing certain death and interment to its victims. 'Serious violations', on the other hand, does not sound and feel quite as bad. It arguably has a cleaner, more sophisticated, mellifluous, feel about it—much like a fine French phrase: 'serious violations'.

But do these phonological notes about the two phrases also resonate in the epistemology of the phrases? International lawyers with greater familiarity of the two notions will likely, at first, think not. And, most assuredly, there is nothing clean, fine or sophisticated about 'serious violations'. The etymology of its words is not even French.

The answer, alas, may not be as certain regarding the intendment of a difference in meaning between the two phrases. Those likely to say, at first, that there is no intended difference in meaning will probably pause in their tracks to wonder why it was that the drafter would employ the formulation 'grave breach ... or other serious violation' in article 90(2)(c)(i) of the 1977 Additional Protocol I to the Geneva Conventions of 1949.¹

There are, however, those who might find themselves constrained to discover a difference in meaning between the two phrases. They are likely those who subscribe to the doctrine that the two phrases operate in different spheres of armed conflicts. Therefore, there must be some purpose to the difference. But the members of this school of thought will also likely pause in their tracks

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¹ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I). It should perhaps be noted that this is the only place in the entire GC 1949 system where such a formulation occurs. In fact, 'serious violations' never appears in the main Geneva Conventions, although, as will be seen later, 'grave breaches' does appear there.

when asked why precisely it could be that exactly the same act will be described differently—with possibly different connotations in the sense of somberness—if committed in different spheres of armed conflicts. That is to say, why would rape amount to a ‘grave breach’ when a soldier committed it in the war between Ethiopia and Eritrea (an international armed conflict), but a rape committed by a soldier fighting in the Libyan civil war will not amount to a ‘grave breach’? The aim of this essay is to explore these seemingly difficult questions.

Defining ‘War Crimes’

The current accepted definition of ‘war crimes’ as a generic concept is serious violations of the laws or customs of international or internal armed conflicts, committed in the course of an armed conflict in circumstances that require criminal punishment of the culprit. Although the modifier ‘serious’ often accompanies the modern *description* of the violations that are considered war crimes,² that modifier in itself must not be viewed as a magic beacon that illumines a particular conduct as fit to be described as a war crime. It is rather the very characterisation of a violation as ‘serious’ that is the objective to be discovered in the process of identifying a war crime. At the end of that process, any violation which is identified is said to be ‘serious’, thus qualifying as a war crime; provided that the conduct is also intended to be punished by the sanctions of criminal law. The question thus arises: What is it that *makes conduct* a serious violation so that it is a war crime? The answer is this. Violations of the laws and customs of war are considered serious if (a) they endanger protected persons or objects or they breach important values;³ and (b) they are committed willfully⁴—in the sense of intentionally or in reckless

² See article 8 of the ICC Statute, article 2 of the ICTY Statute, article 4 of the ICTR Statute, article 3 of the SCSL Statute and s 6.1 of Regulation 2000/15 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences (in East Timor), Doc No UNTAET/REG/2000/15 of 6 June 2000. Although article 3 of the ICTY Statute does not employ the term ‘serious violation’ or ‘grave breaches’ (as in article 2) to describe the violations therein listed, the Appeal Chamber of that Tribunal has, nevertheless, interpreted the provision as requiring the element of seriousness. As the ICTR Appeals Chamber observed to steal a loaf of bread in an occupied territory does not make a war criminal out of a member of the occupying force: in *Tadić (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction)* dated 2 October 1995, Case No IT-94-1-AR/72 [ICTY Appeals Chamber] para 94.

³ See *Tadić (Decision on Interlocutory Appeal on Jurisdiction)*, *supra*, [ICTY Appeals Chamber] para 94 (‘the violation must be “serious”, that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim.’) See also ICRC, *Customary International Humanitarian Law*, vol I: Rules [Cambridge: Cambridge University Press, 2005] p 569.

⁴ Article 11(4) of the 1977 Additional Protocol I of the Geneva Conventions defines provides as follows: ‘Any wilful act or omission which seriously endangers the physical or mental health or integrity of any person who is in the power of a Party other than the one on which he depends and which either violates any of the prohibitions in paragraphs 1 and 2 or fails to comply with the requirements of paragraph 3 shall be a grave breach of this Protocol.’ The same notion of wilfulness of the violation is repeated in article 85(3) and 85(4) of the same protocol; articles 12 and 50 of the 1st Geneva Convention 1949; articles 12 and 51 of the 2nd Geneva Convention 1949; article 130 of 3rd Geneva Convention 1949; article 147 of the 4th Geneva Convention 1949.

disregard of their outcome as endangering protected persons or objects or their breach of important values.⁵ The former is the *actus reus* of the crime and latter is the *mens rea*.

