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War Crimes in International Criminal Law

Graduate thesis in Public International Law within the curriculum of Master of International Human Rights Law

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Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.

22 International Military Tribunal 466,
quoted in Cherif M. Bassiouni: Crimes Against Humanity in International Criminal Law,
Martinus Nijhoff Publishers, Dordrecht 1992

There is no moral justification, and no truly persuasive legal reason, for treating perpetrators of atrocities in internal conflicts more leniently than those engaged in international wars.

Theodor Meron:
International Criminalization of Internal Atrocities,
89 AJIL 554 (1995)

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Table of Abbreviations

AJIL	American Journal of International Law
Brit. Y.B. INT'L L.	British Yearbook of International Law
EJIL	European Journal of International Law
ICCPR	International Covenant of Civil and Political Rights
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ILC	International Law Commission
ILM	International Law Materials
UDHR	Universal Declaration on Human Rights
UNTS	United Nations Treaty Series

1.Introduction

About 50 years ago the United Nations' Declaration on Human Rights was developed in order to set down the ground rules for human behaviour. Despite this, and other efforts in the same direction, the post war period has produced an estimated 170 million casualties during armed conflicts and tyrannical regimes and this along with numerous other harmful consequences. Extensive declarations as well as well-developed conventions and treaties have too many times proven insufficient and so have many of the different methods chosen to enforce them. International criminal law, with Draft Codes, ad hoc-tribunals and an international criminal court, is now probably the method with the highest credibility, and maybe not unfounded so. At the same time it is, in many aspects, poorly underdeveloped.

My personal interest in the field international criminal law has been developed through courses and seminars in Antwerp, Lund and Arusha but also through following the process of establishing the International Criminal Court.

I would like to thank my supervisor Professor Göran Melander at the Raoul Wallenberg Institute in Lund. Furthermore I would like to thank Lars Olsson and Lucia Catani for advice, comments and critique.

2. Problem and Purpose

2.1 Outlining the Problem

The Nuremberg trials after the Second World War established, in the attempt to deal with the gross atrocities committed by the Nazi regimes, the individual criminal responsibility for certain serious violations of international law. One of the crimes in the Nuremberg Charter[1] was war crimes, defined as "violations of the laws or customs of war"[2]. This definition was also supplemented by a non-exhaustive list of more or less clearly defined acts, all derived from the existing laws of war. A couple of years later the Geneva Conventions[3] introduced the concept grave breaches, meaning a number of especially serious violations of the Conventions for which individuals should be held responsible under national legislation. This system of grave breaches was complemented in Additional Protocol I of the Conventions from 1977[4]. The concept of war crimes was still, though, easiest described as violations of the laws and customs of war.

During recent years, with the creation and work of the ad hoc tribunals for the former Yugoslavia and Rwanda and the process of the establishment of the International Criminal Court, the development of international law in this field has been both extensive and fast. The question is how much this has done for the clarification of the notion of war crimes under international law.

The obscurity lays on a number of different levels. First of all, there seems to be no general agreement in international law on which different acts that are to be included in the concept. Different instruments provide different answers, also in comparison with international customary law. Secondly there is a vagueness when it comes to the exact meaning of the different acts. This becomes especially clear when realising that interpreting the acts involves the different law disciplines human rights law, humanitarian law and international criminal law. One example is the act of torture which, without a doubt, is a war crime. The act is defined in one way for the Geneva Conventions, in another way in the Torture Convention[5] and in a third

[1] Agreement for the prosecution and punishment of the Major War Criminals of the European Axis, Charter of the International Military Tribunal, Aug. 8 1945, 59 Stat. 1544, 82 UNTS 279 (hereinafter Nuremberg Charter)
[2] Nuremberg Charter art.6(b)
[3] Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva Convention I), Aug.12 1949, 6 UST 3114, 75 UNTS 31 art.49; Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Geneva Convention II), Aug.12 1949, 6 UST 3217, 75 UNTS 85 art.50; Convention Relative to the Treatment of Prisoners of War (Geneva Convention III), Aug.12 1949, 6 UST 3316, 75 UNTS 135 art.129; Convention Relative to the Protection of Civilian Persons in Time of War (Geneva Convention IV), Aug.12 1949, 6 UST 3516, 75 UNTS 287 art.146
[4] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, opened for signature Dec. 12, 1977, 1125 UNTS 3, reprinted in 16 ILM 1391 (1977) (Additional Protocol I)
[5] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, concluded 10 December 1984, entered into force 26 June 1987, 23 I.L.M. 1027

way in the so-called Rome Statute[6]. To complicate matters further, these definitions could also differ widely from definitions, if any, in national legislation. This might not cause problems in practice, but it is definitely still serious enough to be observed. The third level of obscurity concerns the special condition of war crimes, namely the existence of an armed conflict. During many years it has been widely discussed whether and to what extent war crimes can be committed in internal armed conflicts.

Why is it necessary to clarify the scope of war crimes? The rules of armed conflicts are to a large extent derived from humanitarian law, even if some parts can be found in human rights law. These rules are now to an ever increasing extent being borrowed to the growing international criminal law. For the purpose of this thesis, this means two things. First it means that rules that are recommendations, prescriptions or prohibitions are transformed into criminal law. Violations of the rules become criminal acts. Secondly, it means that individuals are to be held responsible for these violations. This, in its turn, means that the rules are the objects for different and more strict requirements. One of these is the principle of legality stating that a crime and its punishment must be clearly stated and described in the law[7].

International criminal law is, and will even after the setting up of an International Criminal Court, to a very large extent be dependent on domestic criminal systems and the work of domestic courts. Why is it still important to have a clear concept of war crimes in *international law*? As I see it, for a number of different reasons. The concept of war crimes in international law is used as a role model when creating the crime in national legislation, but also as a source of interpretation. The national legislation could simply refer to the laws and customs of war or it could contain acts which, in order to be properly interpreted, need international law. Then, as has been implied, the concept has a more direct importance for the ad hoc tribunals and the international criminal court. They are dependent on international criminal law, with all its limitations. The importance is demonstrated by article 3 of the Yugoslavia Statute[8] which simply refers to ”the laws or customs of war” although with some help from a non-exhaustive list of acts. It will certainly be demonstrated again when the Preparatory Commission for the creation of Rules of Procedure and Evidence to the International Criminal Court will start its work in February 1999[9]. One of the main tasks will be the creation of the so-called elements of crimes[10].

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[6] Rome Statute of the International Criminal Court, UN Doc. A/Conf.183/9, adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998, available at <http://www.un.org/icc> (hereinafter Rome Statute)

[7] It is usually expressed by the terms *nullum crimen sine lege* and *nulla poena sine lege*. For international criminal law Bassiouni concludes that the latter does not exist while the former should be rephrased to the less strict *nullum crimen sine iure*. Cherif M. Bassiouni: Crimes Against Humanity in International Criminal Law, Martinus Nijhoff Publishers, Dordrecht 1992 p.111-112.

[8] Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), UN Doc. S/25 704 and Add.1 (1993), Annex containing Statute of the Tribunal for the Former Yugoslavia (hereinafter Yugoslavia Statute)

[9] UN Doc. A/C.6/53/L.9/Rev.1

[10] Rome Statute art.9

Professor Theodor Meron states the following on this matter; ”Another important development is the growing recognition that the elevation of many principles of international humanitarian law from the rhetorical to the normative, and from the merely normative to the effectively criminalized, creates a real need for the crimes … to be defined with clarity, precision and specificity required for criminal law in accordance with the principle of legality (*nullum crimen sine lege*).”[11]

2.2 Purpose

The purpose of this thesis is to shed some light on the three levels of obscurity with the concept of war crimes, described in chapter 2.1. Since such a task is admittedly enormous, the main focus has been put on two of the levels; namely which acts are to be included in the international concept of war crimes and to what extent war crimes can be committed in internal armed conflicts. Regarding the content of the different acts, comparisons have been made between different international instruments and problems and solutions can only be hinted. The humble objective is to draw a rough sketch on the concept of war crimes as it stands today. Because of this I found it important to include the Rome Statute, despite no ratifications yet and therefor no formal status in international law. Again to keep the thesis within workable dimensions it is only dealing with international instruments which means that all my references to international customary law are based exclusively on what is said in the doctrine.

3. An International Crime

[11] Theodor Meron: War Crimes Law Comes of Age, 92 AJIL 468 (1998)

International criminal law can be said to be a combination of two legal disciplines, namely international aspects of national criminal law and criminal aspects of international law[12]. The first discipline deals with issues such as extradition and other forms of co-operation when it comes to the enforcement of the national criminal law. The second discipline deals mainly with substantive international criminal law or international crimes. International criminal law has, throughout its history, been severely criticised mainly on account of the mentioned combination of disciplines. National criminal law is based on a vertical system of authoritative decision-making and coercive means of enforcement while international law is a horizontal system, based on the relationship of co-equals, with consensus for decisions and without any superior power for lawmaking or enforcement. The combination; that is a criminal system without central lawmaking authorities or enforcement mechanism, has been seen as impossible and made many authors reach the conclusion that there are no legal discipline called international criminal law[13]. The basis of this criticism has, or rather will, partly disappear after the creation of an International Criminal Court in July 1998. Although similarities, international criminal law is not identical with human rights law and humanitarian law. The latter focuses basically on protection of individuals in times of war and peace, and then mainly formulated as obligation upon states, and they only overlap with international criminal law when they deal with the responsibility of individuals for their violations[14]. In this way, international criminal law is just providing a means for enforcing human rights law and humanitarian law. The international crimes are more or less directly derived from these two areas of international law.

From now on I will deal only with the discipline of international criminal law described as criminal aspects of international law. There are two aspects to focus on, at least for the purpose of this thesis. The first is *individual* in individual responsibility, as opposed to group and state responsibility. The second is *criminal* in criminal responsibility, as opposed to civil responsibility. State responsibility arises whenever a state fails to comply with a rule of human rights or humanitarian law, for example by violating the right of an individual, and it is a civil responsibility in the sense that it entails certain duties of reparation on the state[15]. Criminal responsibility for states occur, according to the International Law Commission's Draft Articles on State

[12] M. Cherif Bassiouni: An Appraisal of the Growth and Developing Trends of International Criminal Law, 46 Revue International de Droit Pénal, No. 1-2, 1974 p.405-433, reprinted in International Criminal Law and Procedure; John Dugard and Christine van den Wyngaert, Dartmouth Publishing Company, Aldershot 1996 p.70

[13] Schwarzenberger argued in an article 1950 that what was then considered international criminal law was merely national criminal law with certain international element and that an international criminal law was impossible in an international society consisting of sovereign state which "firmly held in their hands both the swords of war and of justice". Georg Schwarzenberger: The Problem of an International Criminal Law, Current Legal Problems 3 p.263-296, reprinted in International Criminal Law and Procedure (1996) p.294-295

[14] Steven R. Ratner and Jason S. Abrams: Accountability for Human Rights Atrocities in International Law, Beyond the Nuremberg Legacy, Clarendon Press, Oxford 1997 p.11

[15] Ibid. p.13

Responsibility from 1980[16], when it violates ”an international obligation that is so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole”[17]. State criminal responsibility is a highly controversial topic especially when it comes to the distinction between crimes and non-criminal violations of international law and the question of responses towards a crime-committing state[18]. Although group criminal responsibility in a way was declared by the Nuremberg Charter[19] by authorising the tribunal to find a group or organisation criminal it is doubtful whether this is generally accepted in international law[20]. Finally, individual civil responsibility is not accepted in international law but individual criminal responsibility has been for certain violations[21]. I will now deal further with the latter.

As mentioned above, the crimes of international criminal law derives from the human rights law and humanitarian law. What is it then that indicates whether international law imposes criminal responsibility on individuals? Different answers have been given to this. Ratner and Abrams mean that it has to do with to what extent the international law directly provides for individual culpability, to what extent it obligates some or all states or the international community as a whole to try and punish the offenders and finally to what extent it authorise these actors to try and punish offenders[22]. Meron rejects such an approach since it would be ”to confuse criminality with jurisdiction and penalties”[23]. With the Nuremberg trials as example, where violators of the Geneva Conventions from 1929[24] and the fourth Hague Convention with annexed Regulations[25] were tried and punished even though these instruments contain no provisions on jurisdiction or scales of penalties, Meron concludes that there are other factors determining whether the law creates individual criminal responsibility. These are ”the extent to which the prohibition is addressed to individuals, whether the prohibition is unequivocal in character, the gravity of the act, and the interest of the international

[16] Report of the International Law Commission to the General Assembly on the work of its thirty-second session, UN Doc. A/35/10 (hereinafter ILC Draft Articles)
[17] ILC Draft Articles art.19. It is exemplified with aggression, colonial domination, slavery, genocide and apartheid.
[18] Steven R. Ratner and Jason S. Abrams (1997) p.15
[19] Nuremberg Charter art.9. According to article 10 individuals could be brought to trial simply for membership of such an organisation or group.
[20] Steven R. Ratner and Jason S. Abrams (1997) p.15. Corporate liability has been suggested in the Council of Europe Draft Convention for the Protection of the Environment through Criminal Law, Council of Europe, Addendum to Doc CDPC(96) 12 and 13 (6 June 1996) art.9.
[21] Ibid. p.14
[22] Ibid. p.10
[23] Theodor Meron: International Criminalization of Internal Atrocities, 89 AJIL 561 (1995)
[24] Convention for the Amelioration of the Condition of the Wounded and sick of Armies in the Field, signed at Geneva 27 July 1929, 47 Stat. 2074, 118 LNTS 303 and Convention Relative to the Treatment of Prisoners of War, signed at Geneva 27 July 1929, 47 Stat. 2021, 118 LNTS 343
[25] Convention Respecting the Laws and Customs of War on Land, signed at the Hague 18 Oct. 1907, The Laws of Armed Conflicts, A Collection of Conventions, Resolutions and Other Documents; Dietrich Schindler and Jiri Toman (eds.), Martinus Nijhoff Publishers, Dordrecht and Henri Dunant Institute, Geneva 1988 p.63(Hague Convention IV) and Annex to the Convention, Regulations Respecting the Laws and Customs of War on Land, The Law of Armed Conflicts (1988) p.74 (Hague Regulations)

community"[26]. He adds to this that just because an obligation is addressed to a state does not exclude an individual's responsibility, if individuals clearly must carry out that obligation[27].

Bassiouni, who has dealt most extensively with this issue, has as a starting point the same kind of questions as described for Ratner and Abrams above. He singles out 315 multilateral instruments, developed between 1815 and 1989, and divide them into 22 categories of international crimes[28] on "empirical or experiential" grounds[29]. The latter means that he chose such conventional or customary international law that explicitly or implicitly establishes that a given act is part of international criminal law. The law does so by containing one or more of the so-called penal characteristics. These are; "(1) Explicit recognition of the proscribed conduct as constituting an international crime, or a crime under international law, or a crime. (2) Implicit recognition of the penal nature of the act by establishing a duty to prohibit, prevent, prosecute, punish, or the like. (3) Criminalization of the proscribed conduct. (4) Duty or right to prosecute. (5) Duty or right to punish the proscribed conduct. (6) Duty or right to extradite. (7) Duty or right to cooperate in prosecution, punishment (including judicial assistance). (8) Establishment of a criminal jurisdictional basis. (9) Reference to the establishment of an international criminal court or international tribunal with penal characteristics. (10) No defence of superior orders"[30]. The 22 categories of international crimes that can be derived on the basis of this are; Aggression, War Crimes, Unlawful Use of Weapons/Unlawful Emplacement of Weapons, Crimes Against Humanity, Genocide, Racial Discrimination and *Apartheid*, Slavery and Related Crimes, Torture, Unlawful Human Experimentation, Piracy, Aircraft Hijacking, Threat or Use of Force Against Internationally Protected Persons, Taking of Civilian Hostages, Drug Offences, International Traffic in Obscene Publications, Destruction and/or Theft of National Treasurers, Environmental Protection, Unlawful Use of the Mails, Interference with Submarine Cables, Falsification and Counterfeiting, Bribery of Foreign Public Officials, and Theft of Nuclear Materials[31]. Bassiouni does not stop here though. From the 315 multilateral instruments he derives a number of elements that in fact distinguishes the international crimes from national crimes. These elements are;

"1. International:

(a) Conduct constituting a threat to the peace and security of the international community, whether

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[26] Theodor Meron (1995) p.562

[27] Ibid. p.562

[28] Cherif M. Bassiouni: Crimes Against Humanity in International Criminal Law, Martinus Nijhoff Publishers, Dordrecht 1992 p.45

[29] Cherif M. Bassiouni: The Penal Characteristics of Conventional International Criminal Law, Case Western Reserve Journal of International Law 15, 1983 p.27-37, reprinted in International Criminal Law and Procedure (1996) p.330

[30] Cherif M. Bassiouni: International Crimes: Digest/Index of International instruments 1815-1985, Oceana Publications Inc. 1986 p.lv

[31] Cherif M. Bassiouni: A Draft International Criminal Code and Draft Statute for an International Criminal Tribunal, Martinus Nijhoff Publishers, Dordrecht 1987 p.28-29

directly or indirectly; or,

(b) Conduct recognized by commonly shared world community values as shocking to the collective conscience of the world community.

2. Transnational:

(a) Conduct affecting the public safety and economic interests of more than one state whose commission transcends national boundaries; or,

(b) Conduct involving citizens of more than one state (either as victims or perpetrators) or conduct performed across national boundaries.

3. State Action or Policy:

Conduct containing in part any one of the first two elements but whose prevention, control and suppression necessities international cooperation because it is predicated on 'state action or state policy' without which the conduct in question could not be performed"[32].

Finally, Bassiouni emphasises that this way of looking at international criminal law is "characterized by unevenness and lack of systematization"[33] and that it in fact never has existed any global vision of this discipline that could lead to a drafting of a comprehensive International Criminal Code. Still, his reasoning provides some variables to distinguish between a "normal" international convention and an international criminal convention, and between a national crime and an international crime.

4. The Concept of War Crimes

[32] Cherif M. Bassiouni (1992) p.46-47. The third element was first formulated; "contain only in part one of the two first elements but where the element of 'necessity' for effective cooperation is more substantially needed to control, prevent and suppress such violative conduct". Cherif M. Bassiouni (1987) p.36

[33] Cherif M. Bassiouni (1992) p.45

The expressions ”war crimes” and ”war criminals” have sometimes been used in a broad generic sense, including not only war crimes in a strict sense but also other crimes such as crimes against peace and crimes against humanity. This was for example the case in the Nuremberg Charter[34]. Other meanings are for example the legalistic definition as a technical breach of the laws of war, the grave breaches of the Geneva Conventions[35] and the first Additional Protocol[36], the category ”violations of the laws and customs of war” included in the Statute of the International Tribunal for the Former Yugoslavia[37], the category ”exceptionally serious war crimes” as used in the Draft Code of Crimes against the Peace and Security of Mankind from 1991[38] or simply ”war crimes” as used in the Draft Code from 1996[39] and the Rome Statute[40] [41]. The concept war crime will for the purpose of this thesis be used in the strict sense; that is not including crimes against peace, crimes against humanity and genocide. It hereby encompasses a broad array of specific acts, all limited by a general element, namely the presence of an armed conflict. Since the purpose of this thesis is to examine the scope of the concept of war crimes a further specification will be developed in chapter 6 and 7. As a minimum though, it is possible to already at this point conclude that provisions from the so-called Geneva law and the Hague law are to be included. The Geneva law is concerned with ”the condition of war victims who have fallen into enemy hands”[42] and are closely connected to the International Committee of the Red Cross. The first convention is from 1864[43] and the present Geneva law is mainly the four conventions from 1949 and their Additional Protocols[44]. The Hague law deals with the permissible means and methods of war. Its first instruments are said to be the Lieber Code[45], developed by the United States of America during the American Civil War (1861-65), and dealing with a lot of land warfare issues, and the Declaration Renouncing the Use, in Time of war, of Explosive Projectiles Under 400 Grammes

[34] Nuremberg Charter art.6 ”…the trial and punishment of the major *war criminals* of…”(my italics)
[35] Geneva Convention I art.49; Geneva Convention II art.50; Geneva Convention III art.129; Geneva Convention IV art.146
[36] Additional Protocol I art.85
[37] Yugoslavia Statute art.3
[38] International Law Commission - Draft Code of Crimes against Peace and Security of Mankind (1991), Report of the International Law Commission, 43rd Session, UNGAOR, 46th Session, Supp.No.10, A/46/19 (1991) (hereinafter Draft Code 1991) art.22
[39] International Law Commission - Draft Code of Crimes against Peace and Security of Mankind (1996), International Law Commission, 48th Session, UN Doc. A/CN.4/L.522 of 31 May 1996, as adopted with amendments on 5 July 1996 (hereinafter Draft Code 1996) art.20
[40] Rome Statute art.8
[41] The Law of War Crimes - National and International Approaches; Timothy L.H. McCormack & Gerry J. Simpson (eds), Kluwer Law International, The Hague 1997 p.12
[42] Fritz Karlshoven: Constraints on the Waging of War, ICRC, Geneva 1987 p.7
[43] Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, signed at Geneva 22 Aug. 1864, 22 Stat. 940, The Laws of Armed Conflict (1988) p.279
[44] See *supra* note 4 and Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, opened for signature Dec. 12, 1977, 1125 UNTS 609, reprinted in 16 ILM at 1442 (1977) (Additional Protocol II)
[45] Instructions for the Government of Armies of the United States in the Field, prepared by Francis Lieber, promulgated as General Orders No. 100 by President Lincoln, 24 April 1863, The Laws of Armed Conflict (1988) p.3

Weight[46] made by the International Military Commission in St. Petersburg 1868[47]. Many of the Hague rules that play a part in international humanitarian law today were developed during the first and second Hague Peace Conference 1899[48] and 1907[49] but there are also more recent conventions such as the Hague Convention for the Protection of Cultural Property of 1954[50], the Weapons Convention of 1980[51] and the Landmine Convention[52].

