PROSECUTION OF WAR CRIMES IN INTERNATIONAL LAW: REVISITING THE IDEA OF UNIVERSAL JURISDICTION FOR THE PROSECUTION OF ACTS OF GRAVE BREACHES*

Abstract

The broadening of the scope of the concept of 'crimes against humanity' and war crimes in recent years, so as to include acts committed in time of non-international armed conflict, has been of decisive importance in the universal prosecution of war criminals. As the judges at Nuremberg observed in condemning the Nazi leaders for their atrocities: '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.' The paper discussed the concept of universal jurisdiction in the prosecution of war crimes and acts of grave breaches in international law. Using the doctrinal method, the paper discovered that the prosecution of acts of grave breaches and acts amounting to war crimes by domestic or ordinary courts of the state instead of the International Criminal Court or International Tribunals is an effective instrument in the fight against impunity for war crimes and crimes against humanity. Indeed, in numerous countries the example set by the ad hoc tribunals and the implementation of the ICC Statute have led to a notable increase in national prosecutions for international crimes, including grave breaches. It is submitted that the International Criminal Court will move practice further in the direction of the universality of punishment intended by the drafters of the Geneva Conventions.

Keywords: International Subjects, statehood, universal jurisdiction, grave breaches international responsibility for unlawful acts.

1. Introduction

The grave breaches regime in the Geneva Conventions and Additional Protocol I has partially lived up to its promise of ending impunity and ensuring universality of punishment. It has often been noted that prosecutions for grave breaches are scarce, and that impunity still appears to be the norm.[1] Indeed, states only occasionally prosecute acts that might constitute grave breaches within the grave breaches regime. However, a thorough survey of the prosecution of acts constituting grave breaches in national courts must consider the diverse nature of such prosecutions. Acts constituting grave breaches can be prosecuted as such, but can also be charged as other international crimes (like crimes against humanity or genocide) or ordinary crimes, like murder. This paper will discuss each of these categories in turn. It will show how national law and international law interrelate in these prosecutions, noting in particular that a divergent national application of international criminal law is not necessarily problematic but can be a useful and important motor for the development of the law on prosecution of grave breaches.

2. International Crimes

International crimes as discussed in this paper are those crimes that amount to war crimes or acts of grave breaches not necessarily crimes that have international character like drug trafficking. In discussing other international crimes other than war crimes, it is the international legal personality of the person involved that matters and not merely the nature of the crime. In which case, one would consider the legal personality of non state actors particularly international organizations. This is because the Reparation for Injuries Cases[2] has shown that international organizations have legal personality even if it is in the limited sense. The paper however considered international crime for the purposes of discussing the prosecution of offences regarded as war crimes and acts of grave breaches. It is necessary to observe that international crimes is a customary international law concept, and it implies not only a duty upon a State to prosecute those crimes that take place on the territory of that State, but crimes outside the State as well. It is under this concept that the duty to prosecute or extradite to any willing country any individual who has been accused of war crimes. Over the last half a century, international law has become increasingly involved in the regulation of non-international armed conflict or, as it is known more colloquially, civil war. In its landmark ruling on jurisdiction in the *Tadic*[3] case, the Appeals Chamber of the

---

* **By Vitus Mazi UDEGBULEM, PhD,** Lecturer, Department of International Law & Jurisprudence, Faculty of Law, Imo State University, Owerri, Imo State. Email: maziudegbulem@rocketmail.com

[1] . W.N. Ferdinandusse, Direct Application of International Criminal Law in National Courts (The Hague: T.M.C. Asser Press, 2006), p. 91.

[2] Supra.

[3] *Prosecutor v. Tadic,* Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, at para. 100 (Oct. 2, 1995), *reprinted in* 35 I.L.M. 32 (1995).