The decision maker is, of course, largely spared this voyage of discovery if an international instrument has already identified a given conduct as a war crime. The prosecutors and judges of the International Criminal Court enjoy this benefit of a ready-made solution to the problem, because their Statute provides, in article 8(2), an apparently closed and lengthy catalogue of all the imaginable conducts fit to be described as war crimes.

Not all decision makers, however, enjoy the luxury—or hamstring, depending on how you see the matter—of a ready-made solution. The prosecutors and judges of the International Criminal Tribunals for Rwanda and for the former Yugoslavia, as well as of the Special Court for Sierra Leone, are among those who may, from time to time, embark upon the voyage of discovery of what is a serious violation of the laws and customs of war. This is because their statutes provide the lists of war crimes in the non-exhaustive formulation of ‘these violations shall include, but shall not be limited to ...’.⁶ The provisions thus permit the lists to be augmented from other sources of international humanitarian law. The notion of *seriousness* in relation to the violations qualifying as war crimes thus assumes particular significance, given the general view that international humanitarian law exists in general international law beyond the written codes of international humanitarian law.⁷

‘Serious Violations’ and ‘Grave Breaches’

An occasional by-product of the analysis of war crimes is the controversy surrounding an understanding and application of the term ‘grave breaches’ of the Geneva Conventions of 1949 on the laws and customs of war. The notion of ‘grave breaches’ was introduced into the Geneva Conventions of 1949 under the heading ‘Repression of Abuses and Infractions’ (of the Conventions). It began with article 49 of the First Convention which provides as follows:

The High Contracting Parties undertake 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 defined in the following Article.

⁵ See ICRC, *Customary International Humanitarian Law*, vol I: Rules, *supra*, p 574.

⁶ See article 4 of the ICTR Statute, article 3 of the ICTY Statute, article 3 of the SCSL Statute.

⁷ See *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* [1986] ICJ 14 [ICJ] para 218; *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] 1 ICJ Rep 226 [paras 79–82]; *Tadić (Decision on Interlocutory Appeal on Jurisdiction)*, *supra*, [ICTY Appeals Chamber] para 94; *Prosecutor v Delalić (Judgment)*, dated 16 November 1998, Case No IT-96-21-T [ICTY Trial Chamber] para 303; Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (3 May 1993), UN Doc S/25704 para 35; *Ethiopia v Eritrea (Prisoners of War—Ethiopia’s Claim 4) Partial Award*, 1 July 2003 [Eritrea-Ethiopia Claims Commission] para 31. See also ICRC, *Customary International Humanitarian Law*, vol I: Rules [Cambridge: Cambridge University Press, 2005] p 572; and Cassese, *International Criminal Law* [Oxford: Oxford University Press, 2003] p 47.

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

Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches defined in the following Article.

In all circumstances, the accused persons shall benefit by safeguards of proper trial and defence, which shall not be less favourable than those provided by Article 105 and those following of the Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949.

The same provision appears in identical terms in article 50 of the Second Convention, article 129 of the Third Convention and article 146 of the Fourth Convention. The stated aim of this common provision was to suppress ‘abuses and infractions’ of the Geneva Conventions. The two primary methods employed to achieve this aim were: (a) requiring States Parties, through their undertakings, to proscribe such abuses and infractions in their domestic criminal codes; and (b) obligating States Parties to search for—and prosecute culprits found therein, under a regime of conditional universal jurisdiction, or to extradite the culprits to other States Parties with sufficient jurisdictional links to the violations.

Having required States to do these things in order to suppress ‘abuses or infractions’ of the Geneva Conventions, it became necessary to define the sort of ‘abuses or infractions’ intended to be suppressed. That was done in the next provision, typified by article 50 of the First Convention that states as follows:

Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

The same provision appears in the same terms in all the four Geneva Conventions of 1949, with necessary variation made after the sentence ‘wilfully causing great suffering or serious injury to body or health’, so as to meet the special aims of each particular Convention.⁸

These specific catalogues of grave breaches were further collated from the Geneva Conventions and restated in article 2 of the Statute of the International Criminal Tribunal for the former Yugoslavia, for purposes of

⁸ Article 51 of the Second Convention is identical with article 50 of the First Convention. But article 130 of the Third Convention ends with ‘compelling a prisoner of war to serve in the forces of the hostile Power, or wilfully depriving a prisoner of war of the rights of fair and regular trial prescribed in this Convention’; and article 147 of the Fourth Convention ends with ‘unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.’

defining the jurisdiction of that Tribunal. One notes the specific reference to ‘grave breaches’ in the provision which reads as follow:

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

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

Another war crimes provision is made in article 3 of the ICTY Statute. But this refers not to ‘grave breaches’ but merely to ‘violating the laws or customs of war.’ Although article 3 does not say ‘serious’,⁹ the Appeals Chamber of the ICTY has, by the reasoning process of necessary implication, interpreted article 3 as importing the concept of ‘serious violations’, since the notion of war crimes has been judicially interpreted in the *Tadić* case as relating only to serious violations.¹⁰

As the general tenor of this essay will reveal, it is submitted that the failure of the drafters of article 3 of the ICTY Statute to employ the modifier ‘serious’ might not have been an accidental omission. To the contrary, this might have been a deliberate omission, in order to distinguish article 2 (which refers to ‘grave breaches’) from article 3 (which does not refer to ‘grave breaches’). This proposition is particularly borne out by the submission (made below) that the word ‘grave’ is a synonym for the word ‘serious’. Therefore, any intended distinction might have appeared contrived had the drafters employed the words ‘grave’ (as they did in article 2) and ‘serious’ (as the judges in *Tadić* would have preferred) in relation to article 3: hence, the decision not to employ the word serious in the latter provision. It is arguable indeed that the drafters might have been wrong in their assumptions, if they had deliberately chosen not to employ the modifier ‘serious’ in article 3. But such an argument may, as will be seen later, not easily warrant a judicial reading in of ‘serious’ in

⁹ Article 3 provides as follows: ‘The International Tribunal shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, but not be limited to: (a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering; (b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity; (c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings; (d) seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science; (e) plunder of public or private property.’

¹⁰ See *Tadić (Decision on Interlocutory Appeal on Jurisdiction)*, *supra*, [ICTY Appeals Chamber] para 94.

article 3, in order to justify treating the phrase ‘grave breaches’ as a concept different from ‘serious violations.’

For its part, the Statute of the International Criminal Tribunal for Rwanda limited the jurisdiction of the ICTR to ‘serious violations’ of common article 3 of the Geneva Conventions. This is seen in article 4 of the ICTR Statute which is the only war crimes provision in the ICTR Statute. Notably, the ICTR Statute makes no reference to the phrase ‘grave breaches’. Article 4 of the ICTR Statute provides as follows:

The International Tribunal for Rwanda shall have the power to prosecute persons committing or ordering to be committed serious violations of Article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977. These violations shall include, but shall not be limited to:

- (a) violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;
- (b) collective punishments;
- (c) taking of hostages;
- (d) acts of terrorism;
- (e) outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;
- (f) pillage;
- (g) the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilised peoples;
- (h) threats to commit any of the foregoing acts.

Article 4 of the ICTR Statute is a collation of the provisions of common article 3 of the Geneva Conventions of 1949 and article 4 of the 1977 Additional Protocol II to the Geneva Conventions. Common article 3 of the Geneva Conventions is a special provision introduced in 1949 in an effort to regulate internal armed conflicts, at a time when the view was particularly strong that international law must proceed with great caution in matters considered the internal affairs of nation States. R2P had not become a fashionable acronym in those days. With the evolution of international law and with confidence increasingly gained that international law could indeed regulate internal armed conflicts,¹¹ an effort was made in 1977 to expand that regime of regulation. Hence, the introduction of Additional Protocol II.

¹¹ A notable milestone in this evolution was the declaration of the International Court of Justice in 1970 that ‘all States can be held to have a legal interest’ in the protection of certain rights, given their importance; thus making them obligations *erga omnes*. Rights qualifying as such include those deriving from the prohibition of genocide, as well as the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination: *Case Concerning the Barcelona Traction, Light and Power Co Ltd (Belgium v Spain)* 1970 ICJ 3, p 32.

In view of the dichotomy between international armed conflicts and internal armed conflicts, some commentators have imbued the term ‘grave breaches’ with a particularly sombrous aura of a special genre of war crimes that even transcends the idea of war crimes as ‘serious violations’ of the law and customs of war. In the British *Manual of the Law of Armed Conflict*, for instance, one observes the following commentaries:

The Geneva Conventions 1949 introduced a new concept, that of ‘grave breaches’. These are war crimes of such seriousness as to invoke universal jurisdiction.¹²

...