In the Nuremberg Charter the individual criminal responsibility was for the first time established regarding war crimes[53]. The description of the crime in the Charter was; ”violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labour 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”[54]. This provision was derived from the Hague law and the Geneva law[55]. In the Geneva Conventions from 1949 and Additional Protocol I from 1977 individual criminal responsibility was established for certain violations referred to as grave breaches. According to article 85 paragraph 5 of the Protocol, the grave breaches are to be considered as war crimes. Although it seemed to be a general consensus among the drafters about the fact that grave breaches were war crimes, there were different opinions about the inclusion of this specific paragraph. The advocates of it emphasised the importance of establishing one concept of war crimes while the opponents were of the opinion that the Geneva law should stick to its own terminology[56]. The compromise was the inclusion of the expression ”without prejudice to the application of the Conventions and of this Protocol”, which means that the fact that the grave breaches are to be considered as war crimes will not affect the

[46] Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, signed at St. Petersburg, 29 November/11 December 1868, The Laws of Armed Conflicts (1988) p.101
[47] Frits Karlshoven (1987) p.11-12
[48] Four Hague Conventions and Declarations, for example Declaration Concerning the Prohibition of the Use of Expanding Bullets, signed at the Hague 29 July 1899, The Laws of Armed Conflicts (1988) p.10
[49] Fourteen Hague Conventions and Declarations, for example Convention Respecting the Laws and Customs of War on Land (IV) and Annex to the Convention, Regulations Respecting the Laws and Customs of War on Land
[50] Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14 1954, 249 UNTS 240
[51] Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, adopted at Geneva 10 Oct. 1980, 19 ILM 1523 and Protocol on Non-detectable Fragments (Protocol I), Protocol on Prohibitions or Restrictions on the Use of Mines, Booby Traps and other Devices (Protocol II), and Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III)
[52] Convention on the prohibition of the use, stockpiling, production and transfer of anti-personnel mines and on their destruction, opened for signature in Ottawa 3-4 Dec. 1997, available at: <http://www.icrc.org/unicc/icrcnews.nsf/ff41558bb06fff2b412561f6004fad66/1fcb5f2d3e32fa5941256568003758b1?OpenDocument>
[53] Steven R. Ratner and Jason S. Abrams (1997) p.7, 14 and 79
[54] Nuremberg Charter article 6(b)
[55] Steven R. Ratner and Jason S. Abrams (1997) p.85
[56] Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949; Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds.), Geneva 1987 p.1003-1004

application of the Conventions and the Protocol. War crimes are not considered limited to the grave breaches[57].

In the Draft Codes referred to above and in the Statutes for the ad hoc tribunals for the former Yugoslavia and Rwanda[58] the concept of war crimes was described by explicit or implicit referral to the Geneva and the Hague Law. The same is basically true for the Rome Statute for the International Criminal Court, although this instrument has some legislative character.

The concept of war crimes is often referred to in a self evident or self explaining way as if its full scope of application and content were clear. The first thing the following chapters will show is that this is not the case.

5. Armed Conflicts

[57] Commentary on the Geneva Conventions of 12 August 1949: Geneva Convention Relative to the Protection of Civilian Persons in Time of War (IV); Jean S. Pictet (ed.), Geneva 1958 p.593-594

[58] Statute of the Rwanda Tribunal, SC Res. 955, UN SCOR, 3453rd mtg., UN Doc. S/RES/955 (1994)

This chapter deals with the general condition of a war crime, that is the war or, as it is more often referred to in international humanitarian law, armed conflict. The intention here is to find some kind of border line between an international armed conflict and a non-international armed conflict. For this I will try to outline a scheme created by international conventions, practice and other legal documents. The intention is not to show which armed conflicts have been considered international or internal, by the use of examples from the history of wars.

First a brief outline of the concept armed conflict. The reason that this concept is preferred before the concept of war is that the latter traditionally includes some formal diplomatic aspects[59]. According to international humanitarian law there is not a war between states unless there has been a ”previous and explicit warning, in the form either of a declaration of war, giving reasons, or of an ultimatum with conditional declaration of war”[60]. It was after the First World War that states started to hesitate to characterise conflicts as war. The advantage with the term armed conflict is that a state cannot avoid the rules of war just by saying that no war has been declared or avoid it on some other formality. Seen in this light, it also seems obvious that armed conflict is the broader concept that includes war[61]. This is confirmed when looking at the Geneva Conventions, where armed conflict got its first legal expression. Common Article 2 paragraph 1 of the Conventions states that the conventions ”shall apply to all cases of declared war or of any *other* armed conflict” (my italics) and it adds that this is the case ”even if the state of war is not recognized by one of them”. Thus for the Conventions to be applicable it is not necessary that a war has been declared and it is not necessary that the combating parties recognises that there is a war going on. An armed conflict between two parties brings the Conventions automatically into operation[62]. What is then an armed conflict? In the commentaries to the Geneva Conventions an international armed conflict is described as any difference arising and leading to intervention of armed forces or any similar forces as described in article 13[63]. The latter article talks about militias and other volunteer corps that are being commanded by a person responsible for his subordinates, that are having a fixed distinctive sign recognizable at a distance, that are carrying arms openly and that is conducting their operations in accordance with the laws and customs of war, and also about so-called levée en masse providing that the

[59] For examples of this opinion see Commentary on the Geneva Conventions of 12 August 1949: Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (I); Jean S. Pictet (ed.), Geneva 1952 p. 28 and 32 and Leslie C. Green: The Contemporary Law of Armed Conflict, Manchester University Press, Manchester 1993 p.67-69. ”Armed conflict” is used in for example the Geneva Conventions, its Additional Protocols and the Weapons Convention.

[60] Convention (III) Relative to the Opening of Hostilities, signed at The Hague, 18 October 1907 art.1, The Laws of Armed Conflicts (1988) p.57

[61] Steven R. Ratner and Jason S. Abrams (1997) p.81.
Leslie C. Green (1993) p.67 and 69: Armed conflict was first considered as a separate level between the state of war and the state of peace and the same author thinks that the two concepts today are used more or less synonymous.

[62] On the other hand, a declaration of war without any use of force would also make the Conventions applicable.

participants carry their arms openly and that they respect the laws and customs of war. To constitute an armed conflict, according to the Geneva Conventions, it does not have to be of a certain length or with a certain number of casualties of either side[64]. There is neither any general rule on how intense the actual military activities must be to fulfil the standards of an armed conflict. In conclusion, there are no exact criteria to be used when defining armed conflicts. As a minimum though, ”it involves the use of armed forces, as opposed to police, and involves the use of force, although that may not involve the actual firing of weapons”[65]. In the Tadic case[66] the Appeals Chamber describes armed conflicts, for the purpose of application of international humanitarian law, as ”whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State”. More important though, it states that humanitarian law applies also after the cessation of hostilities until a general conclusion of peace is reached or, in the case of a non-international armed conflict, a peaceful settlement is achieved. Further it states that the law applies in the whole territories of the involved states, or in the case of a non-international armed conflict, the whole territory under the control of the party, whether or not actual combat is taking place there[67].

Armed conflicts are in international law divided into two main categories; international armed conflicts and non-international armed conflicts[68]. The reasons for this division is of historic-political origin rather than of a legal one. The suggestion to have the full scope of the Geneva Conventions of 1949 applicable to armed conflicts not of an international character was rejected on the basis that this would constitute too severe a threat to state sovereignty; ”Attempts to protect individuals might well prove to be at the expense of the equally legitimate protection of the State”[69]. The different levels of armed conflicts in international law are then above all dealt with in the Geneva Conventions and their Additional Protocols. In these the division is made between international armed conflicts, armed conflicts not of an international character according to Common Article 3 and non-international armed conflicts according to Additional Protocol II. I will now deal with them in order. The Geneva Conventions are as a whole applicable to international armed conflicts and this is shown by the formulation ”any … armed conflict which may arise between two or more of the High Contracting Parties” in common article 2. Additional Protocol I applies to the same kind of

[63] Commentary I (1952) p.32
[64] Steven R. Ratner and Jason S. Abrams (1997) p.81
[65] Ibid. p.82
[66] Prosecutor v. Dusko Tadic, Decision of 2 October 1995 in Case No. IT-94-1-AR72 (hereinafter Tadic decision)
[67] Tadic decision para 70. See also Prosecutor v. Delalic and others, Judgement of 16 November 1998 in Case No. IT-96-21 (hereinafter Celebici judgement) para 183.
[68] Other terms are armed conflicts not of an international character and internal armed conflicts.
[69] Commentary I (1952) p.43. See also Tadic decision para 80; ”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 represent.”

situations[70]. During the creation of the Conventions the question whether they should be applicable in non-international armed conflicts as well was raised, and answered negatively[71]. The concern in this respect was instead going to be met by what was going to become Common Article 3. During the drafting of the second Hague Convention from 1899[72] the situation was somewhat different. The Convention was ”binding on the Contracting Powers, in case of war between two or more of them”[73] but the issue of application in internal armed conflicts was never explicitly raised; it ”simply had not yet entered [the contracting parties] minds”[74]. The fourth Hague Convention with its annexed regulations from 1907, which are most relevant for this thesis, is in the same manner only applicable to international armed conflicts[75]. According to some authors this limitation is only relevant when applying the Convention and the regulations themselves and not when the same provisions have become part of international customary law, as they have now[76]. As an international armed conflict in the sense of the Geneva Conventions is, according to Additional Protocol I, also included so-called wars of national liberation[77].

During a long time the only instruments in international humanitarian law dealing, or at least explicitly dealing, with non-international armed conflicts were the Geneva Conventions and Additional Protocol II. Common Article 3 sets out rules for an ”armed conflict not of an international character occurring in the territory of one of the High Contracting Parties”. The main issue during the creation of this article was initially how this kind of armed conflict should be defined[78]. Since this proved to be an almost impossible question to solve the compromise was to just call it armed conflict not of an international character and instead limit the protection provided for[79]. Still it is important to find out what such a conflict is. The commentary enumerates a number of different criteria which were put forward during the preparatory work in order to distinguish an armed conflict from ”any form of anarchy, rebellion, or even plain banditry”[80]. These criteria deal with for example the level of organisation for the armed forces and possibilities for armed forces to respect and ensure respect for the Conventions. The commentary concludes though that

[70] Additional Protocol I art.2
[71] Commentary I (1952) p.43-48 and Frits Kalshoven (1987) p.26
[72] Convention (II) with Respect to the Laws and Customs of War on Land, signed at the Hague 29 July 1899, 36 Stat. 2227, The Laws of Armed Conflicts (1988) p.63 (Hague Convention (II) 1899)
[73] Hague Convention (II) 1899 art.2
[74] Frits Karlshoven (1987) p.26
[75]The Law of the International Criminal Tribunal of the Former Yugoslavia; Cherif M. Bassiouni and Peter Manikas (eds.), Transnational Publishers Inc., New York 1996 p.510
[76] A Treaties on International Criminal Law, Vol. I, Crimes and Punishment; M. Cherif Bassiouni & Ved P. Nanda (eds.), Springfield, USA 1973 p.414-415
[77] Additional Protocol I art.1(4). For the paragraph to apply a) there must be an armed conflict in which a people is struggling against colonial domination, alien occupation or a racist regime; and b) the struggle of that people must be in order to exercise its right to self-determination. Commentary (1987) p.53-54
[78] Commentary I (1952) p.43-46
[79] Ibid. p.46-48
[80] Ibid. p.49-50

these criteria are not obligatory and that Common Article 3 instead ”should be applied as widely as possible”[81], meaning both when set against events such as rebellion and civil disturbances but also against international armed conflicts[82]. The answer to the question of demarcation to an international armed conflict was confirmed in the Nicaragua case[83] when the International Court of Justice clarified that common article 3 was to be seen as ”a minimum yardstick … which are also to apply to international conflicts”[84]. On the question when a strife, a riot, or whatever one choose to call it, stops and an non-international armed conflict starts there is a big difference between Common Article 3 and Additional Protocol II which states that it ”shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature”[85]. These situations have one or more of the following characteristics; large scale arrests, a large number of political prisoners, the probable existence of ill-treatment or inhuman conditions of detention, the suspension of fundamental judicial guarantees and allegations of disappearances[86]. In addition to this, Additional Protocol II contains three criteria for its application. These are 1) that the counterpart to the armed forces of the High Contracting Party should act under responsible command, 2) that this counterpart exercise such control over a part of the territory as enable it to carry out sustained and concerted military operations, and 3) that the counterpart exercise such control over a part of the territory as enable it to implement the protocol. The responsible command criterion means the organization capable to plan and carry out the kind of military operations referred to in criterion two, and a certain degree of *de facto* authority[87]. The second criterion refers to the continuity of the operation and the level of planning and how well that plan is implemented[88]. The third criterion is connected with the other two; being under responsible command and in control of a part of the territory concerned, the counterpart must be in a position to implement the Protocol. Common article 3 does not have the mentioned criteria for its application and, as indicated above, it is unclear where the border-line to internal disturbances and tensions is[89]. Nevertheless it therefor applies to a broader range of armed

[81] Ibid. p.50. In lack of any other guidelines it seems, the criteria set forth in the commentary are suggested as a description, and perhaps limitation, of the scope of application of Common Article 3. The Law of the International Criminal Tribunal of the Former Yugoslavia (1996) p.456

[82] Commentary I (1952) p.52; ”… its terms must *a fortiori* be respected in the case of international conflicts proper when all the provisions of the Convention are applicable.”

[83] Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgement, I.C.J. Reports 1986, para 14 (hereinafter Nicaragua case)

[84] Nicaragua case para 218

[85] Additional Protocol II art.1(2). In addition to this article 3(1) states that ”Nothing in this Protocol shall be invoked for the purpose of affecting the sovereignty of a State or the responsibility of the government, by all legitimate means, to maintain or re-establish law and order in the State or to defend the national unity and territorial integrity of the State”.

[86] Commentary (1987) p.1355

[87] Ibid. p.1352

[88] Ibid. p.1353

[89] Steven R. Ratner and Jason S. Abrams (1997) p.92-93

conflicts[90]. Albeit, in the Rome Statute the war crimes originating from Common Article 3 as well as the ones from Additional Protocol II both are subject to the mentioned threshold distinguishing non-international armed conflicts from internal disturbances and tensions[91]. It is interesting to note though, that the war crimes in the Statute originating from the Protocol do not have the threshold of three criteria. It simply applies to ”armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups”[92].

6. War Crimes committed in International Armed Conflicts

6.1 Mechanism for Individual Criminal Responsibility

[90] Commentary (1987) p.1350

[91] Rome Statute art.8(d) and 8(f). Article 8(3) further states a threshold identical to the one mentioned in *supra* note 18 with the exception of ”affecting the sovereignty of a State”. It refers to war crimes originating from Additional Protocol II and Common Article 3, the latter which seems to be more restrictive than existing law.

6.1.1 The Geneva Law

The earlier Geneva Conventions were no successes in the respect of repression of violations of their provisions. The Convention from 1864 is totally silent on the matter[93]. The Conventions from 1906 and 1929 contained articles requiring states to enact legislation for repression of breaches[94] but neither of them proved effective since states did not comply with these articles[95]. I will not deal further with the older Geneva Conventions.

It was in the Geneva Conventions from 1949 that articles on repression of violations for the first time were properly developed. This was, regarding the individual criminal responsibility for violations, done through the so-called system of grave breaches which is common for all the four Conventions. The Conventions here make a distinction between breaches and "grave breaches" of its provisions, the grave ones being: "wilful killing; torture or inhuman treatment, including biological experiments; wilfully causing great suffering or serious injury to body and health; extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly; compelling a prisoner of war or a protected person under the Fourth Convention to serve in the forces of a hostile Power; depriving a prisoner of war or a protected person under the Fourth Convention of the rights of fair and regular trial prescribed in the Convention; taking of hostages; unlawful confinement of protected persons under the Fourth Convention; unlawful deportation or transfer of protected persons under the Fourth Convention."[96] To constitute a grave breach the above mentioned acts[97] must be committed against persons or objects that are protected by the conventions. These are;

"- the wounded and sick, and members of medical and religious personnel (First Convention);

- the wounded, sick and shipwrecked, religious, medical and nursing personnel of hospital ships and their crew, medical and religious personnel of other ships (Second Convention);

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[92] Rome Statute art.8(2)(f). The formulation is from the Tadic decision paragraph 70. On the one hand it does not establish the requirements of responsible command and exercising control over the territory and it expands the concept to conflicts between organised groups, while it on the other hand requires the armed conflict to be "protracted".

[93] Commentary I (1952) p.353

[94] Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, signed at Geneva 6 July 1906, 35 Stat. 1885, The Laws of Armed Conflicts (1988) p.301 art.28 provided for the repression of (1) individual acts of pillage and ill-treatment of the wounded and sick of armed forces, and (2) abuse of the Red Cross flag or armlet, which is to be punished as an unlawful use of military insignia".
Convention for the Amelioration of the Condition of the Wounded and sick of Armies in the Field (1929) art.29: "The Governments of the High Contracting Parties shall also propose to their legislatures, should their penal laws be inadequate, the necessary measures for the repression in time of war, of any act contrary to the provisions of the present Convention".
Convention Relative to the Treatment of Prisoners of War (1929) did not contain such a provision.

[95] Commentary I (1952) p.356-357

[96] Geneva Convention I art.50; II art.51; III art.130 and; IV art.147

[97] Even though act could also mean failure to act, which will be dealt with briefly in chapter 6.2, I will for the purpose of this thesis continuously use the term "act".

- prisoners of war (Third Convention);
- civilians who, in case of conflict or occupation, find themselves in the hands of a Party to the conflict, or of an Occupying Power, of which they are not nationals (Fourth Convention)…
- hospitals, ambulances, medical equipment and vehicles (First Convention);
- hospital ships, coastal rescue craft and coastal medical installations (Second Convention);
- civilian hospitals and their equipment and in occupied territory movable or immovable property (Fourth Convention)."[98]

Why the particular acts mentioned above were chosen to constitute grave breaches was mainly motivated by the fact that they were considered the most serious of the breaches of the conventions and therefor deserving being object of universal measures of repression. The list of grave breaches should not be seen as exhaustive which means that acts that are not included also can be the object of the measures I will deal with below[99]. The reason that the wording "grave breaches" was used, and not for example "grave crimes" or "war crimes", was that, although all the grave breaches are called "crimes" in the penal legislation of almost all countries, the word "crime" generally has a different meaning in different countries[100].