International Criminal Tribunal for the former Yugoslavia traced the origins of this phenomenon to the Spanish Civil War thus:

> As early as the Spanish Civil War (1936-39), State practice revealed a tendency to disregard the distinction between international and internal wars and to apply certain general principles of humanitarian law, at least to those internal conflicts that constituted large-scale civil wars. The Spanish Civil War had elements of both an internal and an international armed conflict. Significantly, both the republican Government and third States refused to recognize the insurgents as belligerents. They nonetheless insisted that certain rules concerning international armed conflict applied. Among rules deemed applicable were the prohibition of the intentional bombing of civilians, the rule forbidding attacks on non-military objectives, and the rule regarding required precautions when attacking military objectives.[4]

It should be noted that the Universal Declaration of Human Rights provide that everyone has duties to the community,[5] including duty to ensure the non violation of the fundamental rights of the person, in the same manner equally the African Charter of Human and Peoples Rights[6] gives some particular attention to the subject. Nevertheless, as a general rule, international human rights law addresses the question of individual responsibility, holding that States are bound to ensure respect for human rights b**y,** for example, enacting and enforcing criminal law.[7] This duty is usually only implicit in the human rights instruments, with some notable exceptions: Convention on the Prevention and Punishment of the Crime of Genocide[8] the International Convention on the Elimination of All Forms of Racial Discrimination,[9] the International Convention on the Suppression and punishment of the Crime of Apartheid,[10] and the Convention Against Torture and Other Cruel[11], Inhuman or Degrading Treatment or Punishment. The duty to prosecute is also set out explicitly in international humanitarian law instruments. Accordingly, Article 146 of the Geneva Convention on the Protection of Civilians requires States parties to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention. This is the provision in international law that gives states parties to the Geneva Convention the powers to enact special domestic legislation for the prosecution of war criminals. Article 146 of the Geneva Convention[12] therefore is the legal justification for the prosecution of acts amounting to war crimes and grave breaches in ordinary national courts as such offences like murder, manslaughter, assault etc.

3. Prosecution of International Crimes

By and large, the obligation to investigate and prosecute concerns crimes committed within the jurisdiction of a State, that is, its territory, and as a general rule, is limited to serious crimes of violence against the person.

---

[4] *Prosecutor v Tadic*, Supra

[5] See Article 29(1)

[6] . See Article 27- 29 of the African Charter on Human and Peoples' Rights, 1981.

[7] See particularly Article 146(1) of Geneva Convention on the Protection of Civilian

[8] . *See* Convention on the Prevention and Punishment of the Crime of Genocide, adopted on Jan. 12, 1951, Art. V thereof. The Convention is generally referred to as the 'Genocide Convention'. Article V of the Convention reads thus: The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention, and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in article Ill.

[9] . *See* International Convention on the Elimination of All Forms of Racial Discrimination, Jan. 4, 1969, art.4, 660 U.N.T.S. 195. Article 4 thereof.

[10] . See Article IV International Convention on the Suppression and Punishment of the Crime of Apartheid, Jul. 18, 1976. Article IV reads:

The States Parties to the present Convention undertake: (a) To adopt any legislative or other measures necessary to suppress as well as to prevent any encouragement of the crime of apartheid and similar segregationist policies or their manifestations and to punish persons guilty of that crime;

(b) To adopt legislative, judicial and administrative measures to prosecute, bring to trial and punish in accordance with their jurisdiction persons responsible for, or accused of, the acts defined in article 11 of the present Convention, whether or not such persons reside in the territory of the State in which the acts are committed or are nationals of that State or of some other State or are stateless persons.

[11].See Article 4 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which was adopted on June 26, 1987. The Convention is popularly referred to as 'Convention against Torture' Article 4 of the Convention reads thus:

1. Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture.

[12] Article 146 GC IV

Arguably, many of the norms that impose a duty to investigate and prosecute serious violent crimes against the person, are not only binding upon those States that have signed, ratified, or acceded to the relevant treaties, but are also obligations imposed by customary international law. These obligations are enhanced with respect to a somewhat narrower category of offenses that are sometimes described as 'international crimes.[13] The Rome Statute of the International Criminal Court declares[14] that 'Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes'. Unfortunately, the concept of 'international crimes' is not clarified further in the Rome Statute[15] or, for that matter, in any of the other relevant treaties. Rather, it is a customary international law concept, and it implies not only a duty upon a State to prosecute those crimes that take place on the territory of that State, but crimes outside the State as well.

