

Reflections on the *Iudicare* Limb of the Grave Breaches Regime

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Abstract

This article addresses the iudicare limb of the grave breaches regime. While the Hague formula of aut dedere aut iudicare must certainly be considered when construing the iudicare limb of the grave breaches regime, this article shows that the iudicare limb applicable to grave breaches is independent of other similar conceptions. Moreover, we see that there is no absolute duty to arrest, nor can there be an absolute duty to prosecute and to punish. What the iudicare limb in fact entails is a duty to investigate and, where so warranted, to prosecute and to convict. In some circumstances, immunities influence this obligation. There are, in addition, certain implications arising from the procedural safeguards implicit in the iudicare limb. Finally, this article concludes with a word of caution concerning amnesties in hybrid accountability systems, querying whether international practice might slowly come to accept a less categorical regime, as it does in the field of war crimes committed in non-international armed conflicts and crimes against humanity. This would perhaps better reflect the political complexities of the transition from armed conflict to peace.

1. Introduction

In its Westphalian era, international law followed Immanuel Kant's famous dictum of 1797 that amnesty is implied in the very concept of the conclusion of peace.¹ The new policy after the First World War replaced the idea of 'perpetual oblivion' by the 'twofold principle of prosecution of war criminals from among the vanquished aggressor States, on the one hand, ... and the granting of an amnesty to eventual war criminals who acted against

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1 I. Kant, *Metaphysik der Sitten: Erster Teil Anfangsgründe der Rechtslehre* (Hamburg: Felix Meiner, 1954), at 179.

the aggressor States'.² Only the so-called grave breaches regime within the 1949 Geneva Conventions established the symmetrical legal duty *aut dedere aut iudicare* (extradite or prosecute) with respect to a core category of war crimes.³ Although this new legal regime for international armed conflicts was confirmed and expanded through the 1977 First Additional Protocol to the Geneva Conventions (Additional Protocol I), it hardly occupied a prominent place in the international practice. In fact, Antonio Cassese even described it as 'a dead letter' in 1986.⁴ The interest that international legal scholarship took into the matter was also relatively limited. As the International Law Commission's (ILC) Special Rapporteur on *aut dedere aut iudicare* has commented, the concept 'was largely forgotten for more than half a century'.⁵

The ILC's ongoing study of the principle *aut dedere aut iudicare* is evidence of a re-awakened interest in the grave breaches regime. This is to be welcomed because it would be erroneous to assume that the recent proliferation of international criminal courts has rendered the enforcement provisions contained in the grave breaches obsolete. The reach of international criminal courts is, and will remain, limited, leaving domestic courts with the obligation to investigate alleged grave breaches in accordance with the legal structure contemplated in the Geneva Conventions. This is emphasized in the Rome Statute of the International Criminal Court (ICC), through its recognition of the primacy of national criminal proceedings. Yet, the ICC Statute's principle of complementarity does not contain a duty to institute national criminal proceedings for crimes under international law, and is not universally binding on all states. The grave breaches regime, on the other hand, requires investigation and prosecution in the absence of extradition. In this sense, the grave breaches regime retains an important place in the contemporary landscape of international criminal law. The same assessment is implied in the Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal in the International Court of Justice (ICJ)'s *Arrest Warrant* case, according to which:

the international consensus that the perpetrators of international crimes should not go unpunished is being advanced by a flexible strategy in which newly established international criminal tribunals, treaty obligations and national courts all have their role to play.⁶

This means that there are good reasons to look more closely into the *iudicare* limb of the grave breaches regime and to shed greater light on its modern scope and meaning.

2 F. Domb, 'Treatment of War Crimes in Peace Settlements — Prosecution or Amnesty?', 24 *Israel Yearbook on Human Rights* (1995) 253–267, at 255 et seq.

3 Art. 49(2), GC I; Art. 50(2), GC II; Art. 129(2), GC III; Art. 146(2), GC IV; Art. 85(1), AP I.

4 A. Cassese, *International Law in a Divided World* (Oxford: Oxford University Press, 1986), at 275.

5 Z. Galicki, Preliminary Report on the Obligation to Extradite or Prosecute (*aut dedere aut iudicare*), UN Doc. A/CN.4/571, 7 June 2006, § 2.

6 *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment of 14 February 2002, ICJ (*Arrest Warrant Case*), § 51.