The system of grave breaches is based on three fundamental obligations, namely the obligation to enact special legislation on the subject, the obligation to search for any person accused of having committed, or having ordered to commit, a grave breach, and the obligation to try such persons or, if the Contracting Party prefers, to hand them over for trial to another state concerned[101]. The first obligation is similar to the obligation contained in the Geneva Convention from 1929. Albeit, since the latter had proven to be ineffective when it came to changing national legislation, a stronger wording was chosen using the Genocide Convention[102] article 5 as a model[103]. Instead of governments proposing their legislatures that necessary measures should be taken, the Conventions from 1949 simply states that state parties undertake to enact any legislation necessary to provide effective penal sanctions[104]. The obligation includes to enact a legislation that should specify both the nature and the extent of the penalty for each violation, so that this will not be left up to the judges' discretion[105]. The legislation should also deal with the persons that have committed as well as the persons that have ordered these persons to commit the grave breaches. The lack

[98] Commentary (1987) p.976-977
[99] Commentary I (1952) p.371
[100] Ibid. p.371
[101] Ibid. p.362
[102] Convention on the Prevention and Suppression of the Crime of Genocide, Dec. 9 1948, 78 UNTS 277
[103] Final Record of the Diplomatic Conference Convened by the Swiss Federal Council for the Establishment of International Conventions for the Protection of War Victims and held at Geneva from April 21st to August 12th 1949 (hereinafter Final Record), Vol IIB p.85
[104] There were suggestions for making the provision even stronger by the inclusion of a two-year time limit for the enacting of appropriate legislation, but this proposal was rejected. Final Record Vol.IIB p.85-86, 132
[105] Commentary I (1952) p.364

of reference to responsibility of those persons who fail to intervene to prevent or put an end to a breach of the conventions was in the Commentary interpreted in the way that this is something that must be solved by national legislation[106]. The question of responsibility for failure to act was later solved in Additional Protocol I article 86 and this is further dealt with in chapter 6.2. The second obligation imposes an active duty for states which means that as soon as the state realises that a person, who have violated any of the grave breaches, is on its territory it is obliged to make sure that this person is arrested and prosecuted without delay. The search should take place spontaneously and not merely on a request from another state[107]. The third obligation states the principle *aut dedere aut judicare*[108]. The state can according to this bring the person before its own courts or, if it so wish, extradite him to another state party. The conditions for extradition is that the national legislation in the extraditing state allows this and that the requesting state can show enough evidence against the accused for sufficient charges; that this state has made out a *prima facie* case. The essential aspect of the third obligation is that a state must in some way act to bring the accused to justice; if it for some reason cannot extradite, it must prosecute. Important to note here is also that there is nothing in the paragraph that prevents a state to surrender an accused to an international criminal court if the competence of this has been recognised by the state parties to the Conventions[109]. The third obligation clarifies that universal jurisdiction is provided for the grave breaches.

As mentioned above the enumeration of grave breaches does not contain all the breaches of the Conventions but is at the same time not exhaustive. In addition to this, the system of grave breaches includes a provision stating that all state parties ”shall take measures necessary for the suppression of all acts contrary to the provisions [of the conventions] other than the grave breaches”[110]. The question of the character of the measures has been left open and can include for example disciplinary order[111]. The system of grave breaches also includes a safeguard of a proper trial and defence[112].

The system was reinforced and developed in a number of ways by the first Additional Protocol to the Geneva Conventions. It applies to the grave breaches of both the Protocol and the Conventions[113]. Furthermore, the system is extended to the grave breaches defined in the Conventions when committed against the categories of persons and objects mentioned in article 85(2) of the Protocol. These are:

- persons who have taken part in hostilities and have fallen into the power of an adverse party within

[106] Ibid. p.364
[107] Ibid. p.366
[108] The principle to either extradite or prosecute. It is a modern adaptation of Grotius' *aut dedere aut punire*, rephrased by professor Cherif M. Bassiouni. Cherif M. Bassiouni: Introduction, in International Criminal Law: Crimes; Cherif M. Bassiouni (ed.), Transnational Publishers Inc., New York 1986 p.xviii
[109] Commentary I (1952) p.366
[110] Geneva Convention I art.49 (para 3), II art.50 (para 3), III art.129 (para 3) and IV art.146 (para 3)
[111] Frits Kalshoven (1987) p.68
[112] Geneva Convention I art.49 (para 4), II art.50 (para 4), III art.129 (para 4) and IV art.146 (para 4)
[113] Additional Protocol I art.85(1)

the meaning of articles 44 and article 45 of the Protocol. These provide a broader definition than that of prisoner of war in the third Geneva Convention article 4. Article 44 extends the concept of combatants, and thereby the concept of prisoners of war, to encompass such guerrilla fighters who do not fulfil all the necessary conditions in the Convention[114]. In addition to this it extends the protection granted to prisoners of war to the same category in situations when they in fact have lost this status[115]. These changes are in line with the inclusion of wars of national liberation within the Protocol's scope of application. Article 45 strengthens article 5 paragraph 2 of the third Convention[116] by enumerating a number of situations in which a person is presumed to be a prisoner of war. Article 45 cover those persons whose status as a prisoner of war have not yet been established but not those whose right to prisoner of war-status has been rejected in the proper manner. They might though be protected by the fourth Convention and therefor be protected by the system of grave breaches anyway;

- refugees and stateless persons within the meaning of article 73 who are in the power of an adverse party. This article place these categories on an equal level with civilians in the fourth Convention[117];
- the wounded, sick and shipwrecked of the adverse party, as defined in article 8 of the Protocol. This article enlarge the categories compared to the definitions in the First and Second Convention[118], for example by including both militaries and civilians, not to mention persons that are neither wounded nor sick, such as new-born babies and expectant mothers;
- medical or religious personnel, medical units and transports under the control of the adverse party as defined in article 8 of the Protocol. This article enlarge the categories compared to the definitions in the Conventions by including for example civilian medical personnel, temporary medical personnel, temporary medical units and temporary medical transports as long as they are exclusively assigned to medical tasks[119].

There were suggestions to include the category of persons referred to in article 75 as well[120] but this was rejected because many states feared that this would include, as grave breaches, breaches committed by a

[114] Geneva Convention III art.4 (A)(2)
[115] Additional Protocol I art.44 (3-4)
[116] Geneva Convention III art.5 (para 2): "Should any doubt arise as to whether persons having committed a belligerent act and having fallen into the hands of the enemy belong to any of the categories enumerated in article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal."
[117] The fourth Geneva Convention does, to a certain extent, include refugees within its protection. It does not, though, take into account refugees who do not longer enjoy the protection of the state of which they are nationals. Commentary (1987) p.848
[118] Geneva Convention I art.13 and II art.13
[119] Commentary (1987) p. 992

party to the conflict against its own nationals[121]. The grave breaches enumerated in Additional Protocol I do not have to be committed against any protected persons; in fact the Protocol does not speak in terms of protected persons at all[122].

The system was also, as mentioned, developed by increasing the number of acts. These are enumerated in article 11 and article 85 paragraph 3 and 4. Article 11 aims at protecting the physical and mental health and integrity of persons and does so by generally prohibiting ”any medical procedure which is not indicated by the state of health of the person concerned and which is not consistent with generally accepted medical standards”[123]. To constitute a grave breach the act or omission must be wilful, it must seriously endanger the physical or mental health or integrity of the person concerned, and it has to be committed against a person who is in the power of a state other than the one on which he depends[124]. Article 85 paragraph 3 deals with breaches ”on the battlefield” or what is commonly referred to as the Hague Law, while paragraph 4, with the exception of subparagraph 4(d) which also belongs to the Hague Law, deals with different violations of rights of persons in the power of the enemy.

Additional Protocol I further develops the system of grave breaches by urging the state parties to assist and cooperate with each other in criminal proceedings regarding these issues[125]. Last but not least; the list of judicial guarantees included in the system of grave breaches is set out in detail and enlarges by article 75(4) of the Protocol[126].

All the grave breaches do fall under a definition of war crimes[127] and according to Additional Protocol I article 85(5) they are also qualified as such. At the same time does the concept of war crimes extend beyond grave breaches[128].

The system of grave breaches is, as shown above, ultimately dependent on the compliance of the state parties in adjusting the national legislation and it might therefore be considered of secondary importance

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[120] Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva 1974-77, Vol.IX (hereinafter Official Records) p.256
The persons referred to in article 75 are persons that are affected by a situation of international armed conflict, as defined in article 1 of the Protocol, in the power of a party to the conflict and who do not benefit from a more favourable treatment under the Conventions or the Protocol.

[121] Commentary (1987) p.993

[122] Steven R. Ratner and Jason S. Abrams (1997) p.85 ”… with respect to civilians, its grave breaches apply to all civilians, not merely those under the control of another state.”

[123] Additional Protocol I art.11(1). The provision is further specified in paragraph 2 and 3.

[124] Ibid. art.11(4)

[125] Ibid. art.88-89. Article 89 explicitly deals with ”serious violations” which, according to the commentaries, are something distinguished from ”grave breaches”. Commentary (1987) p.1033. However, reading article 90(2)(c)(i) (”other”) it seems as if ”grave breaches” are included in the concept of ”serious violations”.

[126] In connection with this there might be reason to mention paragraph 7 of the same article, which clarifies that nothing in article 75 is an obstacle to the prosecution and trial of persons accused of war crimes or crimes against humanity. The paragraph is in fact superfluous but is justified in the commentaries by ”it is a fact that often things which are self-evident become even more evident if they are stated”. Commentary (1987) p.889

[127] Joyce A.C. Gutteridge: The Geneva Conventions of 1949, 26 Brit.Y.B. INT’L L. 305

how well-developed or detailed it is, when it comes to determining its success.. The same goes of course for other breaches of the Conventions and the Protocol. If the state parties does not enact the proper legislation, take the duty to extradite or prosecute as well as the duty to search for suspects seriously, the system cannot work. Here it all comes down to the principle of *pacta sund servanda*; states willingness to honour their concluded agreements. First of all, the four Geneva Conventions are widely, almost universally, ratified[129] and are also considered being part of international customary law[130]. Additional Protocol I has a lower number of ratifications[131] and cannot be said, as a whole, to be part of international customary law[132]. For the repression of violations the ratifications and support leading to the development of customary law are, as indicated, only the first step. The states also have to fulfil their obligations according to the Conventions and the Protocol, the most prominent of which is to enact an appropriate legislation. This is something that states to a large extent have failed to do[133]. Regarding the state parties' obligation to search, investigate and prosecute it is, according to some authors, even worse[134].

6.1.2 The Hague Law

The Hague Conventions from 1899 and 1907 are silent when it comes to the criminal responsibility of individuals for violations of them and the annexed regulations to the fourth Convention. All that this means is that there are no obligations for states to enact the appropriate legislation or to bring individuals accused of the violations before justice. Regarding the latter aspect, states have this competence according to international customary law[135]. The competence might be derived from article 3 of Convention IV of

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[128] Commentary IV (1958) p.594

[129] Number of state parties to the Geneva Conventions: 188; available at: <http://www.icrc.org/unicc/icrcnews.nsf> (Dec.1 1998)

[130] See Report of the Secretary-General pursuant to paragraph 2 of Security Council Resolution 808, UN Doc. S/25704 and Add.1 (1993) (hereinafter Secretary-General's Yugoslavia Report) para.35 and Theodor Meron: Human Rights and Humanitarian Norms as Customary Law, Clarendon Press, Oxford 1989 p.41-62.

[131] Number of state parties to the Additional Protocol I: 152; available at: see *supra* note 39

[132] Theodor Meron (1989) p.62-70 and 74-78. Secretary-General's Yugoslavia Report does not exclude that some provisions of Additional protocol I might be part of international customary law since it only enumerates instruments that are *beyond any doubt* part of customary law.

[133] Krzysztof Drzewicki: National legislation as a measure for implementation of international humanitarian law, in Implementation of International Humanitarian Law; Frits Karlshoven & Yves Sandez (eds), Martinus Nijhoff Publishers, Dordrecht 1989 p.112 and Michael Bothe: The role of national law in the implementation of international humanitarian law, in Etudes et essais sur le droit international humanitaire et sur les principes de la Croix-Rouge en l'honneur de Jean Pictet; Christophe Swinarski (ed.), Geneva 1984 p.305-307

[134] Frits Karlshoven (1987) p.69

[135] Frits Kalshoven (1987) p.67 and Alex Obote-Odora: The Judging of War Criminals: Individual Criminal Responsibility Under International Law, Edsbruk 1997 p.34-35

1907[136]. It has been suggested that there is a customary obligation to deal with violations when committed by nationals. This obligation should then derive from article 56 of the Regulations on land warfare[137] [138]. The fourth Hague Convention with its annexed regulations is part of international customary law[139].

The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict article 28 does, with the provision of grave breaches as a model, impose on contracting states to take necessary steps to prosecute and impose penal or disciplinary sanctions upon persons who commit or order to be committed a breach of the Convention. In short, the states are responsible for enacting the proper legislation which include a sanction for each breach[140]. The Convention is not clearly part of international customary law[141].

6.1.3 International Tribunals and the International Criminal Court

As shown above the Geneva Law and the Hague Law rely on national legislation and national enforcement, when it comes to repress individuals' violation of their provisions. There are obvious weaknesses with such a system, one being that states are made responsible for trying persons accused of crimes committed with the knowledge, or even in the name of, the state itself. This problem has been addressed on a number of occasions especially throughout recent history, by the setting-up of international tribunals. Before the summer of 1998 these have always been on an ad hoc basis. When it comes to the acts of war crimes these tribunals have not created new definitions but used already existing conceptions, from the Geneva Law and the Hague Law. The exact scope has differed though.

The Nuremberg trials took place under the terms of the Charter drafted in London 1945 by representatives from the United States, the United Kingdom, the USSR and France[142]. They aimed at "trial and punishment of the major war criminals of the European Axis"[143]. The military tribunal had subject matter jurisdiction over crimes against peace, war crimes and crimes against humanity. The war crimes

[136] Alex Obote-Odora (1997) p.34. Other authors are of the opinion that article 3 (second sentence) in fact absolves private persons from responsibility and shift this to states. Igor P. Blishchenko: Responsibility in Breaches of International Humanitarian Law, in International Dimensions of Humanitarian Law, Unesco Geneva 1988 p.282

[137] Hague Regulations art.56 (para 2): "All seizure of, destruction or wilful damage done to institutions of this character, historic monuments, works of art and science, is forbidden, and should be *made the subject of legal proceedings*" (my italics)

[138] Frits Kalshoven (1987) p.68

[139] Secretary-General's Yugoslavia Report para 34-35 and The Laws of Armed Conflict (1988) p.63

[140] Jirí Toman: The Protection of Cultural Property in the Event of Armed Conflict, Commentary on the Convention for the Protection of Cultural Property in the Event of Armed Conflict and its Protocol, signed on 14 May 1954 in The Hague, and on other instruments of international law concerning such protection, UNESCO Publishing 1996 p.87

[141] Secretary-General's Yugoslavia Report para 34-35

[142] 19 other states subsequently acceded to the Agreement. Steven R. Ratner and Jason S. Abrams (1997) p.163 note 3

[143] Nuremberg Charter art.1. Individual responsibility is stated in article 6.

provision used a brief formulation and an exemplifying list[144] and all the indictment, prosecutions and judgements were in fact concentrated to the acts on this list[145]. This even though the provision implicitly referred back to already existing international humanitarian law[146]. One of the most important effects of the Nuremberg trials was that they clearly establish individual criminal responsibility for certain crimes, for example war crimes as defined and described in the Charter[147].

In 1993 the Security Council of the United Nations established a war crimes tribunal as a response to the violence and atrocities committed in connection with the war in Yugoslavia. The Security Council saw the violence as a threat to the peace and security and could therefor use its power according to the UN Charter[148] chapter VII[149]. The Statute of the tribunal establishes jurisdiction over ”persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991”[150]. Individual criminal responsibility is provided for in article 7[151]. In order to avoid violations of the principle *nullum crimen sine lege* the tribunal are, when it comes to its *ratione materiae,* only to apply such ”rules of international humanitarian law which are beyond any doubt part of customary law”[152]. This would mean two things; that the provision is part of international customary law and that individual criminal responsibility is provided for its violation. The crimes within the jurisdiction are Grave breaches of the Geneva Conventions of 1949, Violations of the laws and customs of war, Genocide and Crimes against humanity[153], the two first being war crimes in a strict sense. As has been shown in chapter 6.1.1 the system of grave breaches in the Geneva Conventions is part of international customary law and it establishes

[144] See chapter 4.
[145] Steven R. Ratner and Jason S. Abrams (1997) p.85
[146] ”[T]he crimes defined by Article 6, section (b) of the Charter were already recognized as War Crimes under international law. They were covered by Articles 46, 50, 52 and 56 of the Hague Convention of 1907, and Articles 2, 3, 4, 46, and 51 of the Geneva Convention of 1929. That violations of these provisions constituted crimes for which the guilty individuals were punishable is too well settled to admit of argument.” 22 International Military Tribunal Trials at 497; quoted in Steven R. Ratner and Jason S. Abrams (1997) p.85
[147] The invention in this case was not so much that the Conventions mentioned in *supra* note 146 gave rise to individual criminal responsibility but that rules from international customary law could do so. The Law of War Crimes (1997) p.174
[148] Charter of the United Nations, signed at the United Nations Conference on International Organisation, San Francisco, California, June 26 1945, Department of State Publication 2353, Conference Series 74
[149] See Security Council Resolution 808, UN Doc. S/25314 (22 Feb. 1993) and Security Council Resolution 827, UN Doc. S/25704 (25 May 1993); Both preambles states that the situation in the territory of the former Yugoslavia constitutes ”a threat to international peace and security”.
[150] Yugoslavia Statute art.1
[151] ”A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime…shall be individually responsible for the crime.” The formulation is meant to include ”all perpetrators along the chain of command, from the level of policy decision-makers to the rank-and -file level of soldiers, paramilitary, or civilians”. Daphna Shraga and Ralph Zacklin: The International Criminal Tribunal for the Former Yugoslavia, 5 EJIL (1994) p.370
[152] Secretary-General’s Yugoslavia Report para 34. The opposite approach, that the Statute should be seen as a quasi-legislation the language of which the tribunal were to be bound by, would limit treaty obligations, the application of well-established customary international law and the positive law of the states of the former Yugoslavia. The Law of the International Criminal Tribunal of the Former Yugoslavia (1996) p.487-488
[153] Yugoslavia Statute art.2-5

individual criminal responsibility. Article 2 includes only the acts enumerated in the article and only when they are committed against persons and property protected by the Geneva Conventions under the strict conditions set out there[154]. The concept of protected persons seems to be somewhat stretched in the Celebici case. As shown above, the concept does not include a state's own civilians and in the mentioned case the victims were Bosnian Serbs detained by Bosnian authorities. The Tribunal takes the pragmatic approach to consider the detained as protected persons since they were detained clearly because of their Serb identity[155]. More complicated is how article 3 of the Statute should be interpreted. The article is created in a manner similar to the Nuremberg Charter, in the way that it outlaws violations of the laws or customs of war and enumerate some of these violations, although not all of them. As mentioned above, the rules have to be part of international customary law and the relevant instruments are in that case the Geneva Conventions, the Hague Convention (IV) and the Regulations annexed thereto, the Genocide Convention and the Charter of the International Military Tribunal of 1945[156]. Article 3 of the Statute should therefore, according to the Secretary-General, be based on the Hague Regulations as interpreted and applied by the Nuremberg Tribunal[157]. It has been suggested though that both the Additional Protocols should be included in the concept of "laws and customs of war" in the article[158]. On the same issue the Commission of Experts mentioned "Hague Convention IV of 1907, the Geneva Conventions of 1949 and, to some extent, the provisions of Additional Protocol I"[159]. The latter opinion seems reasonable, especially considering the overlapping by many acts of the different instruments. The issue was also dealt with by the Tribunal itself, particular when it came to the application of humanitarian law for armed conflicts not of an international

[154] Tadic decision para 81. Other views on this are that article 2 includes the grave breaches of Additional Protocol I as well (The Law of the International Criminal Tribunal of the Former Yugoslavia(1996) p.489) and that it applies to armed conflicts of a non-international character (Amicus Curiae Brief Presented by the Government of the United States, Motion Hearing, Prosecutor v. Tadic, Case 94 IT-94-1-T July 25 1995). One separate opinion in the Tadic decision, on this matter, has also received much attention. Judge Abi-Saab argues that internal armed conflicts could be included in the system of grave breaches and therefor article 3 of the Statute either by a teleological interpretation of the Geneva Conventions, "in the light of their object and purpose", or through a new customary rule ancillary to these Conventions (Prosecutor v. Dusko Tadic: Separate opinion of Judge Abi-Saab on the defence motion for interlocutory appeal on jurisdiction, 2 Oct. 1995, Case No. IT-94-1-AR72). One of the reasons that this opinion has received so much attention is that the majority in fact admits that "a change in customary law concerning the scope of 'grave breaches' system might gradually materialize". Tadic decision para 83

[155] Celebici judgement para 264-266. In this decision the Tribunal explicitly rely on the human rights doctrine on civilians' protection from excesses of their own governments.