The Rome Statute gives the International Criminal Court jurisdiction to prosecute three international crimes, namely, genocide, crimes against humanity, and war crimes.[16] In the recent *Arrest Warrant* case[17], the ICJ referred to 'crimes against humanity and war crimes' rather than to international crimes, probably because there may be other 'international crimes' that lack the same level of importance and do not strike at the core of fundamental human rights. The offences of drug trafficking, for example, may be an 'international crime' and contrary to the purposes and principles of the United Nations, but it is almost certainly neither a crime against humanity nor a war crime, nor can it be said to rise to the same level of gravity when considering war crimes.[18] In other words, when the Rome Statute refers to a duty to exercise criminal jurisdiction over those responsible for international crimes, it is surely referring to crimes against humanity and war crimes, but probably not to international crimes like drug trafficking. Therefore, the international crimes referred to for the purposes of this discussion, will be used in this narrow sense, and on the understanding that it overlaps more or less precisely with the category of crimes considered by the ICJ in the *Arrest Warrant* case,[19] and that set out in the Refugee Convention.[20] Crimes falling within this category also include genocide and apartheid, both of which are often said to be merely specific categories of the broader concept of crimes against humanity.

4. Jurisdiction to Prosecute International Crimes

Jurisdiction generally is the power of a court to judicially entertain a matter or case placed before it. It is a general principle of law that where the court lacks jurisdiction, whatever be the outcome of the decision, no matter how brilliantly conducted, the case will in the absence of requisite jurisdiction be a nullity. This is because jurisdiction is the life wire of adjudication and if a court has no jurisdiction to decide a case, the proceedings remain ab ignition a nullity.[21] This principle applies to municipal courts. There is no reason to exclude the principle when dealing with international crimes in international law because the court or Tribunal to hear the crimes must first possess jurisdiction to do so. Recognition of a duty to exercise criminal jurisdiction in the case of international crimes raises a number of important questions. At a minimum, it clearly means the obligation to prosecute crimes committed on a State's territory.[22] But, as has already been noted, this duty exists, in any event, under various human rights treaties as well as under customary law with respect to a broad range of crimes against the person, many of which do not rise to the seriousness of international crimes. The duty of States[23] resulting from

---

[13] . See Article 1 of the Rome Statute of the International Criminal Court, 1998. Hereinafter referred to as Rome Statute.
[14]. See Article 1 of the Rome Statute.
[15] .See art. 5(1). *Also see* Williams Schabas: *Introduction To The Rome Statute* (2001). Williams noted that while Article 5(1) contemplates possibility of prosecution for aggression, the crime itself is left undefined, and the conditions for prosecution are not specified. At present, and for the foreseeable future, the ICC according to Williams is not capable of prosecuting the crime of aggression.
[16] . See Articles 6, 7 and 8 of the Rome Statute
[17] . Case Concerning the Arrest Warrant of 11 April 2000 (Congo v. Belgium) 2002 I.C.J1.21 **.**
[18] . See the Canadian case of Pushpanathan v. Canada, [1998] 1 S.C.R. 982, at paras. 59-60
[19]. Supra
[20]. Article 1(F)(a) Convention Relating to the Status of Refugees, adopted on Apr. 22, 1954
[21]. See *Egunjobi v. Federal Republic of Nigeria*, 20012 12 SC (pt. IV) 148, *Federal Republic of Nigeria & Anor v Lord Chief Udensi Ifegwu* (2003) 8 SC 111.
[22] . The Common Article 3to the Geneva Conventions clearly provides for what the states parties should do to prevent the commission of war crimes. It provides list of offences that are prohibited under international law during armed conflict.
[23] . This is the practical effect of Article 146 of the GC IV. It provides thus: The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article. Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a ' prima facie ' case.
Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the

international human rights law to prosecute crimes committed on their territory corresponds to another general principle of public international law by which States exercise criminal law jurisdiction over their own territory and nationals.