Serious violations of the law of armed conflict, other than those listed as grave breaches in the Conventions or Protocol, remain war crimes and punishable as such.¹³

This manner of treating the concept of grave breaches has even led another commentator to assert as follows:

[G]rave breaches only apply to armed conflicts of an international character (or to a state of occupation) and not to internal armed conflicts. A grave breach of the Geneva Conventions may not, therefore, be committed in the context of an internal armed conflict. Because the subject-matter jurisdiction of the ICTR is limited to war crimes committed in an internal armed conflict, grave breaches do not fall within its jurisdiction and the relevancy of the grave breaches regime is therefore limited, as far as the *ad hoc* Tribunals are concerned, to the ICTY.¹⁴

Quite significantly, however, is the fact that the drafters of the Elements of Crimes of the Statute of the International Criminal Court have subscribed to this view. They were understandably inspired by the framework of article 8(2) of the Statute which began the listing of war crimes with a list of violations classified as ‘grave breaches’ under article 8(2)(a)—though not explicitly described as pertaining exclusively to international armed conflicts. Next on the article 8(2) list are a different set of violations classified under article 8(2)(b) as ‘Other serious violations of the laws and customs applicable in international armed conflicts, within the established framework of international law’. The employment of the term ‘other’ to describe article 8(2)(b) violations, together with the distinctiveness of those crimes in comparison to those listed as ‘grave breaches’, suggests that both sets of crimes were intended to be understood as pertaining to international armed conflicts. This is the case notwithstanding, as noted earlier, that ‘grave breaches’ were not explicitly described as operating only in international armed conflicts. In contrast, article 8(2)(c) lists a set of crimes expressly indicated as applicable in non-international armed conflicts.

As will be argued presently, the description of a crime as a ‘grave breach’ is a doubtful basis upon which to limit its application to international armed conflicts.

¹² UK Ministry of Defence, *The Manual of the Law of Armed Conflict*, [Oxford: OUP, 2004], p 424.

¹³ *Ibid*, p 427.

¹⁴ G Mettraux, *International Crimes and the Ad Hoc Tribunals* [Oxford: OUP, 2005] p 54. See also A Cassese, *International Criminal Law* [Oxford: OUP, 2003] pp 55-56.

The current view of ‘grave breaches’ as something special and different was given judicial impetus by a majority of the judges of the ICTY Appeals Chamber in *Tadić (Decision on Interlocutory Appeal on Jurisdiction)*, with Judge Abi-Saab dissenting.¹⁵ In that decision, the majority of the ICTY Appeals Chamber reasoned that the notion of ‘grave breaches’ is limited to international armed conflicts and does not apply to internal armed conflicts. Their conclusion was based solely on the fact that the Geneva Conventions provided for universal jurisdiction for purposes of ‘grave breaches.’ As the Appeals Chamber put it:

The international armed conflict element generally attributed to the grave breaches provisions of the Geneva Conventions is merely a function of the system of universal mandatory jurisdiction that those provisions create. The international armed conflict requirement was a necessary limitation on the grave breaches system in light of the intrusion on State sovereignty that such mandatory universal jurisdiction represents. State parties to the 1949 Geneva Conventions did not want to give other States jurisdiction over serious violations of international humanitarian law committed in their internal armed conflicts—at least not the mandatory universal jurisdiction involved in the grave breaches system.¹⁶

Having identified universal jurisdiction as the defining attribute of the ‘grave breaches’ regime of the Geneva Conventions, the Appeals Chamber then concluded that it is for that reason that the term must be understood to apply exclusively to international armed conflicts.¹⁷

The Appeals Chamber’s analysis and conclusion are both apparently and substantively wobbly. Its apparent weaknesses include, first, that the Appeals Chamber itself did acknowledge that developments in international law may negate its conclusion, particularly those developments that contradict the original regulatory premises for the divergent treatment of international and internal armed conflicts.¹⁸ Second, there are no legal authorities cited by the Appeals Chamber in support of its analysis and conclusion that the concept of ‘grave breaches’ applies only to international armed conflicts.¹⁹ Third, the Chamber cited state practices of the United States and Germany, according to which grave breaches may be committed both in international and internal conflicts alike.²⁰ Fourth, the three judges of the Trial Chamber had taken the

¹⁵ *Tadić (Decision on Defence Motion for Interlocutory Appeal on Jurisdiction)*, *supra*, paras 79–84.

¹⁶ *Ibid*, para 80.

¹⁷ The Appeals Chamber of the ICTY followed this precedent without further discussion in its subsequent judgment in the *Čelebići Case: Prosecutor v Delalić & Ors (Judgment)* dated 20 February 2001, Case No IT-96-21-A [ICTY Appeals Chamber] para 134.

¹⁸ According to the Chamber: ‘However, we are aware that this conclusion may appear not to be consonant with recent trends of both State practice and the whole doctrine of human rights - which, as pointed out below (see paras. 97-127), tend to blur in many respects the traditional dichotomy between international wars and civil strife’: para 83.