[156] Secretary-General's Yugoslavia Report para.35

[157] Ibid. para.44

[158] See Provisional Verbatim Record of the Three Thousand Two Hundred and Seventeenth Meeting, May 25 1993, UN Doc. S/PV.3217 p.11, 15 and 19. Explicitly by the representative from the United States, Mrs Albright, but also by the representatives from the United Kingdom and France by referral to the humanitarian law in force in the territory of the former Yugoslavia at the time the offences were committed. See also James C. O'Brien: The International Tribunal for Violations of International Humanitarian Law in the Former Yugoslavia, 87 AJIL 646.

[159] Letter dated 24 May 1994 from the Secretary-General to the President of the Security Council, May 27 1994, UN Doc. S/1994/674 (hereinafter Yugoslavia Commission Final Report), as referred to in The Law of the International Criminal Tribunal of the Former Yugoslavia (1996) p.509

character. In the Tadic case the Appeals Chamber first concluded that the conflicts in the former Yugoslavia had both international and internal characteristics and that the Security Council had empowered the tribunal to deal with violations in both these contexts[160]. It further stated that international customary law has developed to govern non-international armed conflicts[161] and that it in fact imposes individual criminal responsibility for certain violations committed in non-international armed conflicts[162]. Generally, regarding article 3, the Appeals Chamber stated that the article covers ”any serious offence against humanitarian law not covered by Article 2, 4 or 5”[163].This rule must be part of customary law or, if it is part of treaty law, the required conditions must be met and furthermore the violation of it must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule[164].

The Rome Statute was created at the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court from June 15 to July 17 1998, after six sessions of preparatory work by a committee at the United Nations headquarters in New York. The International Criminal Court (ICC) will ”exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in [the] Statute, and shall be complementary to national criminal jurisdictions”[165]. Individual criminal responsibility is dealt with in article 25. The International Criminal Court is not, as the tribunals mentioned above, created on an ad hoc basis which means, among other things, that it does not have the same obligation to include only such crimes that are part of international customary law. The Statute is a legislation and the jurisdiction covers events after the entry into force of it[166]. No state has ratified the Statute yet. The war crimes provision consists of an extensive list of acts, divided into four parts. The first part covers the grave breaches of the Geneva Conventions and is more or less identical with the Yugoslavia Statute article 2. The small differences do hardly open for a different interpretation than the one that was made in the Tadic decision[167]. The second part covers grave breaches from Additional Protocol I, rules from the Hague Regulations and also some non-grave breaches of the Geneva Conventions and Additional Protocol I. Part three and four cover war crimes committed in armed conflicts not of an international character and will be dealt with in chapter 7.1.3. Particular for all the war crimes in the Statute

[160] Tadic decision para 77
[161] Ibid. para 127
[162] ”customary international law imposes criminal liability for serious violations of common Article 3, as supplemented by other general principles and rules of protection of victims of internal armed conflict, and for breaching certain fundamental principles and rules regarding means and methods of combat in civil strife.” Tadic decision para 134. This is confirmed regarding Additional Protocol II article 4 in Prosecutor v. Anto Furundzija, Judgement of 10 December 1998 in Case No. IT-95-17/1-T10 (hereinafter Furundzija judgement) para 44.
[163] Tadic decision para 91
[164] Ibid. para 94 and Furundzija judgement para 258
[165] Rome Statute art.1.
[166] Rome Statute art.11(1)
[167] See *supra* note 154.

is that it is possible for states to derogate from the Court's jurisdiction over them for a period of seven years[168].

6.2 General about the Acts of War Crimes

In the next sub-chapter I will deal with all those acts of war crimes which can be derived from the reasoning in chapter 6.1. These acts are many times put in the exact same wording in different instruments. Where this is not the case, no matter if the difference is substantial or not, it will be mentioned and dealt with in the text. In this chapter I will deal with such aspects of war crimes that are the same for all or a number of acts from a particular instrument, but that could very well differ from one instrument to another. These aspects are mentioned here so that they do not have to be repeated under every act. Common for all the acts, regardless of which instrument they are from, is that they have to be committed during some kind of armed conflict. Regarding the nexus between the act and the armed conflict, the Yugoslavia Tribunal has said that it is enough that the act is closely related to the conflict as a whole and that this does not mean that the two for instance have to occur at the exact same time and place. Furthermore, it does not mean that the act is "part of a policy or of a practice officially endorsed or tolerated by one of the parties to the conflict, or that the act be in actual furtherance of a policy associated with the conduct of war or in actual interest of a party to the conflict"[169].

Common for all the acts from the system of grave breaches in the Geneva Conventions[170] is that they have to be committed during an international armed conflict and against any of the persons or objects protected by the Geneva Conventions and Additional Protocol I. With the exception of persons or objects protected by Additional Protocol I, the same goes for all non-grave breaches of the four Conventions. The grave breaches from article 85(3) and (4) of the Protocol[171] must be committed wilfully and during an international armed conflict. The grave breaches from article 85(3)[172] must thereto cause death or serious injury to body and health.

Regarding all grave breaches, article 86 of the Protocol states that these shall be repressed also when they are a result from a failure to act when there is a duty to do so. "Repressed" here refers to enacting

[168] Rome Statute art.124
[169] Prosecutor v. Dusko Tadic, Judgement of 7 May 1997 in Case No. IT-94-1-T (hereinafter Tadic judgement) para 573
[170] From *Wilful killing* to *Taking of hostages*.
[171] From *Making the civilian population or individual civilians the object of attack* to *Making the clearly-recognized historic monuments…*
[172] From *Making the civilian population or individual civilians the object of attack* to *The perfidious use of the distinctive emblem…*

legislation that lays down penal sanctions for the perpetrators of grave breaches[173]. Article 86 was an attempt to bring the Geneva Conventions up to date with international customary law, on this issue[174].

The acts derived from Common Article 3, which are totally overlapped by different grave breaches[175], must be committed in an armed conflict[176] and against persons taking no active part in hostilities[177].

The Yugoslavia Statute article 2 and the Rome Statute article 8(2)(a) deals with and refers to the grave breaches of the Geneva Conventions. As has been shown in chapter 6.1.3 this does not include the grave breaches from Additional Protocol I. More than that though, the provisions do not include the category of protected persons and objects, that are included in the system of grave breaches according to Additional Protocol II article 85(2).

The war crimes enumerated in the Rome Statute are within the jurisdiction of the International Criminal Court ”in particular when committed as a part of a plan or policy or as part of a large-scale commission of such crimes”[178]. This phrase was the result of a compromise between no threshold at all and a threshold stating that a war crime could only be committed under the above stated circumstances. It is doubtful that it, as it stands, has any legal implications at all.

The mental element for the crimes in the Rome Statute is dealt with in an article of its own[179], even if this is overlapped for many acts of the war crimes by the terms ”wilful”, ”wilfully” and ”intentionally”. At least two question marks should be asked regarding the general article. First, one could ask whether the phrase ”Unless otherwise provided” means that a crime can be committed by negligence or if it only refers to other forms of intent and secondly, one could ask if paragraph 2(b) proscribes so called *dolus eventualis* or something else.

In chapter 6.3 I have only referred to the international instrument or instruments where the act is explicitly mentioned. This means for example that article 3 of the Yugoslavia Statute is not mentioned for all the acts that this provision in fact covers.

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[173] Commentary (1987) p.1010

[174] Commentary (1987) p.1005-1007

[175] In the enumeration below it is only *Outrages upon personal dignity…* that is mentioned separately but this act might be included under *Torture or inhuman treatment…* and *Wilfully causing great suffering or serious injury to body or health*.

[176] See chapter 5 regarding Common Article 3:s relationship to international and non-international armed conflicts..

[177] See chapter 7.2 regarding the scope of persons.

[178] Rome Statute art.8(1)

[179] Rome Statute art.30 Mental element

1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.
2. For the purposes of this article, a person has intent where:
(a) In relation to conduct, that person means to engage in the conduct;
(b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.
3. For the purposes of this article, ”knowledge” means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. ”Know” and ”knowingly” shall be construed accordingly.”

6.3 The Acts

Wilful killing

This act is included in the system of grave breaches[180] and Common Article 3(1)(a)[181] of the Geneva Conventions, the Yugoslavia Statute article 2(a) and the Rome Statute article 8(2)(a)(i).

Wilful killing or murder[182] is a crime according or all legal systems in the world and there ought to be more than a basic consensus on the content of this concept. Some remarks should be made though. The provision covers not only the act of killing but also faults of omission, provided of course that the omission was wilful and was intended to cause death. Another aspect that is included is putting persons to death as a reprisal[183]. The case of killing prisoners of war or civilians as a result of acts of war, for example the bombardment of a civilian hospital, was not dealt with by the making of the Geneva Conventions and the question of including this here was therefor left open[184]. This probably comes down to what *mens rea*, or more specifically what intent, that is required for the act. This differ from one national legal system to another and in international criminal law this issue is only briefly touched upon[185]. The Yugoslavia Tribunal responds to this issue by stating that a murder has taken place when ”there is demonstrated an intention on the part of the accused to kill, or inflict serious injury in reckless disregard of human life”[186].

Torture or inhuman treatment, including biological experiments

These acts are included in the system of grave breaches[187] and Common Article 3(1)(a)[188] of the Geneva Conventions, the Yugoslavia Statute article 2(b) and the Rome Statute article 8(2)(a)(ii).

The prohibition of torture is a human rights rule[189] and is considered being part of international customary law[190]. Torture is in the Geneva Conventions understood in its ”legal meaning-i.e., the infliction of suffering

[180] Geneva Convention I art.50; II art.51; III art.130 and; IV art.147
[181] See *infra* note 198.
[182] There is no difference between these two acts. Celebici judgement para 422
[183] Different kinds of reprisals are prohibited both according to the Geneva Conventions (I art.46; II art.47; III art.13 para 3; and IV art.33 para 3) and Additional Protocol I (art.20; 51(6); 52(1); 53(c); 54(4); 55(2) and; 56(4).
[184] Commentary on the Geneva Conventions of 12 August 1949: Geneva Convention Relative to the Treatment of Prisoners of War (III); Jean S. Pictet (ed.), Geneva 1960 p.627 and Commentary IV (1958) p.597
[185] In the international instruments that I am using for this thesis the question is only dealt with in the Rome Statute; see *supra* note 86.
[186] Celebici judgement para 439
[187] Geneva Conventions *supra* note 180
[188] See *infra* note 198.
[189] See for example Universal Declaration of Human Rights, UN General Assembly resolution 217A (III) of 10 December 1948 art.5 and International Covenant on Civil and Political Rights, concluded 16 December 1966, entered into force 23 March 1976, 999 UNTS 171 art.7
[190] J. Herman Burgers and Hans Danelius: The United Nations Convention against Torture. A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Martinus Nijhoff Publishers 1988 p.12. See also Celebici judgement para 452 and 454 and Furundzija judgement para 160-161.

on a person to obtain from that person, or from another person, confession or information"[191]. The secondary purpose to obtain confession or information is what distinguish torture from inhuman treatment and other forms of causing suffering. It is unclear whether there can be other purposes for torture than to obtain a confession or information. One can here compare with the more detailed definition that was given to the concept many years later in the Torture Convention. According to this torture is an act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. The purposes of this infliction should be for example obtaining information or a confession, punishment or intimidation or coercion or for any reason based on discrimination of any kind. Within the definition is not included pain or suffering arising only from, inherent in or incidental to lawful sanctions[192]. Furthermore, the definition of torture in the Rome Statute should be mentioned, although it is referring to torture as an act of crimes against humanity[193]. This definition starts and ends as the definition in the Torture Convention; "the intentional infliction of severe pain or suffering, whether physical or mental" that is not "arising only from, inherent in or incidental to, lawful sanctions". Instead of stating any purpose or identifying the torturer this definition states that the victim should have been "in the custody or under the control of the accused". Neither the Torture Convention nor the Rome Statute can restrain a possibly broader concept in the Geneva Conventions[194]. In the Celebici case the Tribunal concluded that it is the definition in the Torture Convention that is part of international customary law and this is therefor to be used for the purpose of the Yugoslavia Statute[195].

What constitutes inhuman treatment is not all clear[196] although it should mean more than treatment causing physical injury or injury to health[197]. Common Article 3 enumerates four acts that definitely are to be considered as inhuman treatment[198] and article 27 of the fourth Geneva Convention further develops the

[191] Commentary IV (1958) p.598
[192] Torture Convention art.1(1)
[193] Rome Statute art.7(2)(e)
[194] Torture Convention art.1(2): "This article is without prejudice to any international instrument…which does or may contain provisions of wider application"
Rome Statute art.7(2): The definitions are "For the purpose of paragraph 1" (Crimes against humanity)
[195] Celebici judgement para 459 and 494
[196] The same seems to be the case for "cruel, inhuman or degrading treatment or punishment" in the Torture Convention. See J. Herman Burgers and Hans Danelius (1988) p.70-71.
[197] Commentary IV (1958) p.598
[198] "a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; b)taking of hostages; c) outrages upon personal dignity, in particular humiliating and degrading treatment; d) the passing of sentences and the carrying out of executions without previous judgement pronounce by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples". With this reasoning Common Article 3 is as a whole and without doubt substantially included in the system of grave breaches. Celebici judgement paragraph 532

concept. Compared to other acts, inhuman treatment encompasses, as a minimum, both torture and wilfully causing great suffering or serious injury to body and health[199].

In the concept ”torture and inhuman treatment” is explicitly included ”biological experiments”, which is to a certain degree clarified in the third Geneva Convention article 13[200]. It should also be mentioned here that the opinion has been put forward that the acts torture or inhuman treatment should, at least under certain circumstances, include rape[201]. This opinion has been confirmed by the Yugoslavia Tribunal[202]. Rape will be further dealt with below.

Wilfully causing great suffering or serious injury to body or health

These acts are included in the system of grave breaches[203] and Common Article 3(1)(a)[204] of the Geneva Conventions, the Yugoslavia Statute article 2(c) and the Rome Statute article 8(2)(a)(iii).

The act ”wilfully causing great suffering” refers to such suffering inflicted without the purposes stated for torture and it covers both moral and physical suffering[205]. The seriousness for ”serious injury to body and health” is measured by the length of time the victim is incapacitated for work.

It can now also be said with certainty that rape is included in this provision[206]. In a number of indictments before the Yugoslavia tribunal ”forcible sexual intercourse” has been covered by the act ”wilfully causing great suffering”[207].

Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly

These acts are included in the system of grave breaches of the Geneva Conventions[208], the Yugoslavia Statute article 2(d) and the Rome Statute article 8(2)(a)(iv).

In order to clarify this provision’s content when it comes to the words ”unlawfully and wantonly” it has to be read together with a number of prohibitions in the relevant Geneva Conventions. For example it is

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[199] Celebici judgement para 442 and 544

[200] ”no prisoner of war may be subjected…to medical or scientific experiments of any kind which are not justified by the medical, dental or hospital treatment of the prisoner concerned and carried out in his interest”

[201] See Theodor Meron: Rape as a Crime under International Humanitarian Law, 87 AJIL 426 (1993) and Yugoslavia Commission Final Report, as referred to in The Law of the International Criminal Tribunal for the Former Yugoslavia (1996) p.511.

[202] Celebici judgement para 496: ”whenever rape and other forms of sexual violence meet the aforementioned criteria, then they shall constitute torture, in the same manner as any other acts that meet this criteria.” See also Furundzija judgement para 172.

[203] Geneva Conventions *supra* note 180

[204] See *supra* note 198.

[205] Commentary IV (1958) p.599

[206] See Meron (1993) p.426, Yugoslavia Commission Final Report, as referred to in The Law of the International Criminal Tribunal of the Former Yugoslavia (1996) p.496 and The Law of the International Criminal Tribunal of the Former Yugoslavia (1996) p.567

[207] Prosecutor v. Tadic, Case No. IT-94-1-T, Indictment (Feb. 13 1995) para 4.2. In the final amendment to the indictment the charge was changed to art.2(b), that is ”inhuman treatment”. See Tadic indictment supra note 107.

[208] Geneva Convention *supra* note 180

prohibited for the occupying power to destroy all real and personal property in an occupied territory, unless such destruction is rendered absolutely necessary by military operations[209]. It is important to note that the destruction and appropriation must be extensive which could mean that the bombing of a single civilian hospital would fall outside the provision[210]. Such a bombing would, though, very likely constitute other grave breaches. When dealing with the concept ”military necessity” some ideas can be derived from the first Geneva Convention article 33, where the necessity is somewhat restricted on humanitarian grounds[211]. This means that there are limits to how the concept can be used, and the same should be the case for this provision[212]. The Lieber Code includes two elements in the concept, which to some extent are relevant also today. These are that the measures must be indispensable for the securing of the ends of the war and that they are not prohibited according to international law[213]. The first element is not restrictive enough for contemporary international law[214].

Compelling a protected person to serve in the forces of a hostile Power

This act is included in the system of grave breaches of the Geneva Conventions[215], the Hague Regulations article 23 fine[216] and article 52[217], the Yugoslavia Statute article 2(e)[218] and the Rome Statute article 8(2)(a)(v)[219] and article 8(2)(b)(xv)[220].

The provision has no equivalent anywhere else in the Geneva Conventions. Seemingly, there seems to be a difference between the provision in the Geneva Law (”serve in the forces”) and that in the Hague Law (”take part in the operations of war”). That might not be the case in practice though since the former not only refers to the actual recruitment[221]. To ”take parts in the operations of war” is to be understood as

[209] Geneva Convention IV art.53
Other relevant articles: Geneva Convention I art.20, 33 (para 3) and 36; II art.22, 23, 24, 25, 26, 27, 28, 38 and 39 and; IV art.55 (para 2), 57 and 97.
[210] Commentary IV (1958) p.601
[211] The article allows buildings, material and stores of fixed medical establishments to be used by commanders of forces in cases of urgent military necessity, *but only if previous arrangements for the welfare of the wounded and sick are made*.
[212] Commentary I (1952) p.372
[213] Lieber Code para 14
[214] See for example Commentary IV (1958) p.283 and Commentary (1987) p.1473. Edward Kwakwa: The International Law of Armed Conflict: Personal and Material Fields of Application, Martinus Nijhoff Publishers, Dordrecht 1992 p.34-36
[215] Geneva Convention III art.130 and IV art.147
[216] ”compel the nationals of the hostile party to take part in the operations of war directed against their own country”
[217] This article only includes civilians; ”…not to involve the inhabitants in the obligation of taking part in military operations against their own country”.
[218] ”compelling a prisoner of war or a civilian to serve in the forces of a hostile power”
[219] ”compelling a prisoner of war or other protected person to serve in the forces of a hostile Power”
[220] ”compelling the nationals of the hostile party to take part in the operations of war directed against their own country”
[221] Commentary on the Geneva Conventions of 12 August 1949: Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (II); Jean S. Pictet (ed.), Geneva 1960 p.628 and Commentary IV (1958) p.600

more than just performing military services in the strict sense[222]. What would contradict that the two laws are identical acts is that the Rome Statute has chosen both provisions, which would not be necessary if they meant the same thing. A definite difference however is that the Hague Law refers to the broader category nationals of the hostile party.