According to the report of the Commission on Human Rights on this principle, it should remain the rule that national courts have jurisdiction, because any lasting solution must come from the Nation itself.[24] However, though the report observed that in most cases, the national courts are not yet capable of handing down impartial justice or are physically unable to function.[25] And in most frequent cases, too, the state are resistant to this responsibility, usually because the authorities involved in prosecution are complicit with the perpetrators themselves. Even if it is not necessarily an element of the offence, the crimes in question - genocide, apartheid, torture, and so on - almost invariably imply State policy and involvement or, at the very least, tolerance. Definition of an act as an international crime, as opposed to simply an 'ordinary' crime against the person, has a number of consequences, whose objective is to facilitate prevention and punishment of the act. This is why the Fourth Geneva Convention on the Protection of Civilian population provides that it shall be the duty or obligation of each High Contracting Party to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts.[26] This Article is the cornerstone of the system used for the repression of breaches of the Convention. That system is based on three essential obligations laid upon each Contracting Party: to enact special legislation; to search for persons alleged to have committed breaches of the Convention; to bring such persons before its own courts or, if it prefers, to hand them over for trial to another High Contracting Party concerned. It is desirable that States which have ratified the Convention or acceded to it should take without delay the necessary steps to fulfill their obligations under Article 146 (3). This task of adapting penal law for the punishment of breaches of the Convention is certainly a complex one and will often require long and thorough study. The provision also refers to the list of grave breaches as stipulated under Article 147 and ends with the statement of the safeguards of proper trial and defence by which accused persons shall benefit.[27] In such cases of international crimes, there may be a duty upon States to ensure prosecution of offences committed elsewhere, should they obtain custody of a suspected offender. States guarantee that these crimes are adjudicated either by trying the accused person themselves, or by extraditing him or her to another State that is prepared to do so. This is often known by the Latin expression *aut dedere autjudicare* (which means extradite or prosecute). The principle is designed to ensure that perpetrators of particularly serious crimes are brought to justice. The treaty virtually gives all states jurisdiction to try international crimes of this nature whether committed by natural person, state actor or non state actor. he obligation on the High Contracting Parties to search for persons accused to have committed grave breaches imposes an active duty on them. As soon as a Contracting Party realizes that there is on its territory a person who has committed such a breach, its duty is to ensure that the person concerned is arrested and prosecuted with all speed.[28] The necessary police action should be taken spontaneously, therefore, not merely in pursuance of a request from another State. The court proceedings should be carried out in a uniform manner whatever the nationality of the accused. Nationals, friends, enemies, all should be subject to the same rules of procedure and judged by the same courts. There is therefore no question of setting up special tribunals to try war criminals of enemy nationality. Extradition is restricted by the municipal law of the country which detains the accused person. Indeed, a rider is deliberately added: "in accordance with the provisions of its own legislation". Moreover, a special condition is attached to extradition. The Contracting Party which requests the handing over of an accused person must make out a ' prima facie ' case against him. There is a similar clause in most of the national laws and international treaties concerning extradition. The exact

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

[24] . Commission on Human Rights, *Questions on Impunity of Perpetrators of Human Rights Violations (Civil and Political),* at para. 28, *available at* http://www2.hri.ca/fortherecord1 997/documentation/subcommission/ accessed 26 May, 2020.

[25] I*bid*

[26] See Art. 146(1) of the Geneva Convention IV

[27] Article 147 of the Fourth Geneva Convention provides for what amount to grave breaches the violation of which will trigger prosecution for war crimes. It provides thus: grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the present Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

[28] This is the practical effect of article 146 of the GC IV

interpretation of "' prima facie ' case" will in general depend on national law, but it may be stated as a general principle that it implies a case which, in the country requested to extradite, would involve prosecution before the courts. Most national laws and international treaties on the subject refuse the extradition of accused who are nationals of the State detaining them. In such cases Article 146 quite clearly implies that the State detaining the accused person must bring him before its own courts.