¹⁹ The only attempt at citing an authority is the particularly weak reference to the opinion of the UN Secretary General: ‘The above interpretation is borne out by what could be considered as part of the preparatory works of the Statute of the International Tribunal, namely the Report of the Secretary-General. There, in introducing and explaining the meaning and purport of Article 2 and having regard to the “grave breaches” system of the Geneva Conventions, reference is made to “international armed conflicts” (Report of the Secretary-General at para. 37)’: para 82.

²⁰ *Ibid*, para 83. In their amicus curiae brief filed in the case, the United States asserted as follows: ‘the “grave breaches” provisions of Article 2 of the International Tribunal Statute

view that ‘grave breaches’ may be committed in both international and non-international armed conflicts.²¹ Similarly, Judge Abi-Saab, also of the Appeals Chamber, disagreed with his remaining four colleagues that the concept of ‘grave breaches’ applies only to international armed conflicts and not to internal conflicts.²² And, finally, the Appeals Chamber did not identify any juridical or policy advantage to be gained by limiting the application of the notion of grave breaches to international armed conflicts. That is to say, there is no real mischief addressed in the view taken by the Appeals Chamber.

Besides the foregoing outward weaknesses, the following substantive difficulties also undermine the persuasiveness of the Appeals Chamber’s conclusion. First, the feature of universal jurisdiction cannot be seen as something exclusive to international crimes with factual international elements. Such a view is consistent only with the outmoded view of the plight of citizens in the hands of their governments as the exclusive preserve of their State of nationality. It is now accepted without contention that genocide and other crimes against humanity committed within the domestic realm are matters of *obligatio erga omnes*, engaging universal jurisdiction.²³ Similarly, it is accepted that war crimes committed within the jurisdiction of a State does attract universal jurisdiction.²⁴ Notably, also, the ICTY Appeals Chamber itself

apply to armed conflicts of a non-international character as well as those of an international character.’ While the majority of the Appeals Chamber denied the correctness of this view as a legal proposition, they nevertheless accepted the statement as ‘articulat[ing] the legal views of one of the permanent members of the Security Council on a delicate legal issue; on this score it provides the first indication of a possible change in *opinio juris* of States. Were other States and international bodies to come to share this view, a change in customary law concerning the scope of the “grave breaches” system might gradually materialize.’ In the same vein, it was accepted in the 1992 edition of the German Military Manual that grave breaches of international humanitarian law include some violations of common Article 3: *Humanitäres Völkerrecht in bewaffneten Konflikten* - Handbuch, August 1992, DSK AV2073200065, at para 1209.

²¹ In this connection, it may be pointed out that there is no hierarchy or superiority among the judges of the ICTY, according to which judges of the Appeals Chamber enjoy a presumption of greater wisdom or knowledge of the law. The judges of the ICTY individually enjoy equal stature, and are under an equal obligation of regular rotation in and out of the Appeals Chamber. As rule 27(a) of the ICTY Rules provides: ‘Permanent Judges shall rotate on a regular basis between the Trial Chambers and the Appeals Chamber. Rotation shall take into account the efficient disposal of cases.’ In the circumstances, one may take the view that the eight judges who considered the question came out equally divided on the matter—ie the three judges of the Trial Chamber plus Judge Abi-Saab of the Appeals Chamber versus the four judges of the Appeals Chamber who formed the majority against Judge Abi-Saab.

²² See Separate Opinion of Judge Abi-Saab.

²³ Paragraph 6 of the preamble to the Statute of the International Criminal Court; I Brownlie, *Principles of Public International Law*, 6th edn [Oxford: Oxford University Press, 2003] pp 303–304; M Shaw, *International Law*, 4th edn [Cambridge: Cambridge University Press, 1997] pp 471–472; V Lowe, ‘Jurisdiction’ in M Evans, *International Law* [Oxford: OUP, 2003] at p 343, and United Nations, *Report of the Secretary-General pursuant to Paragraph 2 of Security Council Resolution 808 (1993)* presented on 3 May 1993, paras 64 and 65; Principle 2(1) of the *Princeton Principles on Universal Jurisdiction*; Amnesty International, ‘Universal Jurisdiction: 14 Fundamental Principles on the Effective Exercise of Universal Jurisdiction’ (1999) AI Index: IOR 53/01/99, p 2; *Prosecutor v Furundžija (Judgement)* of 10 December 1998, Case No IT-95-17/1-T [ICTY Trial Chamber] para 156; In addition to customary international law, see also articles III and IV of the Convention for the Suppression and Punishment of the Crime of *Apartheid* (1973), GA Res 3068 (XXVIII).