Wilfully depriving a protected person of the rights of fair and regular trial

This act is included in the system of grave breaches[223] and Common Article 3(1)(d) of the Geneva Conventions[224], the Yugoslavia Statute article 2(f) and the Rome Statute article 8(2)(a)(vi).

The provision in the Geneva Conventions adds the wordings ”prescribed in the present Convention” which means that the exact meaning of the crime is to be found in different places in the two mentioned Conventions. Examples of violations are; violation of the principle of *non bis in idem*[225]; violation of the principle of legality[226]; violation of the right to present a defence which includes the right to have the charge or charges presented to him in a language which he understands, the right to a certain time frame and certain facilities to prepare the defence, the right to call witnesses and, if necessary, the service of a competent interpreter[227]; violation of the right to a qualified defence advocate or counsel[228]; violation of the right to appeal and the right to be informed about this right[229] and; making the protected person appear before a court without notifying the Protecting Power[230]. Additional Protocol I article 84(4e) supplements and clarifies the provisions in the Conventions by implicitly referring to article 75 paragraph 3 and 4[231]. Added violations are for example; collective punishments; violation of the principle to be presumed innocent until proven guilty according to law and; violation of the principle that the accused has the right to be tried in his presence[232]. Even if a violation is not explicitly mentioned in the Geneva Conventions or the Additional Protocol it could very well be part of the ”fair trial” war crime anyway[233]. Further clarification might therefore be found in human rights law[234].

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[222] The Proceedings of the Hague Peace Conferences, Translation of Official Texts, Conference of 1907, Vol.III Meetings of the Second, Third and Fourth Commissions, New York 1921 (hereinafter Hague Proceedings III) p.119-123
[223] Geneva Convention *supra* note 215 and Additional Protocol I art.85(4e)
[224] See *supra* note 198.
[225] Geneva Convention III art.86
[226] Geneva Convention III art.99 para 1; and IV art.67
[227] Geneva Convention III art.99 para 2 and 105 para 1,3 and 4; and IV art.71 para 2, art.72 para 1 and 3
[228] Geneva Convention III art.99 para 3; and IV art.72 para 1
[229] Geneva Convention III art.106; and IV art.73 para 1
[230] Geneva Convention III art.104; and IV art.71 para 2-3
[231] Commentary (1987) p.1003
[232] The scope of this principle, for the purpose of article 75, is that the defendant must be present ”at the sessions where the prosecution puts its care, when oral arguments are heard etc. In addition, the defendant must be able to hear the witnesses and experts, to ask questions himself and to make his objections or propose corrections”. Further the defendant could be removed from the courtroom as a result of persistent misconduct. Commentary (1987) p.883
[233] Commentary IV (1958) p.600
[234] See for example UDHR art.10-11 and ICCPR art.14-15.

Unlawful deportation or transfer or unlawful confinement

This act is included in the system of grave breaches of the Geneva Conventions[235], the Yugoslavia Statute article 2(g) and the Rome Statute article 8(2)(a)(vii).

”Unlawful”, when it comes to deportation and transfer, refers back to article 45 and 49 of the fourth Geneva Convention. Deportation from an occupied territory to the territory of the occupying power or to any other country as well as the deportation of an occupying power’s own civilian population into an occupied territory is prohibited[236]. Transfers are also prohibited with the exception when it is for the safety of the protected persons or for imperative military reasons[237]. It must in those cases be done under strict conditions and never to a country which is not part to the Convention or a country in which a person fear persecution for his or her political opinions or religious belief[238].

”Unlawful” when it comes to confinement refers to article 41, 42, 43, 68 and 78 of fourth Geneva Convention. The possibility to intern protected persons is quite extended and the unlawful nature of the might therefor be quite hard to prove[239].

Taking of hostages

This act is included in the system of grave breaches[240] and Common Article 3(1)(b) of the Geneva Conventions[241], the Yugoslavia Statute article 2(h) and the Rome Statute article 8(2)(a)(viii).

Originally, this act derives from the principle that no one may be punished for an act he has not personally committed. The term hostages can be defined as ”persons who are in the power of a party to the conflict or its agent, willingly or unwillingly, and who answer with their freedom, their physical integrity or their life for the execution of orders given by those in whose hands they have fallen, or for any hostile acts committed against them”[242]. The act includes essentially two features; the illegal deprivation of liberty and a threat to

[235] Geneva Convention IV art.147
[236] Geneva Convention IV art.49 para 1 and 6
[237] For this term it can be referred to the remarks made on military necessity under *Extensive destruction and appropriation of property*.
[238] Geneva Convention IV art.49 and 45 para 1 and 4
[239] Commentary IV (1958) p.599. The trial chamber in the Celebici case means, quite contrary, that the confinement of protected persons can only occur in limited cases; ”… that the measure of internment for reasons of security is an exceptional one and can never be taken on collective basis” and furthermore that ”an initially lawful internment clearly becomes unlawful if the detaining party does not respect the basic procedural rights of the detained persons”. Celebici judgement para 583
[240] Geneva Convention *supra* note 235
[241] See *supra* note 198.
[242] Commentary (1987) p.1375

either prolong the detention or to kill the hostage in order to obtain certain advantages[243]. Generally the term must be understood in the widest possible sense[244] but at the same time the hostage taker must be an authority, and not just any individual[245].

Subjecting persons who are in the power of an adverse party to any medical procedure which is not indicated by the state of health of the person concerned and which is not consistent with generally accepted medical standards, and which endanger the physical or mental health or integrity of such person or persons

These acts are included in the system of grave breaches of the Geneva Conventions[246] and the Rome Statute article 8(2)(b)(x)[247].

”Any medical procedure” is in Additional Protocol I article 11(2) exemplified by physical mutilation, medical or scientific experiments and removal of tissue or organs for transplantation[248]. A medical procedure is otherwise to be understood as ”any procedure which has the purpose of influencing the state of health of the person undergoing it”[249]. That a procedure must be indicated by a person’s state of health means that it must either improve the health or relieve from suffering[250]. Since this is vague it must be read together with the second condition; ”consistent with generally accepted medical standards”. The exact scope of these standards are not developed and the only guidance is that medical procedures should be performed in the interest of the patient[251].

The somewhat unclear provision above might have been the reason a somewhat different wording was used for the Rome Statute. The differences are in italics; "Subjecting persons who are in the power of an adverse party to *physical mutilation or to medical or scientific experiments of any kind* which are *neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his interest*, and which *cause death to* or seriously endanger the health of such person or persons”[252]. The Statute omitted the vague ”any medical procedure” but excluded thereby also part of the grave breach. Further the Statute seems to avoid the problems, described above, with ”state of health” and ”generally accepted medical standards”.

Making the civilian population or individual civilians the object of attack

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[243] Commentary IV (1958) p.600
[244] Ibid. p.20
[245] Commentary (1987) p.874
[246] Additional Protocol I art.11(1-4)
[247] This paragraph is worded in a different way which will be shown below.
[248] The latter prohibition allows a couple of exceptions in article 11(3).
[249] Commentary (1987) p.154
[250] The question can be raised whether the ”state of health”-argument, at least seen out of its context, can be used by tyrannical regimes to justify the killing of for example mentally retarded.
[251] Commentary (1987) p.155-156
[252] This is a combination of Additional Protocol I article 11(1-4) and Geneva Convention III article 13 paragraph 1

This act is included in the system of grave breaches of the Geneva Conventions[253] and the Rome Statute article 8(2)(b)(i)[254].

The provision has its origin first and foremost in article 51 of the Protocol but there are also other articles that can be used in an interpretation. ”Attack” is defined in article 49 paragraph 1 and ”civilians” and ”civilian population” is defined in article 50. It is only a grave breach when the civilians are made the object of the attack which is when the status of the attacked are known to the attacker, and when the attack causes death or serious injury to body health[255]. The act does not include indiscriminate or disproportionate attacks[256].

The Rome Statute contains, as mentioned, a similar provision in article 8(2)(i) and the big difference is that it does not include the requirement ”causing death or serious injury to body and health”.

Launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects

This act is included in the system of grave breaches of the Geneva Conventions[257] and the Rome Statute article 8(2)(b)(iv)[258].

”Attack” is defined in the Protocol article 49 paragraph 1, ”civilians” and ”civilian population” in article 50, ”civilian object” in article 52 and ”indiscriminate attack” in article 51 paragraph 4 and 5. The latter term was widely discussed during the Diplomatic Conference[259] and the end result, especially paragraph 5, was severely criticised[260]. To determine whether the consequences of the attack are excessive one has to make a proportionality test as set out in the Protocol article 57 paragraph 2(a)(iii) and (ii); compare the consequences with ”the concrete and direct military advantage anticipated” and avoid, or at least minimise incidental loss of civilian life, injury to civilians and damage to civilian objects. The comparison shall take into account both the means and methods of attack. Regarding the means, the paragraph does not imply any prohibition of specific weapons but only indicates that it is factors as precision and range of a weapon

[253] Additional Protocol art.85(3)(a)
[254] ”Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities”
[255] See chapter 6.2.
[256] Disproportionate attack: art.51(5)(b), Indiscriminate attack: art.51(4-5)
[257] Additional Protocol I art.85(3)(b)
[258] ”Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated”
[259] Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva (1974-77)
[260] Official Records Vol. VI p.164-168

that are of importance when choosing[261]. Regarding methods, the example of bombing factories during times of the day when they are empty, might help to clarify the meaning.

The attacker has to know with certainty that the described consequences will occur, something clearly indicated by the wordings ”in the knowledge”, and this exclude any merely reckless behaviour. To note is also that the actual consequences, that is causing death or serious injury to body and health as stated in the chapeau of article 85(3) of Additional Protocol I, only are prescribed for the civilian population[262].

The Rome Statute contains basically the same provision, although with a somewhat different phrasing. Because of the way it is phrased it probably contains more than the grave breach; it does not say anything about where the attack should be directed. Other substantial differences are that the losses and damages must be *clearly* excessive and it also includes the damage ”widespread, long-term and severe damage to the natural environment”. The latter derives from Additional Protocol I article 35 and 55 and the Convention on the Prohibition of Military or any Other Hostile Use of Environmental Modification Techniques[263] [264].

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

This act is included in the system of grave breaches of the Geneva Conventions[265] and the Rome Statute article 8(2)(b)(iv)[266].

Regarding the definition of certain words it can be referred to what was said for the two former acts. The same goes for ”in the knowledge” and the proportionality test within the concept ”excessive”. Important is that this act only covers attacks against works and installations that are military objectives or attacks against military objectives located at or in vicinity of works or installations. The situation that the works and installations are civilian objects is covered in the Protocol article 85(3)(a)[267]. ”Works or installations containing dangerous forces” are defined exclusively in the Protocol article 56 paragraph 1 as dams, dykes and nuclear electrical generating stations.

Regarding the Rome Statute it can be referred to what was said about the former act.

Making non-defended localities and demilitarized zones the object of attack

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[261] Commentary (1987) p.682

[262] ”A grave breach, according to [article 85(3)(b)], is an indiscriminate attack wilfully launched in the knowledge that its consequences will be excessive as described in [the paragraph], and which produces the effects described in [the chapeau] to such an extent as to be in violation of the principle of proportionality. Commentary (1987) p.996

[263] Convention on the Prohibition of Military or any Other Hostile Use of Environmental Modification Techniques, adopted by resolution 31/72 of the UNGA on 10 December 1976, opened for signature 18 May 1977 at Geneva, 31 UST 333, 1 ILM 88

[264] The effects are cumulative according to the Protocol while they are alternative in the Convention.

[265] Additional Protocol I art.85(3)(c)

[266] See *supra* note 258.

[267] Commentary (1987) p.997

This act is included in the system of grave breaches of the Geneva Conventions[268], the Hague Regulations article 25, the Yugoslavia Statute article 3(c) and the Rome Statute article 8(2)(b)(v)[269].

A non-defended locality can be established by an unilateral declaration and it is defined in Additional Protocol I article 59. A demilitarized zone can only be created by an agreement between two parties. It is defined in article 60.

As all grave breaches from Additional Protocol I the act has to be committed wilfully which in this case also means that the attacker must be aware of the status of the areas.

Making a person the object of attack in the knowledge that he is hors de combat

This act is included in the system of grave breaches of the Geneva Conventions[270], the Hague Regulations article 23(c) and the Rome Statute article 8(2)(b)(vi)[271].

The concept *hors de combat* is defined in article 41 paragraph 2 of the Protocol as a person that is in the power of an adverse party, a person that clearly expresses an intention to surrender or a person that has been rendered unconscious or is otherwise incapacitated by wounds or sickness and therefor incapable of defending himself. In addition to this, the person must abstain from any hostile act and not try to escape. The attacker has to know the status of the person which is shown both by ”wilfully” in the chapeau of article 85(3) and ”in the knowledge” in the relevant paragraph.

The Hague Regulations and the Rome Statute, although with different wording, cover the same situations as the grave breach[272]. They do not, though, require that the attack will cause death or serious injury to body and health[273].

The perfidious use of the distinctive emblem of the red cross, red crescent or red lion and sun or of other protective signs for the purpose of killing, injuring or capturing an adversary

This act is included in the system of grave breaches of the Geneva Conventions[274], the Hague Regulations article 23(b)[275] and (f)[276] and the Rome Statute article 8(2)(b)(vii)[277] and (xi)[278].

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[268] Additional Protocol I art.85(3)(d)

[269] The three latter only cover ”non-defended localities”, albeit with different words;
Hague Regulations: ”The attack or bombardment, by whatever means, of towns, villages, dwellings, or buildings which are undefended”
Rome Statute: as the Hague Regulations with the addition ”and which are not military objectives”
Yugoslavia Statute: ”attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings”

[270] Additional Protocol I art.85(3)(e)

[271] The two latter use different phrasing; ”To kill or wound an enemy who, having laid down his arms, or having no longer means of defence, has surrender at discretion” (Hague Regulations)

[272] Commentary (1987) p.480

[273] See chapter 6.2.

[274] Additional Protocol I art.85(3)(f)

[275] ”To kill or wound treacherously individuals belonging to the hostile nation or army”

[276] ”To make improper use of a flag of truce, of the national flag or of the military insignia and uniform of the enemy, as well as the distinctive badges of the Geneva Convention”

Article 85(3)(f) of the Protocol states that the perfidious use has to be in violation of article 37, which says that the use has to be for the purpose of killing, injuring or capturing an adversary. The concept of perfidy itself is based on three elements; inviting the confidence of an adversary, the intent to betray that confidence, and betrayal concerning the protection afforded by international law applicable in armed conflicts. The protective signs are both to be found in the Geneva Conventions and in article 38 and 39 of Additional Protocol I, which include the signs, emblems and uniforms of the United Nations and of neutral states, flag of truce and the protective emblem of cultural property[279].

The provisions in the Hague Regulations and the Rome Statute, ”To kill or wound treacherously individuals belonging to the hostile nation or army”, are somewhat different from the grave breach. These articles deal with treacherously killing or wounding in general and not just by the use of certain emblems etc[280]. For example a person can feign death to kill an enemy[281]. The Protocol adds capture to the list of purposes though.

In addition to this the Hague Regulations and the Rome Statute contains one more provision that overlaps the grave breach, namely article 23(f) respectively article 8(2)(b)(vii), which talks about ”the improper use” of a number of uniforms, emblems etc.

The Hague Regulations article 23(b) and the Rome statute article 8(2)(b)(xi) seem to cover the full scope of all the above mentioned articles, if adding ”capture” to the list of purposes.

The transfer by the occupying power of parts of its own civilian population into the territory it occupies

This act is included in the system of grave breaches of the Geneva Conventions[282] and the Rome Statute article 8(2)(b)(viii).

The act in the mentioned instruments, contain one more part, namely ”or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory”. Unlawful deportation or transfer of protected persons is already a grave breach according to Geneva Convention IV article 147 and this part of the act is merely a repetition of that provision.

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[277] See *supra* note 276 and ”the flag or the military insignia and uniform … of the United Nations” and ”resulting death or serious personal injury”.
[278] See *supra* note 275.
[279] Other relevant articles are Geneva Convention I art.38; IV, Annex I art.6 and Additional Protocol I art.18; 56; 59(6); 66(4); Annex I art.3, 6-8, 15-16.
[280] The perfidy article in the Protocol (article 37) is considered to encompass the full scope of article 23(b) of the Hague Regulations. Commentary (1987) p.431
[281] Commentary (1987) p.438
[282] Additional Protocol I art.85(4)(a)

The first part of the provision, that is the transfer of parts of the occupying power's own civilian population into an occupied territory, is a breach according to the fourth Convention article 49 paragraph 6. The grave breach is, with Additional Protocol I, extended to include this breach as well.

Unjustifiable delay in the repatriation of prisoners of war or civilians

This act is included in the system of grave breaches of the Geneva Conventions[283].

The grave breach is somewhat different for civilians and prisoners of war. States have an obligation to repatriate prisoners of war who are seriously sick or seriously wounded[284] and prisoners of war after the cessation of active hostilities[285] and failure to do so, without valid and lawful reasons justifying a delay[286], constitute a grave breach. States do not have an equivalent obligation when it comes to civilians. These have the right to leave enemy territory[287] and the grave breach consists in delaying their departure, without valid and lawful reasons justifying such delay.

Practices of apartheid and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination

This act is included in the system of grave breaches of the Geneva Conventions[288].

Neither the Geneva Conventions nor Additional Protocol I contain anywhere else the word *apartheid* but they do contain articles prohibiting any adverse distinction based on a number of different criteria, including race[289]. This act might already be a grave breach, under the provision on inhuman treatment in the Conventions[290].

The crime of *apartheid* is defined in the Apartheid Convention[291] as a number of enumerated acts "committed for the purpose of establishing and maintaining domination by one racial group of persons over another racial group or persons and systematically oppressing them"[292]. The definition could be used here, with the exception for the fact that the grave breach only include the practices, not the policies, of *apartheid*. The Apartheid Convention refers to the crime of apartheid as a crime against humanity[293]. In

[283] Additional Protocol I art.85(4)(b)
[284] Geneva Convention III art.109 (except for seriously sick and wounded prisoners of war who is opposed to being repatriated)
[285] Ibid. art.118 (except for prisoners of war who do not wish to be repatriated). The Hague Regulations article 20 states the general rule "After the conclusion of peace, the repatriation of prisoners of war shall be carried out as quickly as possible".
[286] Only material reasons are acceptable, for example circumstances making transportation impossible or dangerous. Commentary (1987) p.1001.
[287] Geneva Convention IV art.35 (except when their departure is contrary to the national interests of the state)
[288] Additional Protocol I art.85(4)(c)
[289] Geneva Convention I art.12, II art.12, III art.16 and IV art.13 and 27; and Additional Protocol I art.9, 10, 69, 70 and 75.
[290] Commentary (1987) p.1002
[291] International Convention on the Suppression and Punishment of the Crime of *Apartheid*, Nov. 30 1973, G.A. Res. 3068, UN GAOR 28th Sess., Supp. No.30, UN Doc. A/9030 (1973)
[292] Apartheid Convention art.2 art.2
[293] Apartheid Convention art.1 para 1. See also Convention on the Non-applicability of Statutory Limitations to War Crimes and Crimes against Humanity, adopted by Resolution 2391 (XXIII) of the United Nations General Assembly on 26

line with this, the Rome Statute does not include the crime of *apartheid* as a war crime but as a crime against humanity[294]. The definition of the crime is somewhat stricter than the one in the Apartheid Convention and seems to put more emphasise on the policy than on the practice aspect[295].