This obligation is also set out in the Convention Against Torture[29] and in the grave breaches provisions of the Geneva Conventions.[30] However, there is nothing similar in the Genocide Convention or the Apartheid Convention. Some writers have argued that *aut dedere aut judicare* for international crimes is also a customary norm.[31] In the case of international crimes, it is also said that States must recognize that crimes committed within their own jurisdictions - that is, on their sovereign territories - may be prosecuted by other States on a basis known of the doctrine of 'universal jurisdiction'.[32] This is obviously implicit in the obligation *aut dedere aut judicare.* Unlike *aut dedere aut judicare,* universal jurisdiction is rarely set out in international treaties. In the case of the Genocide Convention, for example, the drafters quite intentionally decided to exclude universal jurisdiction, and to specify that genocide should be prosecuted by the State upon whose territory the crime was committed or, alternatively, by an international court.[33] War crimes such as willful killing, torture, inhuman treatment, unlawful deportation and unlawful confinement would have to be punished, at least when committed in international armed conflicts.[34] It should be noted that the universality of jurisdiction for grave breaches is some basis for the hope that they will not remain unpunished and the obligation to extradite ensures the universality of punishment.[35] With the adoption of Additional Protocol I in 1977, the grave breaches regime was expanded with a view to improving the effectiveness of the system.[36] Though by 1948 when the Genocide Convention was drafted, the weak States were very nervous that powerful State might purport to have the authority to prosecute such serious violations of human rights as genocide, committed upon their own territory, thus undermining their sovereignty. This was at the beginning of the Cold War, and they feared political mischief in various forms. However, recently, in individual opinions issued as part of the judgment in the *Arrest Warrant* case[37], several judges of the ICC

---

[29] Article 5(2) of the Convention

[30] . Fourth Geneva Convention, art. 147.

[31] . M.Cherif Bassiouni & Edward M. Wise, 'Aut Dedere Autijudicare', The Duty to Extradite or Prosecute in International Law, (1995) p. 3-5

[32] . Colleen Enache-Brown & Ari Fried, *Universal Crime, Jurisdiction and Duty: The Obligation of Aut Dedere Aut Judicare in international Law, (*43 McGILL L.J. 1998) p. 613, 621. Collen defined universal jurisdiction as principle that assumes that every State has interest in exercising jurisdiction to combat egregious offenses that States universally condemn.

[33] . See Article IV Genocide Convention

[34] . See Articles 49 and 50 GC I, Articles 50 and 51 GC II, Arts 129 and 130 GC III, Arts 146 and 147 GC IV. See Art. 85 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating tothe Protection of Victims of International Armed Conflicts, 8 June 1977 (Additional Protocol I,

[35]. J.S. Pictet (ed.), Commentary, The Geneva Conventions of 12 August 1949, Vol. IV (Geneva: International Committee of the Red Cross (ICRC),1958), at 587.

[36]. See Article 85 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 8 June 1977 (Additional Protocol I).