²⁴ See *Jugement en la cause Fulgence Niyonteze*, Tribunal de Division 2, Armée Suisse Justice Militaire (*Niyonteze Appeals Judgment*). In that case, a Swiss military tribunal,

and in the same *Tadić (Decision on Interlocutory Appeal on Jurisdiction)* found out-of-date and ‘gradually [losing] its weight’ the traditional dichotomy between international and internal armed conflict as a result of which different rules applied.²⁵ According to the Appeals Chamber, ‘[t]his dichotomy was clearly sovereignty-oriented and reflected the traditional configuration of the international community, based on the coexistence of sovereign States more inclined to look after their own interests than community concerns or humanitarian demands.’²⁶ It is therefore submitted that, to the extent that there is no word of limitation in the Geneva Conventions, and there is none, excluding the notion of grave breaches from application in internal conflicts, judges are not at liberty to introduce such words of limitation.

Second, admittedly, there are genuine questions regarding who qualifies as ‘persons or property protected by the Convention’ given the following provision of article 50 of the First Geneva Convention:

Grave breaches to which the preceding Article relates shall be those involving any of the following acts, *if committed against persons or property protected by the Convention*: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.²⁷

Although it is tempting to note that the provision does not exclude common article 3 of the Geneva Conventions (dealing with internal conflicts) from the reference to ‘if committed against persons or property protected by the Convention,’ that argument, is, by no means, straightforward either way. It is possible to take that view as regards the first three Geneva Conventions. But article 4 of the Fourth Geneva Convention might reasonably be seen as removing victims of internal armed conflicts from the class of ‘persons protected by the Convention.’ Article 4 of the Fourth Geneva Convention provides as follows:

Persons 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.

It will not be canvassed now whether it is possible to construe the concept of *nationality* in that provision in a way that brings victims of civil wars within the protection of the Convention, in a war of partition or one that pits different ethnic groups (within a State) against each other. Suffice it to grant, for now, that article 4 of the Fourth Convention is reasonably capable of a construction that removes victims of internal armed conflicts from the protection of the Convention. Notably, though, the ICTY Appeals Chamber did not appear to have considered the effect of article 4 of the Fourth Convention, since it limited itself saying that it is universal jurisdiction that warranted

exercising universal jurisdiction, tried and convicted a Rwandan national in Switzerland for, among other things, war crimes committed in Rwanda in 1994, in what is regarded as an internal armed conflict.

²⁵ *Tadić (Decision on Defence Motion for Interlocutory Appeal on Jurisdiction)*, *supra*, paras 96–98.

²⁶ *Ibid*, paras 96.

²⁷ Emphasis added.

confining the notion of ‘grave breaches’ to the sphere of international armed conflicts.

It is possible, however, to take a certain view of ‘grave breaches’ that rescues it from the proprietary clutches of international armed conflicts. This can be achieved by strictly limiting article 50 of the First Geneva Convention and similar provisions in its kindred Conventions to their aim in 1949. That aim was *not* to define the notion of ‘grave breaches’ for all purposes and for all time. The aim was not even to create a regime of individual criminal responsibility for purposes of trials before international tribunals. The aim was simply to encourage states to know precisely what they had to codify as ‘grave breaches’ in their penal statutes. Once that aim was served, ‘grave breaches’ should remain free, as a notion, to service international law for purposes of proscribing atrocities committed in international and internal armed conflicts.

Third, the matter of plain language remains to be considered. Did the ‘grave breaches’ provision of article 49 of the First Geneva Convention 1949 mean to do more, at the higher level of abstraction, than to repress ‘serious violations’ of the Convention? As a matter of a plain understanding of the English language, ‘grave’ is a synonym of ‘serious’ and ‘breaches’ is coterminous with ‘violations’.²⁸ The view that ‘grave breaches’ simply means ‘serious violations’ is assisted by the fact that the French version of ‘grave breaches’ is *les infractions graves*,²⁹ while ‘serious violations’ translates into *les violations graves*.³⁰ Both French phrases share the identical adjective ‘*graves*’ which translates into ‘serious’ in English. This is why the view might be taken, as suggested earlier, that the drafters of the ICTY Statute deliberately refrained, even if wrongly, from employing the term ‘serious violations’ again in article 3 of that Statute, having employed the term ‘grave breaches’ in article 2 of that Statute; thereby indicating a difference between the two provisions.