2. The Place of the Grave Breaches Regime within International Criminal Law *lato sensu*

In his ground-breaking commentary on the Geneva Conventions, Jean S. Pictet considers the grave breaches regime as part of transnational crimes defined within treaties,⁷ the codification of which commenced in the period of the League of Nations.⁸ This is a fair historical account of the origins of the regime, but it should also be noted that the earlier transnational criminal law conventions linked the principle of *aut dedere aut iudicare* with the traditional heads of criminal jurisdiction. A guiding idea was that the custodial state with no genuine link to the alleged crime could, or should, exercise *jurisdiction by representation* (*principe de la compétence déléguée, stellvertretende Strafrechtspflege*).⁹

Conversely, Pictet himself recognized that the international competence to prescribe and to adjudicate grave breaches is *universal jurisdiction*.¹⁰ Accordingly, the formulation of the grave breaches regime goes beyond the existing precedents. The pertinent paragraph of the Geneva Conventions reads as follows:

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.¹¹

This not only reflects but, in some respects, also exceeds the wording of the conception of *aut dedere aut iudicare* in transnational treaties, which was embodied in Article 7 of the 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft (Hague Convention). The so-called Hague formula constitutes the most stringent form of an *aut dedere aut iudicare* regime in the

7 On the notion of 'transnational crime' as well as on the other basic concepts of international criminal law *lato sensu*, see C. Kreß, 'Universal Jurisdiction over International Crimes and the Institut de droit international', 4 *Journal of International Criminal Justice (JICJ)* (2006) 561–585; and C. Kreß, 'International Criminal Law', in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (Oxford: Oxford University Press, forthcoming 2010), available at <http://www.mpepil.com/> (visited 15 July 2009).

8 J.S. Pictet, *Commentaire: I Convention de Genève* (Geneva: ICRC, 1958), at 402: '*La formule adoptée s'inspirait du principe aut dedere aut punire souvent admis en matière d'extradition.*'

9 Cf. Arts 8 and 9 International Convention for the Suppression of Counterfeiting Currency (1929); Arts 7 and 8 Convention for the Suppression of the Illicit Traffic in Dangerous Drugs (1936); for a thorough analysis, see C. Maierhöfer, '*Aut dedere aut iudicare*': *Herkunft, Rechtsgrundlagen und Inhalt des völkerrechtlichen Gebots zur Strafverfolgung oder Auslieferung*' (Berlin: Duncker and Humblot, 2006), at 125, 127.

10 Pictet, *supra* note 8, at 404: '*L'universalité de la juridiction pour les violations graves permet d'espérer que celles-ci ne resteront pas impunies et l'obligation d'extrader concourt à l'universalité de la repression.*'

11 Art. 49(2), GC I; Art. 50(2), GC II; Art. 129(2), GC III; Art. 146(2), GC IV; Art. 85(1), AP I.

area of transnational criminal law, and served as the model for many further conventions.¹² The Hague formula reads as follows:

The Contracting Party in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offense was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution. Those authorities shall take their decision in the same manner as in the case of any ordinary offense of a serious nature under the law of that state.¹³

Two specific features of the wording of the grave breaches regime deserve particular emphasis at the outset. Unlike the Hague formula, the *iudicare* limb of the grave breaches regime is separate from the idea of jurisdiction by representation and contains no reference to a national treatment standard. Both aspects, to which we shall return, allude to the characterization of war crimes as crimes under international law, which form part of international criminal law *stricto sensu*.

3. The Grave Breaches Regime and Customary International Law

While it is not very likely that the ILC can establish a customary duty *aut dedere aut iudicare* covering the whole body of transnational criminal law,¹⁴ the Geneva Conventions' grave breaches regime is now widely held to have acquired the character of customary law. While the ICJ has yet to explicitly endorse that view,¹⁵ the International Committee of the Red Cross (ICRC)'s customary law study appears to support this reading of international custom.¹⁶

12 The leading study on the Hague formula of *aut dedere aut iudicare* is E.M. Wise, 'The Obligation to Extradite or Prosecute', 27 *Israel Law Review* (1993) 268–287.

13 Art. 7, Hague Convention.

14 Cf. the following unambiguous comment submitted by the United States to the ILC: 'The United States does not believe that there is a general obligation under customary international law to extradite or prosecute individuals for offences not covered by international agreements containing such an obligation. Rather, the United States believes that States only undertake such obligations by joining binding international legal instruments that contain extradite or prosecution provisions and that those obligations only extend to other States that are parties to such instruments'; UN Doc. A/CN.4/579/Add.2, 5 June 2007; for a similar view, see Wise, *supra* note 12, at 279; for a thorough analysis of the matter, see Maierhöfer, *supra* note 9, at 192 et seq.