[37] . The Court issued the *warrant* based on universal jurisdiction. It accused Yerodia of inciting racial hatred. ... Belgium sent the *arrest warrant* to Interpol and circulated it to all States, including to the Congo. The *warrant* asked States to *arrest*, detain, and extradite Yerodia to Belgium. Available on https://www.icj-cij.org/en/case/121/summaries. Accessed on 26 May, 2020. On 17 October 2000, the Democratic Republic of the Congo (DRC) filed an Application instituting proceeding against Belgium concerning a dispute over an international arrest warrant issued on 11 April 2000 by a Belgian examining judge against the acting Congolese Minister for Foreign Affairs, Mr. Abdoulaye Yerodia Ndombasi, seeking his detention and subsequent extradition to Belgium for alleged crimes constituting "grave violations of international humanitarian law". The arrest warrant was transmitted to all States, including the DRC, which received it on 12 July 2000. The DRC also filed a request for the indication of a provisional measure seeking "an order for the immediate discharge of the disputed arrest warrant". Belgium, for its part, called for that request to be rejected and for the case to be removed from the List. In its Order made on 8 December 2000, the Court, rejecting Belgium's request for the case to be removed from the List, stated that "the circumstances, as they then presented themselves to the Court, were not such as to require the exercise of its power, under Article 41 of the Statute, to indicate provisional measures. In its Judgment of 14 February 2002, the Court rejected the objections raised by Belgium and declared that it had jurisdiction to entertain the application of the DRC. With respect to the merits, the Court observed that, in the case, it was only questions of immunity from criminal jurisdiction and the inviolability of an incumbent Minister for Foreign Affairs that it had to consider, on the basis, moreover, of customary international law. The Court then observed that, in customary international law, the immunities accorded to Ministers for Foreign Affairs are not granted for their personal benefit, but to ensure the effective performance of their functions on behalf of their respective States. The Court held that the functions exercised by a Minister for Foreign Affairs were such that, throughout the duration of his or her office, a Minister for Foreign Affairs when abroad enjoyed full immunity from criminal jurisdiction and inviolability.

recognized that the exercise of universal jurisdiction in the case of international crimes *(i.e.,* crimes against humanity and war crimes) was consistent with customary international law.

5. Prosecution of Grave Breaches Offences

Pursuant to the provisions of the Geneva Conventions, several states have prosecuted war crimes specifically charged as grave breaches. Some of these prosecutions took place on the basis of universal jurisdiction. In Denmark for instance, a Bosnian asylum seeker was prosecuted and convicted in 1994 for grave breaches of the Third Geneva Convention and the Fourth Geneva Convention committed in July and August 1993 in the prison camp of Dretelj, situated in what is now the Republic of Bosnia and Herzegovina.[38] The defendant had been recognized by other asylum seekers in Denmark as a former prisoner in the Dretelj camp who had joined the guards in mistreating and killing fellow prisoners. He was charged and convicted for having committed acts in the prison camp amounting to grievous bodily harm within the meaning of Section 245 of the Danish Penal Code and Articles 129 and 130 of the Third Geneva Convention and Articles 146 and 147 of the Fourth Geneva Convention. He was sentenced to 8 years' imprisonment. The Court also ordered the defendant to be expelled from Denmark subsequent to having served his prison sentence. In Switzerland, a Bosnian Serb asylum seeker was prosecuted for mistreatment of detainees in the prison camps of Omarska and Keraterm[39] in 1992. The defendant was charged with grave breaches of the Third Geneva Convention, the Fourth Geneva Convention and Additional Protocol I, as well as violations of Common Article 3 and Additional Protocol II.[40] He was, however, acquitted on the facts. The court found the armed conflict at the time to be international in character, but concluded it remained doubtful whether the accused had actually been in the camps.[41] Occasionally, states have prosecuted their own citizens on specific charges of grave breaches. In the United Kingdom for instance, Corporal Payne was convicted for 'inhuman treatment of a person protected under the provisions of the fourth Geneva Convention1949.[42] Corporal Payne pleaded guilty to one count of inhuman treatment for the mistreatment of an Iraqi prisoner in Basra in British-occupied Iraq in 2003. It is to be observed that this case of Payne made history as the first ever British soldier in history to be convicted of a war crime under international law.[43] Still, a survey of domestic prosecutions suggests that prosecutions of acts that constitute grave breaches on charges that explicitly reflect their character as grave breaches are few and far between. More frequently, acts amounting to grave breaches are prosecuted as other international or domestic offences.

6. Prosecution of Grave Breaches Offences as Ordinary Crimes

The Geneva Conventions require states to 'enact any legislation necessary to provide effective penal sanctions for persons committing' grave breaches.[44] The conventions do not explicitly require such prosecutions to reflect the international nature of the crimes committed provided there is a domestic municipal panel sanction for such offence. More generally, international law allows states to prosecute international crimes on the basis of ordinary criminal law.[45] During one of the many trials following the end of the war in former Yugoslavia, the International Criminal Court for former Yugoslavia in 2006 found that 'there is no rule, either in customary or in positive international law, which obligates States to prosecute acts which can be characterized as war crimes solely on the basis of international humanitarian law, completely setting aside any characterizations of their national criminal

---

[38] See The Report of the Eastern Division of the Danish High Court, (Third Chamber) 25 November, 1994 cited by W.N. Ferdinandusse, 'The Prosecution of Grave Breaches in National Court' available at http://www.icrc.org/ihl-nat.nsf . Accessed on 26 May, 2020.