Also of note in this regard is the following Red Cross commentary:

The idea of including a definition of “grave breaches” in the actual text of the Convention came from the experts called in by the International Committee of the Red Cross in 1948. It was thought necessary to establish what these grave breaches were, in order to be able to ensure universality of treatment in their repression. *Violations of certain of the detailed provisions of the Geneva*

²⁸ Indeed, the view of ‘grave breaches’ as synonymous with ‘serious violations’ is given credence in the work of the International Law Commission. In its 1989 *Yearbook*, the following observations appear: ‘In analysing the relevant provisions of the 1949 Geneva Conventions and the Additional Protocols thereto, it was stressed that the concept of a “war crime” was broader than that of a “grave breach”. However, the distinction between “grave breaches” and “serious violations” was not clear. The Conventions and the Protocols seemed to use those two concepts synonymously, except in article 90, paragraph 2 (c) (i), of Protocol I, in which a distinction might have been made, although the text did not fully dispel doubts’: United Nations, ‘Draft Code of Crimes against the Peace and Security of Mankind,’ para 101, Chapter III to the ‘Report of the International Law Commission on the work of its forty-first session (2 May–21 July 1989)’ *Yearbook of the International Law Commission*, 1989, vol II, Part Two, p 53, Doc No A/CN.4/SER.A/1989/Add.1 (Part 2).

²⁹ See the French version of article 2 of the ICTY Statute which translates ‘grave breaches’ into *les infractions graves*.

³⁰ See the French version of article 4 of the ICTR Statute which translates ‘serious violations’ as *les violations graves*.

*Conventions might quite obviously be no more than offences of a minor or purely disciplinary nature, and there could be no question of providing for universal measures of repression in their case.*³¹

In construing ‘grave breaches’ according to its plain meaning, one is reminded of the exhortation of article 31(1) of the Vienna Convention on the Law of Treaties which requires that a treaty to be interpreted ‘in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.’ The meaning of ‘grave breaches’ is ‘serious violations’ and the object and purpose of international humanitarian law is protection of humanity as the victim of armed conflict—international or internal.

And, finally, and also related to the preceding point, is the view that the definition and substance of ‘grave breaches’ indicate no difference as regards its sphere of application. The definition of grave breaches hinges on wilful violation of the relevant rules of armed conflict which seriously endangers the physical or mental health or integrity of any protected person.³² This element of endangerment of protected persons is a constant feature of article 2 of the ICTY Statute which employs the term ‘grave breaches of the Geneva Conventions’ and article 4 of the ICTR Statute which employs the term ‘serious violations of article 3 common to the Geneva Conventions’. As the ICRC correctly observed:

It should be pointed out that, although some of the wording is not the same as the equivalent crimes in the grave breaches applicable to international armed conflicts, there is no difference in practice as far as the elements of these crimes is concerned.³³

In the final analysis, the conclusion becomes irresistible that the decision of the majority in the *Tadić* decision, might have amounted in this particular instance, to an expenditure of important judicial effort on mere logomachy. Agreement is thus compelled toward the dissent of Judge Abi-Saab when he described as ‘artificial’³⁴ the decision of the majority of the ICTY Appeals Chamber in *Tadić (Decision on Interlocutory Appeal on Jurisdiction)*, which created ‘a division of labour’ whereby ‘grave breaches’ is confined exclusively to international armed conflicts, while similar violations committed in internal armed conflicts is treated as ‘other serious violations’. More regrettable is the fact that such an artificial decision influenced the drafting of the elements of grave breaches in the *Elements of Crime* of the ICC Statute.

Perhaps a better approach might possibly be to accept that the concept of ‘grave breaches’ might have originated in the thought-mode of international armed conflicts, but does not exclude modern application to internal armed conflicts. This view is recommended by the realistic proposition that in 1949 when the language of ‘grave breaches’ was introduced into the Geneva

³¹ ICRC Commentary to article 50 of the 1st Geneva Convention
<<http://www.icrc.org/ihl.nsf/COM/365-570061?OpenDocument>> (accessed on 19 November 2006).

³² See Additional Protocol I to the Geneva Conventions of 1949, articles 11(4) and 85(2), 85(3) and 85(4).

³³ ICRC, *Customary International Humanitarian Law*, vol I: Rules, *supra*, 591.

³⁴ *Tadić (Decision on Interlocutory Appeal on Jurisdiction)*, *supra*, [ICTY Appeals Chamber], Separate Opinion of Judge Abi-Saab.

Conventions, there might have remained some doubt, or State Parties' resistance, about the conception of the individual as a proper subject of international law. This might explain the trepidation, if not reluctance, that the drafters felt about providing a direct regime of individual criminal responsibility in the grave breaches provisions of the Geneva Conventions. Hence, the preference for the indirect approach of requiring states to undertake to proscribe, in their domestic criminal codes, grave breaches of the Conventions. This same concern would no doubt have plagued the confidence of the drafters about direct imposition of obligations from the international plane upon parties engaged in internal armed conflicts, especially where half of such parties to internal armed conflicts might not be seen as 'High Contracting Parties' to the Geneva Conventions. The drafters' tentativeness might reasonably have been made worse by the fact that the half of the parties to internal armed conflicts who would not be considered as 'High Contracting Parties' to the Geneva Conventions might have been considered by States, in 1949, as mere 'criminals', 'terrorists' or 'bandits' operating within the internal domain of the 'High Contracting Parties'; and as such enjoyed no level of protection that ought to vex the High Contracting Parties in international law.