Making the clearly-recognized historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples and to which special protection has been given by special arrangement, for example, within the framework of a competent international organization, the object of attack, causing as a result extensive destruction thereof, where there is no evidence that the adverse party has used such objects in support of the military effort, and when such historic monuments, works of art and places of worship are not located in the immediate proximity of military objectives

This act is included in the system of grave breaches of the Geneva Conventions[296], the Hague Regulations article 27 and 56, Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, the Yugoslavia Statute article 3(d) the Rome Statute article 8(2)(b)(ix)[297].

The following conditions must be fulfilled in order to constitute a grave breach:

- the act must be committed wilfully, as stated in the preamble of article 85(4),
- the objects must be ”clearly-recognized historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples”,
- these objects must not have been used in support of the military effort,
- these objects must have been given special protection by special arrangement,
- these objects must not have been located in the immediate vicinity of military objectives, and
- the attack must have caused extensive destruction of the objects.

To understand what kind of property that is protected, the definition in the Convention from 1954 can be used as a point of reference[298].

Of the two articles of the Hague Regulations it is article 56 that uses ”prohibition”-phrasing. It states that ”all seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education,

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November 1968, 13 ILM 540 art.1(b). This means that the practices could constitute both a war crime and a crime against humanity, while the policies are exclusively a crime against humanity.

[294] Rome Statute art.7 (1)(j)

[295] Rome Statute art.7 (2)(h): ”…means inhumane acts of a character similar to [the other acts of crimes against humanity] committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime”

[296] Additional Protocol I art.85(4)(d)

[297] The instruments differ somewhat from each other and this will be further dealt with below.

[298] See Commentary (1987) p.1468.

historic monuments, works of art and science" is forbidden. It is wider than the grave breach in three ways. It includes not only attacks on objects, it has none of the many restrictions that are included in Additional Protocol I article 85(4)(d) and it seems to include more objects, such as institutions dedicated to education and works of science. The Yugoslavia Statute copies this provision. Article 27 of this Regulations uses the weaker "all necessary steps must be taken to spare as far as possible" but has a larger number of objects to protect; "buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected, provided they are not being used at the time for military purposes". The Rome Statute is using the same list of objects with the addition "buildings dedicated to…education". The purpose behind this article is to protect the full range of cultural and religious property protected by the Hague Regulations and the Hague Convention from 1954[299].

The Hague Convention from 1954 states that acts of hostility against cultural property should be refrained from, it should be safeguarded against foreseeable effects of armed conflicts and not used for purposes which are likely to expose it to destruction or damage in the event of armed conflict[300]. Cultural property is defined in the Convention article 1. The Convention allows for the possibility of derogation in the case of imperative military necessity[301].

To add to these non-identical rules on this theme is the grave breach *Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly*[302].

Committing outrages upon personal dignity, in particular humiliating and degrading treatment

These acts are included in Common Article 3(1)(c) of the Geneva Conventions and in the Rome Statute article 8(2)(b)(xxi).

This provision in the Geneva Conventions is to be interpreted in a broad way[303]. It refers to acts which, without directly causing harm to person's integrity and physical and mental well-being, are aimed at humiliating him, or forcing him to perform degrading acts. Included are for example practices of *apartheid*[304], "enforced prostitution and any form of indecent assault"[305] including rape[306].

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[299] Christopher Keith Hall: The Fifth Session of the UN Preparatory Committee on the Establishment of an International Criminal Court, 92 AJIL 333 (1988)
[300] Hague Convention 1954 art.3 and 4(1)
[301] Hague Convention 1954 art.4(2)
[302] Steven R. Ratner and Jason S. Abrams (1997) p.102; "In attempting to punish individuals for this conduct, states will have to decide whether to apply the terms of the 154 Hague Convention, Geneva Convention IV, or Protocol I, which are not coextensive in their definitions or penal provisions."
[303] Commentary I (1952) p.54 "flexible and, at the same time, precise"
[304] Commentary (1987) p.1002
[305] Additional Protocol I art.75(2)(b)
[306] Geneva Convention IV art.27; Additional Protocol I art.76(1) and ibid. II art.4(2)(e). These articles can be used when interpreting *Outrages upon personal dignity* "otherwise, the meaning assigned to these terms under Common Article 3

Employing poison or poisonous weapon

This act is included in the Hague Regulations article 23(a), the Yugoslavia Statute article 3(a) and the Rome Statute article 8 (2)(b)(xvii).

This provision, included already in the Hague Regulations from 1899, is of mainly historical interest[307]. It is undoubtedly part of international customary law[308] and this is probably why it was included in the contemporary Yugoslavia Statute and Rome Statute.

Declaring that no quarter will be given

This act is included in the Hague Regulations article 23(d) and the Rome Statute article 8 (2)(b)(xii).

The meaning of this act is declaring that there shall be no survivors. The term ”quarter” has, though, a broader meaning, namely to provide accommodation and security, and in this way, life[309].

Additional Protocol I contains an article with different wording[310] but with the exact same content[311]. Thus, the act includes also the threat to order that there should be no survivors and to conduct hostilities on the basis of such a policy.

Employing arms, projectiles and material calculated to cause unnecessary suffering

This act is included in the Hague Regulations article 23(e), the Yugoslavia Statute article 3(a) and the Rome Statute article 8 (2)(b)(xx)[312].

The rule on unnecessary suffering has its origin in the Declaration of St. Petersburg from 1868. The basic meaning is that there has to be a weighing between military interests and humanitarian needs before using a specific weapon and factors that therefor have to be taken into consideration are disabling effect, hit probability, weight, cost, degree of injury and killing power. This would mean that the proportionality test described above could be applicable also here[313]. A clear interpretation is lacking though and the concept is of ”relative and imprecise character”[314]. In practice it seems as if the rule on unnecessary suffering has little implication. As Kalshoven puts it; states ”will not lightly decide to discard a weapon, once admitted

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will differ from the meaning of the terms under other provisions of the Conventions, which seems illogical”. The Law of the International Criminal Tribunal of the Former Yugoslavia (1996) p.575 note 210

[307] Frits Kalshoven (1987) p.30

[308] Nagenda Singh and Edward McWhinney: Nuclear Weapons and Contemporary International Law; Martinus Nijhoff Publishers 1989 p.121

[309] Commentary (1987) p.475

[310] Additional Protocol I art.40 ”It is prohibited to order that there shall be no survivors, to threaten an adversary therewith or to conduct hostilities on this basis.”

[311] Commentary (1987) p.475 note 8

[312] Rome Statute art.8(2)(b)(xx): ”Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to this Statute”

[313] See under *Launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects.*

[314] Commentary (1987) p.410

into their arsenals, on the ground that it is said to cause unnecessary suffering"[315]. The method to outlaw weapons so far has not been on the basis of this general clause but specific conventions prohibiting specific weapons[316] and the general clause is then only used to generate these specific provisions[317]. It is even considered that a certain weapon can not be considered prohibited according to the clause unless there is an explicit and parallel prohibition for this weapon[318]. Poison and poisonous weapons, chemical and biological weapons and so-called dum-dum bullets are all such weapons and are therefor included in the provision of the Hague Regulations. That should therefor also be the case for the Yugoslavia statute article 3.

It has been widely debated whether the use of nuclear weapons should be considered outlawed and, in that case, on the basis of which provision in conventional or customary international law[319].

The Rome Statute, which derives its provision from Additional Protocol I article 35(2), widens the scope by including "methods of warfare". It also adds "superfluous injury" as one of the effects that should be caused, but this hardly change the substantial meaning[320]. The third alternative effect is "inherently indiscriminate in violation of the international law of armed conflict". This, and the fact that the weapons, projectiles, materials and methods that cannot be used must be included in an annex to the statute, should probably be seen in the context of the debate of the unlawfulness of nuclear weapons. Considering what has been said above about the hesitation to outlaw weapons in international customary law on the basis of a general clause, an annex might have been considered the only way to provide this provision with a content useful and legitimate for a criminal code. To note here is that there were other suggestions to solve this

[315] Frits Kalshoven (1987) p.30

[316] For example; 1925 Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or other gases, and of Bacteriological Methods of Warfare, 17 June 1925, 26 UST 571, 94 LNTS 65; the Weapons Convention; and the Landmines Convention.

[317] Su Wei: The application of rules protecting combatants and civilians against the effects of the employment of certain means and methods of warfare, in Implementation of International Humanitarian Law; Frits Kalshoven and Yves Sandoz (eds.), Martinus Nijhoff Publishers, Dordrecht 1989 p.384

[318] Ove Bring: Nedrustningens Folkrätt, Nordstedts förlag 1987 p.46-47 and Su Wei, in Implementation of International Humanitarian Law (1989) p.380-381; "The Proceedings of the two Hague Conferences, where the principle was formulated, do not show what precisely this principle means, for at the Conferences participants were fully aware that a general ban on weapons causing unnecessary suffering or superfluous injury was too sweeping and loose and therefor could not but be unworkable."

[319] See for example Nagenda Singh and Edward McWhinney (1989) and Nuclear Weapons and Law, Arthur Selwyn and Martin Feinrider (eds.), Greenwood Press, Connecticut 1984. In a ICJ-case on this issue the majority of judges did not reach a definite conclusion on the question of "legality or illegality of the use of nuclear weapons by a state in an extreme circumstance of self-defence, in which its very survival would be at stake". Legality of the threat or use of nuclear weapons (Advisory Opinion requested by the General Assembly), I.C.J. Reports 1996 para 97

[320] "Superfluous injury" was used instead of "unnecessary suffering" in the Hague regulations from 1899, but the meaning was the same. Ove Bring (1987) p.41 and Yvonne van Dongen: The Protest of Civilian Populations in Time of Armed Conflict; Thesis Publishers, Amsterdam 1991 p.205

question during the creation of the Statute. One of the suggestions in Rome was an exemplifying list with for example nuclear weapons, antipersonnel mines and blinding laser weapons[321].

Employing asphyxiating, poisonous or other gases, and all analogous liquid, materials or devices and bacteriological methods of warfare

These acts are included in the Geneva Protocol from 1925, the Hague Regulations article 23(e), the Yugoslavia Statute article 3(a) and the Rome Statute article 8 (2)(b)(xviii)[322].

The provisions in the Geneva Protocol confirmed the prohibition in international customary law of chemical weapons and extended it to encompass bacteriological weapons as well[323]. The latter is today usually referred to as biological weapons.

Weapons included as chemical are the so-called first generation of chemical weapons, that is chlorine gas, phosgene gas and mustard gas, and the second generation which is the nerve gases[324]. What is more debated is whether gases which are not necessarily lethal, for example tear gas, and herbicides are included. This comes down to how ”or other gases” should be interpreted[325]. This question was answered in the Chemical Weapons Convention[326]. Tear gases used in combat and herbicides used on humans are chemical weapons and prohibited according to the Convention[327].

Biological weapons are using bacteria or other biological organisms to spread diseases among the enemies. These weapons have not been the object of prohibition of use, in a confirmation of the Geneva Protocol, as the chemical weapons have[328].

Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions

This act is included in 1899 Hague Declaration Concerning Expanding Bullets, the Hague Regulations article 23(e), the Yugoslavia Statute article 3(a) and the Rome Statute article 8 (2)(b)(xix).

The bullets are usually referred to as dum-dum bullets, after the place where they first were made. The prohibition was an application of the rule on unnecessary suffering that was contained in the Hague

[321] Christopher Keith Hall: The Fifth Session (1998) p.335
[322] The Rome Statute does not include ”bacteriological methods of warfare”.
[323] Ove Bring (1987) p.44
[324] Ove Bring (1987) p.202
[325] For a restrictive interpretation speaks for example the French version ”gaz asphyxiantes, toxiques *ou similaires*” (my italics) while a more extensive interpretation is indicated by the phrase ”all *analogous* liquids, materials and devices” (my italics).
[326] Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, 32 ILM 800
[327] Chemical Weapons Convention art.I(1)(b) and II(2 and 9)
[328] Convention on the Prohibition of Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, opened for signature on 10 April 1972 at London, Moscow and Washington, 1976 UNTS 1015, does not deal with the use of these weapons.

Regulations from the same year. It is also a follow-up to a declaration made 1868 about explosive bullets, since the effects are very much the same.

Destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war

This act is included in the Hague Regulations article 23(g)[329], the Yugoslavia Statute article 3(b) and the Rome Statute article 8 (2)(b)(xiii).

This is another act where the humanitarian needs have to be measured against military necessity[330]. This kind of weigh was, for article 23(g) of the Hague Regulations, perfectly in line with the rest of the Convention which, according to its preamble is aiming at "diminish the evils of war, *as far as military requirements permit*" (my italics).

Declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party

This act is included in the Hague Regulations article 23(h) and the Rome Statute article 8 (2)(b)(xiv).

Pillaging a town or a place

This act is included in the Hague Regulations article 28 and article 47, the Yugoslavia statute article 3(e) and the Rome Statute article 8 (2)(b)(xvi)[331].

A prohibition of pillage is also included in the fourth Geneva Convention article 33 paragraph 2. Deriving from the commentary on this, the prohibition is totally intact. It includes individual pillage and more organised pillage with the consent of military authority, and it includes both private and public property as the objects of pillage[332]. Even if the different instruments have a somewhat different wording the content is the same.

Collective punishment

This act is included in the Hague Regulations article 50 .

This act expresses the universally accepted principle that no one may be punished for an act he has not personally committed - the principle of individual responsibility. It should be understood in a broad sense, though, including not only legal sentences but sanctions and harassment of any sort, administrative, by police action or otherwise[333]. This makes it wider than the prohibition included as a fair trial-provision. The act should be read and understood in the context of the acts *Wilfully depriving a protected person of the*

[329] Hague Regulations article 46 (para.2) should also be mentioned; "Private property cannot be confiscated"
[330] About "military necessity" see under *Extensive destruction and appropriation of property*.
[331] The wordings are different for the different instruments.
Hague regulations art.28 and the Rome Statute: "pillage of a town or place, even when taken by assault"
Yugoslavia Statute: "plunder of public or private property"
Hague Regulations art.47: "Pillage is formally forbidden".
[332] Commentary IV (1958) p.226
[333] Commentary (1987) p.874

rights of fair and regular trial and *Taking of hostages*; the latter of which is merely an extension of this act.

Intentionally directing attacks against civilian objects, that is objects that are not military objectives

This act is included in Additional Protocol I article 52(1) and the Rome Statute article 8(2)(b)(ii).

This act has no direct equivalent in the Hague Regulations or in the system of grave breaches[334]. It is included in article 52 of Additional Protocol I though. Civilian objects are defined negatively, as not being military objects. The latter are defined as objects a) which by their nature, location, purpose or use make an effective contribution to military action and b) whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage. Both these requirements must be fulfilled in order for the object to constitute a military object, and they have to be fulfilled for each such object. In case of doubt the presumtion shall be for civilian object. The term ”attack” is, as mentioned, defined in article 49 of the Protocol.

Committing rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization or any other form of sexual violence

These acts are included in the Rome Statute article 8(2)(b)(xxii).

As mentioned above, rape is already interpreted to be included in *Wilfully causing great suffering or serious injury to body or health* and in *Torture or inhuman treatment* as grave breaches. Rape, enforced prostitution and other forms of indecent assaults are included in *Outrages upon personal dignity*, which is focusing on the mental rather than the physical harm[335]. This paragraph in the Rome Statute was created to deliberately overlap the grave breaches mentioned. In fact, the full text of the paragraph reads as above and ”also constituting a grave breach of the Geneva Conventions”. This would mean that all the different acts can be grave breaches. The reason behind this wording was to make it clear that a person can be prosecuted for rape as a grave breach as well[336]. It is important to note that a specific

[334] Additional Protocol I article 85(3)(b) prohibits ”indiscriminate attacks”. See Christopher Keith Hall: The Fifth Session (1998) p.334. According to McCormack and Simpson a grave breach, as described in Additional Protocol I article 85(3)(a) has been made when ”civilian property is the object of attack”. The authors do not give any reason for this extensive interpretation of ”civilian population or individual civilians”. Timothy L.H. McCormack and Gerry J. Simpson: The International Law Commission’s Draft Code of Crimes against the Peace and Security of Mankind: An Appraisal of the Substantive Provisions, Criminal Law Forum, Vol.5, No.1 (1994) p.38

[335] Rape is only primarily prohibited in the instruments of humanitarian law, as a violation of a person’s dignity, not of the physical body and health. See for example Geneva Convention IV article 27 paragraph 2 ”Women shall be especially protected against any attack of their *honour* (my italics) in particular against rape…” and Additional Protocol II article 4(2)(e) ”outrages upon *personal dignity* (my italics), in particular … rape”.

[336] Christopher Keith Hall: The Fifth Session (1998) p.334. The author adds ”although this intent is not readily apparent from the wording finally adopted” and, even more serious, that the wording ”suggests that the violence must be committed against a protected person under [the Geneva] Conventions, rather than against the broader category of protected persons in Protocol I”.

provision like this does neither affect international customary law on the subject nor the interpretation of the grave breaches.

There is no definition of rape in the preparatory work of the Geneva Conventions or the Additional Protocols. For the purpose of the Yugoslavia Statute the following was suggested; ”non consensual vaginal penetration by a penis, other body part, or foreign object”[337]. The Rwanda Tribunal took a different approach when it dealt with rape as a crime against humanity, with the definition of torture in the Torture Convention as a model. It acknowledged that rape is used for such purposes as ”intimidation, degradation, humiliation, discrimination, punishment, control or destruction of person” and defined it as ”physical invasion of a sexual nature, committed on a person under circumstances which are coercive”[338]. It further defines sexual violence as ”any act of a sexual nature which is committed on a person under circumstances which are coercive”[339]. A Trial Chamber of the Yugoslavia Tribunal found this definition inadequate for the reason of the criminal law principle of specificity (*nullum crimen sine lege stricta*) and reached a more detailed definition on the basis of different national legal systems. The objective elements in the crime rape are: ”(i) the sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) of the mouth of the victim by the penis of the perpetrator; (ii) by coercion or force or threat of force against the victim or a third person”.[340] Sexual slavery and enforced prostitution are connected and refers to the acts of kidnapping for the purpose of using the kidnapped person as a prostitute for other such purposes. Forced pregnancy ought to mean to keep a woman pregnant against her will for one or a number of alternative purposes, although the act in the Rome Statute, because of the controversial question of abortion, got a more restrictive definition[341].

Utilizing the presence of a protected person to render certain points, areas or military forces immune from military operations

These acts are included in the fourth Geneva Convention article 28 and the Rome Statute article 8(2)(b)(xxiii).

The act prohibits to use civilians in order to ”protect” military objects, that is for example compelling civilian individuals to accompany military convoys or to store military equipment in civilian hospitals. Military operations are defined broadly as ”any acts of warfare committed by the enemy’s land, air or sea

[337] Yugoslavia Commission Final Report, as referred to in The Law of the International Criminal Tribunal of the Former Yugoslavia (1996) p.555

[338] Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-T, Judgement (2 September 1998) (Akayesu judgement) chapter 6.4. See also Celebici judgement para 479.

[339] Akayesu judgement chapter 6.4.

[340] Furundzija judgement para 185

[341] Rome Statute article 7(2)(f) defines the concept for the purpose of crimes against humanity as ”the unlawful confinement, of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy”.

forces, whether it is a matter of bombing, or bombardments of any kind or of attacks by units near at hand"[342]. The act covers both a state's own territory and occupied territory and it covers small as well as wide areas[343].

The act is further clarified by a number of articles in the Conventions and Additional Protocol I[344].

Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions

This act is included in the Rome Statute article 8(2)(b)(xxiv).