[39] . **A**ccording to the indictment, between May and August 1992 more than 7,000 non-Serb civilians from the Prijedor area were detained in the Omarska, Trnopolje and Keraterm camps, where they were confined in inhumane conditions, murdered, beaten, sexually assaulted and psychologically abused. Available on https://www.google.com/search?client=firefox-b-d&q=trial+of+Omarska+and+Keraterm. Accessed on 26 May, 2020. The Keraterm camp was a concentration camp established by Bosnian Serb military and police authorities near the town of Prijedor in northern Bosnia and Herzegovina during the Bosnian War. The camp was used to collect and confine between 1,000–1,500 Bosniak and Bosnian Croat civilians. The Keraterm camp was located on the site of a ceramics factory, just outside the city of Prijedor. According to reports, prisoners were kept in four halls, formerly used as storehouses at the ceramics factory.

[40] . Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-international Armed Conflicts (8 June 1977) (Additional Protocol II, hereinafter AP II).

[41] . See Swiss Military Tribunal, Division 1, Grabez, 18 April 1997, available at http://www.icrc.org/ ihl-nat.nsf. Accessed on 25 may, 2020.

[42] . N. Rasiah, 'The Court-martial of Corporal Payne and Others and the Future Landscape of International Criminal Justice', 7 Journal of International Criminal Justice (JICJ) (2009). p. 177 cited by W.N Ferdinandusse, Op. cit

[43] . *Ibid*

[44] . See Art. 49 GC I, Art. 50 GC II, Art. 129 GC II, Art. 146 GC IV.

[45] . See Ferdinandusse, Op. Cit, at 18-21

law.[46] It is also noteworthy to observe here that the complementarity regime of the International Criminal Court regard prosecutions of international crimes on the basis of ordinary criminal law as a sufficient response, which precludes the International Criminal Court from exercising jurisdiction subsequently on the same subject matter.[47] Therefore prosecution of grave breaches on the basis of ordinary criminal law can be efficient, though some argue that it is not ideal because some national provisions of general criminal law do not generally match all specific aspects of crimes under international humanitarian law.[48] It may not be easy, for example, to find adequate provisions in national criminal codes for the prosecution of such grave breaches as willfully depriving a prisoner of war of the rights of fair and regular trial as stipulated in the Third Geneva Convention[49] or the perfidious use of protected signs like the Red Cross emblem provided in the Additional Protocol I[50].

Be that as it may, grave breaches can be, and often are prosecuted as ordinary crimes like murder and assault. Courts-martial proceedings for war crimes often do not reflect the international nature of the crimes. In the United States, Lieutenant Calley[51] was convicted for his involvement in the infamous My Lai massacre in the Vietnam war on the basis of murder and assault, whereas he could have been charged with grave breaches of the Geneva conventions. In 1996, a spokesman for the US Department of Defense noted that several members of the US Armed Forces had been prosecuted in courts-martial proceedings 'for what amounted to grave breaches of the Geneva Conventions' committed during military operations in Panama and Somalia.[52] Because the US is not signatory to the ICC Treaty, US citizens who are accused of war crimes in recent times are dealt by court-martial proceedings in the United States for crimes that arguably amounted to grave breaches. Several defendants from the former Yugoslavia were charged in Germany not only with genocide, but also with ordinary crimes like murder. It should however be noted that, the fact that the Geneva Conventions and general international law do allow states to prosecute grave breaches on the basis of ordinary criminal law does not mean that any charge suffices to satisfy the requirements of the grave breaches regime as long as some kind of prosecution takes place. For the prosecution to be meaningful, the charges must correspond to the gravity of the crime, as this is an implicit requirement of the grave breaches regime. Also, the charges laid must entail 'effective penal sanctions' according to the terms of the Geneva Conventions themselves.[53] Still, prosecutions of acts constituting grave breaches on charges of ordinary crimes should not automatically be dismissed as inadequate. Provided that the ordinary criminal law applied reflects the gravity of the crime, it can yield an efficient prosecution which leaves enough room for both the proceedings and the judgment to reflect the international background and context of the case.