Many of these concerns, however, are no longer valid in the new order of international law. For it is now axiomatic that international law does impose rights and obligations directly upon individuals, especially in matters of protection of the corporal integrity of the individual, which was considered in the past as the internal affair of States. This is the ethos of humanity and is the fabric with which international humanitarian law is woven. And since one of the objects of international criminal law is to banish impunity from the minds of those in the position of violating the international norms protecting the corporal integrity of the individual, there is little real justification for allowing those engaged in internal armed conflicts to perceive that their own *breaches* of international humanitarian legal norms are less 'grave' than identical, and sometimes less severe, *violations* that may be committed during international armed conflicts. Yet that is what is achieved when it is said that 'grave breaches' may be committed only in international armed conflicts and not in internal ones.

Is international criminal law to be taken to say that it is 'grave breaches' if rapes were committed in the Ethiopia-Eritrea war³⁵; but it is not 'grave breaches' if government troops and their surrogates raped civilian women in Darfur³⁶ in their prosecution of Sudan's civil war? Why is it a 'grave breach' to take civilians as hostages in an international armed conflict, while it is not a 'grave breach' for the RUF rebels to engage in systematic mutilation or amputation of civilians in the Sierra Leone civil war? A rational basis for such propositions has not been found. Nor is it warranted by the apposite observation made by the ICRC to the effect that 'the horrors of [internal armed conflicts] are sometimes even more terrible than those of international

³⁵ *Eritrea v Ethiopia (Central Front—Eritrea's Claims 2, 4, 6, 7, 8 and 22) Partial Award*, 28 April 2004 [Eritrea-Ethiopia Claims Commission] paras 42, 80 and 81.

³⁶ United Nations, *Report of the International Commission of Inquiry on Darfur to the Secretary-General*, dated 25 January 2005, Annex to Letter dated 31 January 2005 from the Secretary-General addressed to the President of the Security Council, Doc No S/2005/60, paras 104, 186, 221, 273, 337, 338 and 340.

wars because of the fratricidal hatred they engender.³⁷ One recent instance of such fratricidal hatred which generated the apogee of horror possible in any war—international or internal—was seen in the Rwandan civil war, which began in 1990 and culminated in the 1994 Genocide. As it was committed under the guise of civil war, the Rwandan genocide, upon any view, will qualify for the term ‘grave breaches.’

Conclusion

It is possible to take the view that the debate about the sphere of application of the notion of ‘grave breaches’ does not lend itself to a straightforward resolution. But this is so when one is lost in the legal thicket and complexities of the Four Geneva Conventions of 1949 and their Additional Protocols of 1977. There are grounds in those instruments to contend that ‘grave breaches’ are war crimes which may only be committed in international armed conflicts. There are reasons to quarrel with that proposition.

In the final analysis, however, it is a pointless debate, for there are more powerful reasons to conclude that to take the view that ‘grave breaches’ is limited to international armed conflicts is to miss the whole point of international humanitarian law. It is about protecting the core values of humanity. And humanity remains the same, regardless of where it is found—on the fields of a high-tech war involving major Western powers against each other or against other nations, as well as in the jungle of an African or Asian country embroiled in a civil war fought with cudgels, machetes, and knobkerries. A serious violation of international humanitarian law is a ‘grave breach’ on either occasion. That is easy to see if the protection of humanity is the aim of international humanitarian law, as it ought to be.

The triumph of humanity in that debate is aided particularly by the usual requirement that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. The plain meaning here and the object and purpose ideal must not be detracted by mystifying draftsmanship that is the hallmark of the Geneva Conventions. For ‘[t]he circumstances in which treaties are drafted are ... often such as to lead to lack of consistency in drafting and care must be taken in attributing significance to variations in terminology: “an interpreter is likely to find himself distorting passages if he imagines that their drafting is stamped with infallibility”’: *Pertulosa Claim*, ILR, 18, 18 (1951), No 129, p 418.”³⁸

³⁷ ICRC, Commentary to Common Article 3 to the Geneva Conventions of 1949: <<http://www.icrc.org/ihl.nsf/COM/380-600006?OpenDocument>> (accessed on 22 November 2006).

³⁸ R Jennings and A Watts, *Oppenheim’s International Law*, vol 1, 9th edn [London & New York: Longman, 1996] Parts 2 to 4, p 1273, fn 12.