This act is based on the general principles in Additional Protocol I article 12(1), 15(1), 21 and 24 stating that medical units, civilian medical personnel, medical vehicles and medical aircraft shall be respected and protected and not be the object of attack. Medical units are defined in article 8 as "establishments and other units, whether military or civilian, organized for medical purposes"[345]. The units can be fixed or mobile, permanent or temporary. In the same way are the other terms defined in article 8[346]. It prohibits attacks on such persons and objects that use, and have the right to use the emblems of the Conventions. Attacks are, as mentioned, defined in article 49 of the Protocol.

Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions

These acts are included in Additional Protocol I article 54(1) and the Rome Statute article 8(2)(b)(xxv).

Additional Protocol I article 54 is an example of prohibition against "methods of total warfare"[347]. It applies to both occupied and non-occupied territories. Article 54(2) develops and clarifies the act, for example by defining "depriving" as attack, destroy, remove or render useless, and also by exemplifying objects indispensable to persons' survival. The big difference between the provision in the Protocol and in the Statute is that the former authorise derogation when "imperative military necessity"[348] so requires.

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[342] Commentary IV (1958) p.209
[343] Ibid.
[344] Geneva Convention IV art.83 (places of internment for civilians shall not be set up in areas particular exposed to the dangers of war); Additional Protocol I art.28(1) (prohibition of the use of medical aircraft in an attempt to render military objectives immune from attack) and; ibid. art.57(1) (in the conduct of military operations constant care shall be taken to spare civilian population, civilians and civilian objects)
[345] Additional Protocol I art.8(e)
[346] Art.8(c) "Medical personnel; art.8(g) "Medical transport"
[347] Commentary (1987) p.653
[348] About "military necessity" see under *Extensive destruction and appropriation of property*.

The referral in the act is to the fourth Geneva Convention article 55 and 59-63.

Recruiting children under the age of fifteen years into armed forces or using them to take direct part in hostilities

These acts are included in Additional Protocol I article 77(2) and the Rome Statute article 8(2)(b)(xxvi).

The age limit of fifteen years old was agreed on already for the fourth Geneva Convention[349] and this has prevailed and been used in more recent international instruments as the Rome Statute and the Child Convention[350]. The notion of ”recruiting” includes both the actual recruitment but also a voluntary enlistment[351]. The act prohibits the use of children to take *direct* part in hostilities. Because of this it might be argued that it doesn't cover indirect participation, such as gathering and transmission of military information, transportation of arms and provision of supplies. The commentary states that such an interpretation would be wrong since the intention behind the article clearly is to keep children outside armed conflicts[352]. The Rome Statute seeks, at first sight, to avoid any doubts by choosing the term ”participate actively” instead. Then one should note that Additional Protocol II article 4(3)(c) only uses ”participate”. Again, with the intention behind the provisions in mind, they should all be interpreted as prohibiting *all* use of children in armed conflicts.

Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilian or civilian objects under the international law of armed conflicts

These acts are included in the Rome Statute article 8(2)(b)(iii).

The inclusion of this in the Statute, despite no exact equivalence in any of the major instruments of humanitarian law, should be seen in the following context. During the preparatory work for the establishment of the international criminal court there was a suggestion for the inclusion of a crime named ”crimes against United Nations personnel”[353]. At the Rome Conference it was rejected as a separate crime and the compromise was this paragraph. It refers to traditional humanitarian law though. Persons and objects used for humanitarian assistance or peacekeeping missions are to be protected against attacks as long as they are to be considered as civilians and civilian objects under international humanitarian law. This act therefore merely seems to restate the act *Intentionally directing attacks against civilian population as such and individual civilians* and *civilian objects.*

[349] Geneva Convention IV art.14, 23 24 and 38
[350] Convention on the Rights of the Child, adopted and opened for signature, ratification and accession by the General Assembly of the United Nations, resolution 44/25 of 20 Nov. 1989, entry into force 2 Sept. 1990 art.38(2-3)
[351] Commentary (1987) p.1380
[352] Commentary (1987) p.901

7. War Crimes committed in Non-International Armed Conflicts

7.1 Mechanism for Individual Criminal Responsibility

7.1.1 The Geneva Law

The Geneva Conventions preceding the ones from 1949 did not contain any provisions regarding internal armed conflicts. In the Conventions from 1949 a common article was created, stating a number of minimum rights from the rest of the Conventions, to be applicable in cases of ”armed conflict not of an international character”[354]. This article was the result of a compromise since it, during the negotiations for the Conventions proved impossible to make all the provisions in the Conventions applicable to internal armed conflicts[355]. Common Article 3 contains no provision identical or even similar to the once creating the system of grave breaches.

Additional Protocol II, to the Geneva Conventions, develops and supplements Common Article 3. Just like this article it does not establish individual criminal responsibility for violations of its acts.

While Common Article 3 is part of international customary law[356], Additional Protocol II is not, at least not as a whole[357].

7.1.2 The Hague Law

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[353] Christopher Keith Hall: The Third and Fourth Sessions of the UN Preparatory Committee on the Establishment of an International Criminal Court, 92 AJIL 129 (1998)
[354] Geneva Convention I-IV art.3
[355] See chapter 5.
[356] Nicaragua Case para 14,114 and Steven R. Ratner and Jason S. Abrams (1997) p.92.
[357] Yugoslavia Commission Final Report, as referred to in The Law of the International Criminal Tribunal of the Former Yugoslavia (1996) p.496, Secretary-General’s Yugoslavia Report para 35 and Steven R. Ratner and Jason S. Abrams (1997) p.95. Number of state parties to the Additional Protocol II: 144; available at: <http://www.icrc.org/unicc/icrcnews.nsf>(Dec.1 1998)

The Hague Conventions are applicable in war, meaning international war between states. It is not that the provisions in these Conventions were created for international armed conflicts exclusively but only that other kind of conflicts were not an issue at that time and were therefore not in the minds of the representatives at the Hague Conferences at the beginning of this century[358]. The Hague Conventions are silent on the matter of individual criminal responsibility for violations of its provisions[359]. As mentioned in chapter 6.1.2 the Hague Conventions are part of international customary law.

The Hague Convention on Cultural Property article 19 states that in armed conflicts not of international character state parties are bound to apply the provisions which relate to respect for cultural property. This article is not part of international customary law[360]. Article 28, dealt with in chapter 6.1.2, relates to armed conflicts not of an international character as well.

7.1.3 International Tribunals and the International Criminal Court

The Rwanda tribunal was created as a response to the genocide taking place in the country 1994. As the Yugoslavia tribunal it was a Security Council resolution in accordance with chapter VII of the United Nations Charter. According to its Statute the tribunal have jurisdiction over ”persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994”[361]. Individual criminal responsibility is provided for in article 6[362]. The crimes within the jurisdiction are Genocide, Crimes against humanity and Violations of Article 3 common to the Geneva Conventions and of Additional Protocol II. The war crimes article includes a list of acts but since this is non-exhaustive the Tribunal is empowered to apply the full scope of the mentioned instruments[363]. Regarding the war crimes, Rwanda was a state party to the Geneva Conventions and Additional protocol II at the time of the conflict which means that the main issue is not whether these instruments are part of international customary law but whether they establish individual criminal responsibility for the persons violating them[364]. In a report of the Secretary-General it was stated that

[358] Frits Kalshoven (1987) p.26. See also The Law of the International Criminal Tribunal for the Former Yugoslavia (1996) p.510
[359] See chapter 6.1.2.
[360] Yugoslavia Commission Final Report, as referred to in The Law of the International Criminal Tribunal of the Former Yugoslavia (1996) p.508
[361] Rwanda Statute art.1
[362] ”A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime … shall be individually responsible for the crime.”
[363] Theodor Meron (1995) p.559
[364] See Theodor Meron (1995) p.561

violations of the mentioned instruments were in the Statute criminalised for the first time[365]. Further clarification on this issue is given when explaining the full scope of Yugoslavia Statute article 3 in chapter 6.1.3. The main point of this reasoning is that, according to international customary law, there are individual criminal responsibility for violations of Common Article 3 of the Geneva Conventions. As showed in the mentioned chapter the same could be the case for parts or all of Additional Protocol II. In the Akayesu case the Rwanda Tribunal states that the fundamental guarantees set out in article 4(2) of Additional Protocol II are part of international customary law and that they, through this, entails individual criminal responsibility for the perpetrator[366].

The International Criminal Court has jurisdiction over war crimes committed in armed conflicts not of an international character. Its Statute covers both the violations of Common Article 3 of the Geneva Conventions and violations more or less directly derived from Additional Protocol II[367].

The reasoning in the Tadic decision by the Yugoslavia tribunal, the establishment of the Rwanda tribunal and the creation of the Rome Statute which criminalize a large number of acts committed during non-international armed conflicts[368] provide in itself good arguments for viewing violations of both Common Article 3 *and* Additional Protocol II as war crimes.

7.2 General about the Acts of War Crimes

The general condition for the acts enumerated in Common Article 3 of the Geneva Conventions[369] is that these acts have to be committed in an armed conflict[370] and against persons taking no active part in hostilities. The equivalent conditions for acts enumerated in Additional Protocol II are that they have to be committed during an internal armed conflict as defined in the Protocol[371] and against persons affected by this kind of conflict[372]. This is to be understood in a broad way as both military and civilian persons, combatants and non-combatants and persons of any nationality[373]. There is no difference in this personal

[365] Report of the Secretary-General pursuant to paragraph 5 of Security Council Resolution 955 (1994), Feb.13, 1995, UN Doc. S/1995/134 para.12; "the Security Concil has elected to take a more expansive approach to the choice of the applicable law … and included within the subject-matter jurisdiction of the Rwanda Tribunal international instruments regardless of whether they were considered part of customary international law or whether they have customarily entailed the individual criminal responsibility of the perpetrator of the crime."
[366] Akayesu judgement chapter 6.5
[367] Rome Statute art.8(2)(c) and (d)
[368] The Rome Statute is not ratified yet but at the end of the Rome Conference the Statute was approved by no less than 120 states.
[369] From the act *Violence to life and person…* to *The passing of sentences and…*
[370] See chapter 5.
[371] See chapter 5
[372] Additional Protocol II art.2(1)
[373] Commentary (1987) p.1359

field of application and the one for Common Article 3[374]. For the Protocol article 4(2)[375] it is not only the acts in themselves that are prohibited but also threats to commit these acts.

The Rwanda Statute refers to both Common Article 3 and Additional Protocol II and enumerates a number of acts in a non-exhaustive list. As will be seen, it usually uses the wording of the Protocol but the referral should still mean that any act in the named instruments could be included.

Since many of the acts included here are identical to acts included as war crimes committed in international armed conflicts it is enough to refer to chapter 6.3 for their content. In chapter 7.3 I have only referred to the international instrument or instruments where the act is explicitly mentioned. This means for example that article 4 of the Rwanda Statute is not mentioned for all the acts which this provision in fact covers.

7.3 The Acts

Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture

These acts are included in Common Article 3(1)(a) of the Geneva Conventions, Additional Protocol II article 4(2)(a)[376], the Rwanda Statute article 4(a)[377] and the Rome Statute article 8(2)(c)(i).

The people referred to in Common Article 3 are to be treated humanely and this notion is described negatively through the prohibition of certain acts, for example the above mentioned one. The enumeration is non-exhaustive, shown by the wordings ”in particular”. ”Murder” covers not only all forms of homicide but also intentional omissions leading to death, and torture includes all forms of physical and mental torture[378]. The act cruel treatment is identical to inhuman treatment dealt with in chapter 6.3[379], and therefor encapsulates torture and acts or omissions which cause serious mental or physical suffering or injury or constitute a serious attack on human dignity.

Rape is included as a cruel treatment[380] but can also be included as torture[381].

The Protocol uses a different wording and is therefor further-reaching than Common Article 3[382].

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[374] The Commentary for Additional Protocol II recognizes that Common Article 3 contains no provision on protection for doctors and other members of medical personnel, medical units or transports or civilian population as such. This protection does exist though and the Protocol is meant to have this ”confirmed and clarified”. Commentary (1987) p.1325-1326

[375] From the act *Collective punishments* to *Pillage* and *Violence to life and person* and *Taking of hostages*.

[376] ”violence to the 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”

[377] See *supra* note 376.

[378] Commentary (1987) p.1373-1374

[379] Tadic judgement para 723 and Celebici judgement para 443 and 552

[380] The Law of the International Criminal Tribunal of the Former Yugoslavia (1996) p.575

[381] See chapter 6.3 *Torture or…*

Taking of hostages

This act is included in Common Article 3(1)(b), Additional Protocol II article 4(2)(c), the Rwanda Statute article 4(c) and the Rome Statute article 8(2)(c)(iii).

It suffices to refer to what has been said for the same act committed in an international armed conflict.

Committing outrages upon personal dignity, in particular humiliating and degrading treatment

These acts are included in Common Article 3(1)(c), Additional Protocol II article 4(2)(e)[383], the Rwanda Statute article 4(e)[384] and the Rome Statute article 8(2)(c)(ii).

Again it suffices to refer to what was said in chapter 6.3 about the same act.

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 civilized peoples

These acts are included in Common Article 3(1)(d), Additional Protocol II article 6(2)[385], the Rwanda Statute article 4(g) and the Rome Statute article 8(2)(c)(iv)[386].

Additional Protocol II article 6 clarifies the provision in Common Article 3, especially by a non-exhaustive list of guarantees in order to strengthen the prohibition of summary justice and of conviction without a trial. The list contains the following guarantees; the principle of non-retroactivity, right to defence, right to information, the principle of individual responsibility, the principle of the presumption of innocence, the right of the accused to be present at his own trial and the right not to be compelled to testify against oneself or to confess guilt. Since the list is only exemplifying a violation that is not included could be part of the ”fair trial” war crime anyway. Just as for the same act during international armed conflicts further clarification might be found in human rights law.

Ordering that there shall be no survivors

This act is included in Additional Protocol II article 4(1) and the Rome Statute article 8 (2)(e)(x)[387].

It can be referred to what was said about the equivalent act committed during international armed conflicts. As was mentioned there, the meaning of the Hague Convention article 23(d) and the Additional

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[382] Commentary (1987) p.1373. To remember though is that the provision in Common Article 3 is to be interpreted in a broad way; ”…one would never be able to catch up with the imagination of future torturers who wished to satisfy their bestial instincts; and the more specific and complete a list tries to be, the more restrictive it becomes. The form of wording adopted is flexible and, at the same time, precise.” Commentary I (1952) p.54

[383] ”Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault”

[384] See *supra* note 383.

[385] ”No sentence shall be passed and no penalty shall be executed on a person found guilty of an offence except pursuant to a conviction pronounced by a court offering the essential guarantees of independence and impartiality”.

[386] As stated but ”generally recognized as indispensable” instead of ”recognized as indispensable by civilized peoples”.

[387] ”Declaring that no quarter shall be given”

Protocol I article 40 are the same[388]. The meaning of the provision in Additional Protocol II, although with a briefer wording, is equally identical.

Collective punishments

This act is included in Additional Protocol II article 4(2)(b) and the Rwanda Statute article 4(b).

It can be referred to what was said about Collective punishments in chapter 6.3..

Acts of terrorism

This act is included in Additional Protocol II article 4(2)(d) and the Rwanda Statute article 4(d).

The act is based on article 33 of the fourth Geneva Convention and is there closely connected to the prohibition of collective punishments. The common feature for the acts is that they ”strike at guilty and innocent alike”[389].

The crime of terrorism is regulated in a number of different international instruments[390] and a definition of the act could be; ”an ideologically motivated strategy of international proscribed violence designed to inspire terror within a particular segment of a given society in order to achieve a power-outcome or to propagandize a claim or grievance irrespective of whether its perpetrators are acting for and on behalf of themselves or on behalf of a state”[391]. The following aspects can be said to be included in the phenomenon of terrorism; the use or threatened use of violence, a means to attain political goals which in the view of those resorting to it could not be attained by lawful means, a strategy, often directed at outsiders who have no direct influence on or connection with what the terrorists seek to achieve, used to create fear which alone makes it possible to attain the goal, a total war in the sense that the end justifies all means[392]. This would mean that terrorism during an armed conflict is committed, also by the members of the armed forces, when certain rules of international humanitarian law are violated. These are for example the attack of civilian population and civilian individuals, the employment of weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering, the prohibition to declare that no quarter shall be given and the prohibition of perfidy. It can hereby be concluded that terrorism, under certain circumstances, constitute a grave breach during international armed conflicts, even if not explicitly

[388] Commentary (1987) p.475 note 8
[389] Commentary IV (1958) p.226
[390] The Convention for the Prevention and Punishment of Terrorism created 1937 never entered into effect and when the UN dealt with the issue years later it chose a piecemeal approach with conventions dealing with piracy, hijacking, kidnapping of diplomats and taking of civilian hostages.
[391] Legal Responses to International Terrorism, US Procedural Aspects; Cherif M. Bassiouni (ed.), Martinus Nijhoff Publishers, Dordrecht 1988 p.xxiii
[392] Hans-Pieter Gasser: Prohibition of terrorist acts in international humanitarian law, International Review of the Red Cross No.253 (1986) p.202

mentioned as such[393]. Further it can be included that terrorism as a violation of humanitarian law during internal armed conflicts might be superfluous[394].

The provision is fairly general and covers not only acts directed against persons who do not take a direct part or who have ceased to take part in hostilities, but also acts directed against installations which would cause victims as a side-effect[395].

Slavery and the slave trade in all their forms

This act is included in Additional Protocol II article 4(2)(f).

The prohibition of slavery is part of international customary law[396] and stated in different human rights instrument[397] as well. Slavery is defined as ”the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised”[398]. The term ”slave trade in all their forms” can be understood by looking at the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery[399]. This Convention aims at abolishing practices as ”debt bondage, serfdom, the promise or gift of a woman in marriage without her consent in exchange for payment, liability of a woman to be inherited upon the death of her husband to another person, and various types of exploitation of child labour”[400].

Pillage

This act is included in Additional protocol II article 4(2)(g), the Rwanda Statute article 4(f) and the Rome Statute article 8(2)(e)(v)[401].

Here it can simply be referred to what was said under *Pillage a town or a place* in chapter 6.3.

Recruiting children under the age of fifteen years into armed forces or groups or using them to participate in hostilities

These acts are included in Additional Protocol II article 4(3)(c) and in the Rome Statute article 8(2)(e)(vii)[402].

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[393] Hans-Peter Gasser (1986) p.207

[394] For the war crimes approach on terrorism in general, see Herman Salinas Burgos: The application of international humanitarian law as compared to human rights law in situations qualified as international armed conflict, internal disturbances and tensions or public emergency, with special reference to war crimes and political crimes, in Implementation of International Humanitarian Law (1989) p.21-22

[395] Commentary (1987) p.1375

[396] Lyal S. Sunga: Individual Responsibility in International Law for Serious Human Rights Violations, Martinus Nijhoff Publishers 1992 p.92

[397] ICCPR art.8(1) and Slavery Convention 60 LNTS 253, entered into force March 9 1927

[398] Slavery Convention art.1(1)

[399] Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, 226 U.N.T.S. 3, entered into force April 30 1957

[400] Lyal S. Sunga (1992) p.88

[401] ”Pillaging a town or a place, even when taken by assault”

[402] ”Conscripting or enlisting children under the age of fifteen years into armed forces or groups using them to participate actively in hostilities”

It can be referred to the same act in chapter 6.3.

Subjecting persons who are in the power of another party to the conflict to any medical procedure which is not indicated by the state of health of the person concerned, and which is not consistent with the generally accepted medical standards applied to free persons under similar medical circumstances

These acts are included in Additional Protocol II article 5(2)(e) and the Rome Statute article 8(2)(e)(xi).

The text in the Protocol reiterates article 11(1) of Additional protocol I and the interpretation of these provisions is identical[403] and it can therefor be referred to what was said for the equivalent act in chapter 6.3.

The improper use of the distinctive emblem of the red cross, red crescent or red lion and sun

This act is included in Additional Protocol II article 12 and the Rome Statute article 8 (2)(e)(ix)[404].