7. Conclusion

Practice shows that grave breaches have been prosecuted in national courts in very different ways. They have been charged as grave breaches, as other international crimes like genocide or crimes against humanity, or as ordinary crimes like murder or manslaughter. These prosecutions have led to serious sentences, to sentences that appear to be rather light and to acquittals. In some of these trials, the Geneva Conventions were not mentioned at all. In others, the grave breaches regime was analysed at length. These trials do show that the grave breaches regime can be an effective instrument in the fight against impunity for war crimes, when it is taken seriously by the states involved. Still, it appears that there are many more grave breaches left unprosecuted than actual prosecutions. This is because major actors in the international arena are not party to the ICC Treaty. Countries like the United States, Israel, Sudan and Russia who recently withdrew her membership of the ICC Treaty because they do not want their nationals to be tried by a foreign court. Russian said it is formally withdrawing its signature from the

---

[46] See the Judgment of the Trial Chambers in Prosecutor v. Hadzihasanovic Ever & Anor (IT-01-47-T),Trial Chamber, 15 March 2006. The accused was found guilty inter alia for failing to take effective control of soldiers under his command during Bosnia conflict.

[47] . See J.K. Kleffner, Complementarity in the Rome Statute and National Criminal Jurisdictions (Oxford: Oxford University Press, 2008), at 119. But see M.M. El Zeidy, The Principle of Complementarity in International Criminal Law: Origin, Development and Practice (Leiden: Martinus Nijhoff, 2008), at 286. The Principle of Complementarity: A New Machinery to Implement International Criminal Law', 23 Michigan Journal of International Law (2002) 933.

[48] . R. Rissing-van Saan, 'The German Federal Supreme Court and the Prosecution of International Crimes Committed in the Former Yugoslavia', 3 JICJ (2005) 381, at 395.

[49] . Article 130 of the GC III

[50] . Art. 85(3) f of the AP I

[51] U.S. v. Calley, 46 C.M.R. 1131, 1138 (1973) the appellant was convicted by general court-martial of three specifications of premeditated murder and one of assault with intent to commit murder in violation of Articles 118 and 134, Uniform Code of Military Justice, 10 USC, p. 918 . Although all charges could have been laid as war crimes, they were prosecuted under the US Military Court. The US has a policy of not subjecting their nationals to the jurisdiction of the International Criminal Court. The US till date is not a signatory to the ICC.

[52] . See statement of John H. McNeill before the committee on the judiciary of the U.S. House of Representatives, 12 June 1996, available at http://judiciary.house.gov/legacy/636.htm. Accessed on 27 May, 2020

[53] . Art. 49 GC I, Art. 50 GC II, Art. 129 GC III, Art. 146 GC IV.

founding Treaty of the international criminal court, a day after the court published a report classifying the Russian annexation of Crimea as an occupation. The repudiation of the tribunal, though symbolic, is a fresh blow to efforts to establish a global legal order for pursuing genocide, war crimes and crimes against humanity. These withdrawals is are inimical to the search for a unified international consensus to achieving universal prosecution for war crimes and acts of grave breaches. The role of the ICC provides some incentive for states parties to take their obligations under the grave breaches regime more seriously in the future. Indeed, in numerous countries the example set by the ad hoc tribunals and the implementation of the ICC Statute have led to a notable increase in national prosecutions for international crimes, including grave breaches. It is submitted that the ICC will move practice further in the direction of the universality of punishment intended by the drafters of the Geneva Conventions.