15 It would appear that the Court has taken common Art. 1 of the GC's to reflect customary international law; *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment, 27 June 1986, ICJ Reports (1986) at 114 (§220); in its Advisory Opinion of 8 July 1996 on the *Legality of the Threat or Use of Nuclear Weapons*, the Court has considered 'the great majority' of the rules of international humanitarian law contained in the 'codification instruments' as being customary in nature: *Legality of the Threat or Use of Nuclear Weapons*, ICJ Advisory Opinion of 8 July 1996 (*Nuclear Weapons Advisory Opinion*), §82.

16 While the pertinent Rule 158 is not explicit in this respect due to its broader scope, the commentary is clear: 'This rule, read together with rule 157, means that states must exercise the criminal jurisdiction which their national legislation confers upon their courts, be it limited to

This view is shared by the Special Rapporteur for the Institut de droit international, Christian Tomuschat,¹⁷ who took a rather cautious approach to the identification of customary international law with regard to universal jurisdiction over crimes under international law.¹⁸ Until the 1990s, the limited amount of 'hard' state practice weakened the claim that the grave breaches regime had grown into customary international law.¹⁹ Since then, the picture has become less 'cloudy',²⁰ because, in the wake of the armed conflicts in the former Yugoslavia, national criminal jurisdictions have become more active.²¹ As a result one can say that:

*la base factuelle nécessaire pour pouvoir assumer l'existence d'une règle coutumière, est venue compléter l'opinio iuris qui avait trouvé son reflet dans les textes conventionnels.*²²

We would therefore concur with what appears now to be the predominant position²³ and would add for the sake of clarity that also the further development of the grave breaches regime through Articles 11(4) and 85(3)–(5) of Additional Protocol I has probably grown into custom: While the wisdom of expanding the grave breaches list into the realm of the conduct of hostilities

territorial and personal jurisdiction, or include universal jurisdiction, which is obligatory for grave breaches': J.-M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law, Volume I: Rules* (Cambridge: Cambridge University Press and ICRC, 2005), at 607 (emphasis added).

17 C. Tomuschat, 'La cristallisation coutumière', in H. Ascensio, E. Decaux and A. Pellet (eds), *Droit International Pénal* (Paris: Pedone, 2000), at 28.

18 For the text of the 2005 resolution on universal jurisdiction, see <http://www.idi-iil.org/idiE/resolutionsE/2005.kra.03.en.pdf> (visited 15 July 2009); for a critical analysis, see Kreß, *supra* note 7.

19 T. Meron, *Human Rights and Humanitarian Norms as Customary Law* (Oxford: Oxford University Press, 1989), at 61.

20 Wise, *supra* note 12, at 283, spoke of a 'cloudy picture' with respect to the alleged customary law status of the grave breaches regime.

21 The relevant case law includes the Danish case *Saric*, Eastern Division of High Court (Third Chamber), 25 November 1994 (R. Maison, 'Les premiers cas d'application des dispositions pénales des Conventions de Genève par les juridictions internes', 6 *European Journal of International Law (EJIL)* (1995), 260); the French case *Elvir Javor*, Cour de Cassation, Chambre Criminelle, 26 March 1996, No. 95-81527; the Dutch case *Darko Knezevic*, Hooge Raad de Nederlander, 11 November 1997, *Netherlands Yearbook of International Law* (1999), at 277; the Camerounian case *Bagosora*, Cour d'Appel du Centre (Yaounde), 15 March 1996, available at <http://www.icrc.org/ihl-nat.nsf> (visited 15 July 2009); the Swiss case *Grabec*, Tribunal Militaire de Division 1 (Lausanne), 18 April 1997 (A. Ziegler, 'In Re G. Military Tribunal, Division 1', 92 *American Journal of International Law (AJIL)* (1998), 78); the German cases *Djajic*, Bayrisches Oberstes Landesgericht, 23 May 1997, *Neue Juristische Wochenschrift* (1998), at 392; *Bundesgerichtshof*, 21 February 2001, *Neue Juristische Wochenschrift* (2001), at 2728, 2729; the Belgian cases *Ntezimana*, *Higaniro*, *Mukangango* and *Mukabutera*, Cour d'Assises de Bruxelles, 8 June 2001, available at <http://www.asf.be/Assises/Rwanda2/fr/fr.Verdict.verdict.htm> (visited 15 July 2009).

22 Tomuschat, *supra* note 17, at 28.

23 The position of the present author on the recent development of customary international criminal law is expressed in C. Kreß, 'War Crimes Committed in Non-International Armed Conflicts and the Emerging System of International Criminal Justice', 30 *Israel Yearbook on Human Rights* (2000) 103–178, at 104 et seq.; and in Kreß (2006), *supra* note 7, at 574 et seq.

was challenged in the course of the negotiations, Article 85 of Additional Protocol I was finally adopted by consensus²⁴ and the subsequent practice does not point to a differentiated treatment of the grave breaches regime under customary international law.