The content and the connection with the different phrasing in the Rome Statute are dealt with in chapter 6.3. The act here does not use the term ”perfidious” but the, at least seemingly, less strict ”improper”. Improper use is all use that is not for the purpose of protecting the persons and objects mentioned[405].

Making the civilian population as such, as well as individual civilians, the object of attack

These acts are included in Additional protocol II article 13(2) and the Rome Statute article 8(e)(i)[406].

The provision only refers to direct attacks and not to attacks directed against military objectives which incidentally affect the civilian population. Even if Additional Protocol II is silent on the point, the provision also prohibits attacks against a civilian population which contain one or some non-protected persons[407]. The provision does not include civilians that take direct part in hostilities[408]. The term ”attack” is defined in the same way as in Additional Protocol I, namely ”acts of violence against the adversary, whether in offence or in defence”[409]. A more developed definition of ”attack directed against any civilian population” was included in the Rome Statute, although it is meant to be used exclusively for the article of crimes against humanity[410].

Besides this, it can be referred to what was said about this act in chapter 6.3.

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[403] Commentary (1987) p.1391

[404] ”Killing or wounding treacherously individuals belonging to the hostile nation or army”

[405] Commentary (1987) p.1442

[406] ”Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities”

[407] Commentary (1987) p.1452. For international armed conflicts Additional Protocol I article 50(3) says: ”The presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character”

[408] Additional Protocol II art.13(3)

[409] Additional Protocol I art.49(1)

[410] Rome Statute art.7(2) ”For the purpose of” crimes against humanity, and art.7(2a) ”’Attack directed against any civilian population’ means a course of conduct involving the multiple commission of acts …against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack”

Using starvation of civilians as a method of warfare by depriving them of the objects indispensable to their survival

This act is included in Additional Protocol II article 14.

For the definition of terms it can be referred to chapter 6.3. Article 14 does not contain any possibility for derogation, as the same act in Additional Protocol I does, which of course makes it much stronger[411].

Making works or installations containing dangerous forces the object of attack, if such attack may cause the release of these dangerous forces and consequent severe losses among the civilian population

These acts are included in Additional Protocol II article 15.

It can simply be referred to what was said for the same act in chapter 6.3.

Committing any acts of hostility directed against historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples, and to use them in support of the military effort

The act is included in Additional Protocol II article 16, the Hague Convention on Cultural Property article 19[412] and the Rome Statute article 8 (e)(iv)[413].

The Protocol prohibits any acts of hostility directed against historic monuments, works of art or places of worship which constitute the cultural heritage of peoples, and to use them in support of the military effort. ”Any act of hostilities” means any act related to the conflict which prejudices or may prejudice the physical integrity of protected objects. Thus, the object does not have to be damaged[414]. The second prohibition is a necessary complement to ensure an effective protection of the objects. The Convention’s protection is more extensive and states that acts of hostility against cultural property should be refrained from, it should be safeguarded against foreseeable effects of armed conflicts and not used for purposes which are likely to expose it to destruction or damage in the event of armed conflict[415]. Cultural property is defined in the Convention article 1. The Convention allows for the possibility of derogation in the case of imperative military necessity[416]. Article 16 of the Protocol emphasises that the conditions for applying the Convention are not in any way modified by the Protocol.

[411] Commentary (1987) p.1456-1457
[412] ”…each Party to the conflict shall be bound to apply, as a minimum, the provision of the present Convention which relate to the respect for cultural property”
[413] ”Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives”
[414] Commentary (1987) p.1470
[415] Convention 1954 art.3 and 4(1)
[416] Convention 1954 art.4(2)

Ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand

This act is included in Additional protocol II article 17(1) and the Rome Statute article 8(2)(e)(viii).

The provision only deals with forced movements within the territory of a state[417]. It is further limited in a number of ways. The displacement must be for reasons related to the conflict, which for example excludes movements due to epidemics or natural disasters. There are also two exceptions to the prohibition. First, if the displacement is executed for the security of the civilian population. Secondly, if the displacement is demanded by imperative military reasons[418]. Even if it is hard to make a general explanation on what is meant by this, it is clear that the exceptions have to be interpreted narrowly and can only encompass a minimum of cases[419].

Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the law of armed conflict

These acts are included in the Rome Statute article 8(2)(e)(iii).

It can be referred to what was said about this act during international armed conflicts.

Committing rape, sexual slavery, enforced prostitution, forced pregnancy and enforced sterilization

These acts are included in the Rome Statute article 8(2)(d)(vi).

As mentioned above rape is already interpreted to be included in *Violence to life and person* as cruel treatment and torture and in *Outrages upon personal dignity.* For the relationship between these provisions and the above stated provision from the Rome Statute as well as the definition and clarification of terms it can simply be referred to what was said about this act in chapter 6.3.

Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law

The act is included in the Rome statute article 8(e)(ii).

Just as the equivalent act committed in an international armed conflict this act is based on provisions stating that medical units and medical personnel, shall be respected and protected and not be the object of an attack. For internal armed conflicts these provisions are in Additional Protocol II article 9(1) and 11(1).

For further clarification it can be referred to the same act in chapter 6.3.

[417] Commentary (1987) p.1472
[418] About ”military necessity” see under *Extensive destruction and appropriation of property* in chapter 6.3.
[419] Commentary (1987) p.1473

Destroying or seizing the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war

These acts are included in the Rome Statute article 8(2)(e)(xii).

This act was previously to the Statute only set out in instruments dealing with international armed conflicts[420] and for its interpretation it can be referred to what was said about this act in chapter 6.3.

Using certain prohibited weapons

This act is included in the Chemical Weapons Convention and the Weapons Convention.

As for international armed conflicts the criminalisation of the use of weapons in non -international armed conflicts has also relied on specific provisions. Specific prohibited is the use of chemical weapons according to the Chemical Weapons Convention, mines according to Protocol II of the Weapons Convention and blinding laser weapons according to Protocol III of the same Convention[421].

8. Conclusion

There is a reluctance among states to deal with crimes committed during armed conflicts. Despite a countless number of atrocities and violations committed during a countless number of armed conflicts, and without doubt so, relatively few persons have actually been held responsible for them. One might ask why. Individuals, groups, nations and sometimes the whole world community have been appalled, have considered the acts punishable crimes and have demanded that something must be done. International and national rules that indicate which the crimes are have been developed. There are also rules explaining what measures should be taken when a crime has been committed. I have accounted for some of those international rules in this thesis. So why? Although the reasons might be numerous I mean that they all spring from the fact that a world order with sovereign states only recognises crimes according to the national law and only that these crimes are dealt with according to national judicial systems. For war crimes this has proved to constitute a problem. Crimes committed during armed conflicts, especially when more than one state is involved, are not just ordinary crimes but often highly sensitive political matters. To investigate, prosecute and convict a person for a crime that he committed while he was fighting for and in the name of his country is not something that is easily done. Especially when the person accused is a leading figure in the state. A large part of the international law developed on these matters is depending on the national law and the national judicial systems. The supranational initiatives taken have been fragmentary and selective.

This kind of reasoning would suggest a well-developed international criminal law system as the most desirable solution. Important to remember though is that such a system does not provide all the answers.

[420] Christopher Keith Hall: The Fifth Session (1998) p.336
[421] Theodor Meron: Is International Law Moving towards Criminalization?, 9 EJIL (1998) p.27

Critics against, for example, the development of the International Criminal Court sometimes use arguments meaning that such a Court would stand no chance against all the atrocities committed all over the world. This might very well be so, but the same is the reality for all national judicial systems regarding their national crimes. Moreover, it is important to note that an international criminal system will never, and could never, work without the national criminal systems.

The international crime that I have dealt with, war crimes, is not one homogenous crime but in fact many different and I have chosen, for the purpose of this thesis, to call them acts. Neither are they just international crimes since they are included in all or many states' criminal laws. Except for the common denominator, that the acts have to be committed during an armed conflict, and for some basic acts, different criminal systems as well as different international instruments present this crime differently. In the introductory chapter I underlined the importance of a uniform concept of war crimes in international law and I also mentioned the three ways in which I found the concept especially unclear. I call these the three levels of obscurity.

The first level is which different acts that are included in the concept of war crimes. There are authors that suggest that war crimes are all violations of the laws and customs of war. The suggestion of such a broad concept might be commendable but does not help to clarify it for the purpose of an international criminal system. Exactly which are the laws of war and which of the rules in them can be used as criminal law? Most of them are phrased in ways different from national criminal law and this because they were never meant to be used as such. And what is the exact scope of the customs of war? Other authors might suggest a concept limited to the grave breaches of the Geneva Conventions, since these instruments explicitly impose national law to criminalise the mentioned acts and to provide methods for dealing with the criminals. Such a concept is too narrow since the system of grave breaches only encompasses the kind of acts a state must deal with as a minimum, not all the acts it can deal with. The Rome Statute for the International Criminal Court includes a long list of acts in its war crimes-article and it might be tempting, at an initial stage, to see it as a codification of applicable international law. As I have shown, this is not the case though. At the same time as it develops it in some aspects, it is more restrictive in others. I have based my enumeration in chapter 6.3 and 7.3 on international humanitarian law instruments and international customary law, even if the latter is not explicitly referred to for the different acts. It has of course been my intention to as precise as possible reflect international law in this respect.

The second level of obscurity is regarding the exact meaning of the different acts. I have in chapter 5, 6.2-6-3 and 7.2-7.3 accounted for the elements of the different crimes and I have also suggested solutions on how different terms and phrases should be interpreted for the purpose of an international criminal system.

More importantly, I have clarified that in order to interpret a war crime provision one has to use national criminal law, humanitarian law and human rights law.

Because of the fact that humanitarian law has been developed gradually during a long period of time and are traditionally divided into two parts, called Geneva Law and the Hague Law, many of the acts overlap in a more or less obvious way. One example of this are the acts which could be assembled under the name ”offences of mistreatment”, such as torture, inhuman treatment, outrages upon personal dignity, *apartheid* and wilfully causing great suffering or serious injury to body or health. Theoretically, the best solution when creating a criminal code would be to avoid this obvious overlapping although practically, for example when creating the Rome Statute, this was not done. So have also I been true to the original formulations. Because of the same phenomenon there could also be differences between what might seem to be the same act, although stated in different instruments. An example of this are the acts in Common Article 3 of the Geneva Conventions compared to the ones in Additional Protocol II. Even if they are the same acts the instruments they are derived from are applicable in somewhat different armed conflicts which in fact makes the acts themselves different. This kind of inconsistencies are dealt with in the thesis.

What has often been referred to as a vagueness when it comes to the content of an act of war crimes is regarding the use of certain weapons. There is in humanitarian law a general clause prohibiting the use of weapons that are calculated to cause unnecessary suffering. It has been argued that this clause has no autonomous content but must be supplemented with specific prohibitions and this view seemed to be confirmed in the Rome Statute. My view is that this is not necessarily correct. It ought to be perfectly possible to use the clause for the purpose of an international criminal system without risking to violate the principle of legality and without loosing the usefulness of such a provision. In my opinion, the reluctance to use the clause as a basis for prohibition of the use of certain weapons is for political rather than legal reasons.

Finally, the second level of obscurity refers to how poorly international law treats the mental element. It is only included fragmentarily in many instruments and it is merely the Rome Statute that has dealt with it more closely - or at least has the intention to do so, since, as has been indicated, its provision on this issue in no way is free from question marks.

The third level of obscurity refers to the extent to which acts committed during armed conflicts not of an international character are included in the concept of war crimes. First, one should note that the acts that in fact are included are to a great extent identical with the equivalent acts committed during international armed conflicts. This I clearly show by my many referrals to chapter 6.3 in chapter 7.3. The big difference between the two chapters though is which and how many acts that are included. Despite an enormous development during recent years, with the ad hoc tribunals for Rwanda and former Yugoslavia and the

Rome Statute, there is still a huge gap between the scope of war crimes committed in international armed conflicts and war crimes committed in non-international armed conflicts. The reason for this divergence is clearly political. If looking at the attempts to define an international crime, accounted for in chapter 3, one find nothing that should exclude acts just because they are committed in another kind of conflict. For example, this kind of acts do contain the international element that Professor Bassiouni introduces, in that they could very well constitute a threat to the peace and security of the international community, if not directly then indirectly. They must also be considered shocking to the collective conscience of the world community, in the same way as if they had been committed during an armed conflict between states. My own view on this matter coincides with the statement of Professor Meron, that there are ”no truly persuasive legal reason” for dealing with war crimes in the different contexts any differently.

9. Bibliography

9.1 Articles

Bassiouni, Cherif M.: The Penal Caracteristics of Conventional International Criminal Law, Case Western Reserve Journal of International Law, 15, p.27-37

Gutteridge, Joyce A.C.: The Geneva Conventions of 1949, 26 Brit.Y.B. INT’L L. 294

Hall, Christopher Keith: The Third and Fourth Sessions of the UN Preparatory Committee on the Establishment of an International Criminal Court, 92 AJIL 124 (1998)

Hall, Christopher Keith: The Fifth Sessions of the UN Preparatory Committee on the Establishment of an International Criminal Court, 92 AJIL 331 (1998)

McCormack, Timothy L.H. and Simpson, Gerry J.: The International Law Commission’s Draft Code of Crimes against the Peace and Security of Mankind: An Appraisal of the Substantive Provisions, Criminal Law Forum, Vol.5, No.1 (1994) p.1-55

Meron, Theodor: Classification of Armed Conflict in the Former Yugoslavia: *Nicaragua’s* Fallout, 92 AJIL 236 (1998)

Meron, Theodor: International Criminalization of Internal Atrocities, 89 AJIL 554 (1995)
Meron, Theodor: Is International Law Moving towards Criminalization?, 9 EJIL (1998) p.18-31
Meron, Theodor: Rape as a Crime under International Humanitarian Law, 87 AJIL 424 (1993)
Meron, Theodor: War Crimes Law Comes of Age, 92 AJIL 468 (1998)
O'Brien, James C.: The International Tribunal for Violations of International Humanitarian Law in the Former Yugoslavia, 87 AJIL 639 (1993)
Shraga, Daphna and Zacklin, Ralph: The International Criminal Tribunal for the Former Yugoslavia, 5 EJIL (1994) p.360-380

9.2 Books

Best, Geoffrey: War and Law since 1945, Clarendon Press, Oxford 1994
Bassiouni, Cherif M.: A Draft International Criminal Code and Draft Statute for an International Criminal Tribunal, Martinus Nijhoff Publishers, Dordrecht 1987
Bassiouni, Cherif M. & Wise, Edward M.: Aut Dedere Aut Judicare, The Duty to Extradite or Prosecute in International Law, Martinus Nijhoff Publishers, Dordrecht 1995
Bassiouni, Cherif M.: Crimes Against Humanity in International Criminal Law, Martinus Nijhoff Publishers, Dordrecht 1992
Bassiouni, Cherif M.: International Crimes: Digest/Index of International instruments 1815-1985, Oceana Publications Inc. 1986
Burgers, J. Herman and Danelius, Hans: The United Nations Convention against Torture. A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Martinus Nijhoff Publishers 1988
Bring, Ove: Nedrustningens Folkrätt; Nordstedts förlag 1987
Cassese, Antonio: Violence and Law in the Modern Age (trans. by S.J.K. Greensleaves), Princeton University Press, New York 1988 ???
Commentary on the Geneva Conventions of 12 August 1949: Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (I); Jean S. Pictet (ed.), Geneva 1952
Commentary on the Geneva Conventions of 12 August 1949: Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (II); Jean S. Pictet (ed.), Geneva 1960
Commentary on the Geneva Conventions of 12 August 1949: Geneva Convention Relative to the

Protection of Civilian Persons in Time of War (IV); Jean S. Pictet (ed.), Geneva 1958

Commentary on the Geneva Conventions of 12 August 1949: Geneva Convention Relative to the Treatment of Prisoners of War (III); Jean S. Pictet (ed.), Geneva 1960

Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949; Yves Sandoz, Christophe Swinariski and Bruno Zimmermann (eds.), Geneva 1987

van Dongen, Yvonne: The Protest of Civilian Populations in Time of Armed Conflict; Thesis Publishers, Amsterdam 1991

Etudes et essais sur le droit international humanitaire et sur les principes de la Croix-Rouge en l'honneur de Jean Pictet; Christophe Swinarski (ed.), Geneva 1984

Final Record of the Diplomatic Conference Convened by the Swiss Federal Council for the Establishment of International Conventions for the Protection of War Victims and held at Geneva from April 21st to August 12th 1949

Green, Leslie C.: The Contemporary Law of Armed Conflict, Manchester University Press, Manchester 1993

Implementation of International Humanitarian Law; Frits Karlshoven & Yves Sandez (eds), Martinus Nijhoff Publishers, Dordrecht 1989

International Criminal Law: Crimes; Cherif M. Bassiouni (ed.), Transnational Publishers Inc., Dobbs Ferry, New York 1986

International Criminal Law and Procedure; John Dugard & Christine van den Wyngaert (eds.), Dartmouth Publishing Company Ltd 1996

International Dimensions of Humanitarian Law/ Henry Dunant Institute, Martinus Nijhoff Publishers 1988

Kalshoven, Frits: Constraints on the Waging of War, ICRC Geneva 1987

The Law of the International Criminal Tribunal of the Former Yugoslavia; Cherif M. Bassiouni and Peter Manikas (eds.), Transnational Publishers Inc., New York 1996

Kwakwa, Edward: The International Law of Armed Conflict: Personal and Material Fields of Application, Martinus Nijhoff Publishers, Dordrecht 1992

The Law of War Crimes - National and International Approaches; Timothy L.H. McCormack and Gerry J. Simpson (eds.), Kluwer Law International 1997

The Laws of Armed Conflict - A Collection of Conventions, Resolutions and Other Documents; Dietrich Schindler and Jiri Toman (eds.), Martinus Nijhoff Publishers Dordrecht and Henri Dunant Institute, Geneva 1988

Legal Responses to International Terrorism, US Procedural Aspects; Cherif M. Bassiouni (ed.),

Martinus Nijhoff Publishers, Dordrecht 1988

Meron, Theodor: Human Rights and Humanitarian Norms as Customary Law, Clarendon Press, Oxford 1989

Nuclear Weapons and Law, Arthur Selwyn and Martin Feinrider (eds.), Greenwood Press, Connecticut 1984

Obote-Odora, Alex: The Judging of War Criminals: Individual Criminal Responsibility Under International Law, Edsbruk 1997

The Proceedings of the Hague Peace Conferences, Translation of Official Texts, Conference of 1907, Vol.III Meetings of the Second, Third and Fourth Commissions, New York 1921

Ratner, Steven R. and Abrams Jason S.: Accountability for Human Rights Atrocities in International Law, Beyond the Nuremberg Legacy, Clarendon Press, Oxford 1997

Singh, Nagenda and McWhinney, Edward: Nuclear Weapons and Contemporary International Law; Martinus Nijhoff Publishers 1989

Toman, Jirí: The Protection of Cultural Property in the Event of Armed Conflict, Commentary on the Convention for the Protection of Cultural Property in the Event of Armed Conflict and its Protocol, signed on 14 May 1954 in The Hague, and on other instruments of international law concerning such protection, UNESCO Publishing 1996

A Treaties on International Criminal Law, Vol. I, Crimes and Punishment; M. Cherif Bassiouni & Ved P. Nanda (eds.), Springfield, USA 1973

9.3 Cases

International Court of Justice

Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986 para 14

Legality of the threat or use of nuclear weapons (Advisory Opinion requested by the General Assembly), I.C.J. Reports 1996 para 97

International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991

Prosecutor v. Dusko Tadic, Judgement of 7 May 1997 in Case No. IT-94-1-T

Prosecutor v. Delalic and others, Judgement of 16 November 1998 in Case No. IT-96-21
Prosecutor v. Anto Furundzija, Judgement of 10 December 1998 in Case No. IT-95-17/1-T10
International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994
Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-T, Judgement (2 September 1998)