The one difficult question that remains is whether there is now also a duty *aut dedere aut iudicare* with respect of (certain) war crimes committed in an armed conflict not of an international character? In his Separate Opinion to the famous *Tadić* jurisdiction decision of the International Criminal Tribunal for the former Yugoslavia (ICTY), Judge Abi-Saab pronounced himself in favour of such a legal evolution:

As a matter of treaty interpretation ... it can be said that this normative substance has led to a new interpretation of the [Geneva] Conventions as a result of the “subsequent practice” and *opinio juris* of the States parties: a teleological interpretation of the Conventions in the light of their object and purpose to the effect of including internal armed conflicts within the regime of “grave breaches”. The other possible rendering of the significance of the new normative substance is to consider it as establishing a new customary rule ancillary to the Conventions, whereby the regime of “grave breaches” is extended to internal conflicts. But the first seems to me as the better approach.²⁵

Rightly, the majority position in *Tadić* was more cautious. While it duly acknowledged the *amicus curiae* brief of the US pursuant to which the “grave breaches” provisions of Article 2 of the International Tribunal Statute apply to armed conflicts of a non-international character as well as those of an international character,²⁶ it concluded from this no more than the following: ‘Were other States and international bodies to come to share this view, a change in customary law concerning the scope of the “grave breaches” system might gradually materialize.’²⁷

In a recent monograph, one author argues that state practice has led to this change.²⁸ We would, however, respectfully submit that it is still too early to reach this conclusion. Some of the relevant cases may perhaps be interpreted in the progressive sense. Yet, the fact remains that they do not contain an explicit statement to that effect, and did little more than avoid the characterization of the armed conflict as international or non-international.²⁹ Other cases, on closer inspection, rest on grounds other than the extension of the grave

24 B. Zimmermann, in Y. Sandoz, C. Swinarski and B. Zimmermann (eds), *Commentary on the Additional Protocols* (Geneva: Martinus Nijhoff Publishers, 1987), at 590 (Art. 85); it is noteworthy that Art. 85(3)(c) AP I is worded more restrictively than Art. 56 AP I the customary nature of which continues to be open to some doubt.

25 Separate Opinion of Judge Abi-Saab, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, *Tadić* (IT-94-1), Appeals Chamber, 2 October 1995, §6.

26 Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, *Tadić* (IT-94-1), Appeals Chamber, 2 October 1995, §83.

27 *Ibid.*

28 Maierhöfer, *supra* note 9, at 195 et seq.

29 This is true for the Danish case *The Prosecution v. Saric*, *supra* note 21; the French case *Elvir Javor*, *supra* note 21.

breaches regime to non-international armed conflicts.³⁰ The German *Bundesgerichtshof* has explicitly reserved its position on the matter.³¹ The few cases that do point (and they do so more by implication) towards a change of customary law,³² do not suffice to consider such a change as a *fait accompli*. The more accurate view is therefore to speak of a possible assimilation of the customary law of non-international armed conflict to the grave breaches regime of its international counterpart, not to proclaim the existence of *iudicare* obligations in all types of conflict.

4. The Absence of a Legal Requirement to Enact a Special Piece of War Crimes Legislation to Adjudicate Grave Breaches

According to Jean Pictet, it follows from the grave breaches regime that states have to enact special legislation.³³ There are many good policy reasons to adopt such a special piece of legislation. One such advantage is precisely the possibility to highlight that grave breaches are subject to the duty *aut dedere aut iudicare*. Yet, Pictet's idea of a legal requirement to pass legislation that specifically contemplates the grave breaches as such continues to find insufficient support in the relevant sources of law: The pertinent words '[t]he High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions' make no mention of special legislation. In addition, the practice of states does not reveal an *opinio iuris communis* to this effect. While the adoption of the Statute of the ICC has triggered a commendable tendency to adopt special pieces of national legislation on crimes under international law, including grave breaches of the Geneva Conventions, this tendency is to be explained by the 'complementarity incentive'; not based on the obligations contained in the grave breaches regime. The fact thus remains that states do not violate their obligation to adjudicate grave breaches of the Geneva Conventions and Additional Protocol I if they apply their general criminal law to them.³⁴

30 This is true for the Swiss cases *Grabec*, *supra* note 21, and *Niyonteze*, *supra* note 21, sec. II(3)(c) where reference is made to a provision of domestic Swiss law.

31 *Supra* note 21.

32 The Dutch case *Darko Knesevic*, *supra* note 21, at 277; the Camerounian case *Bagosora*, *supra* note 21, and, arguably, the Belgian cases *Ntezimana*, *Higaniro*, *Mukangango* and *Mukabutera*, *supra* note 21.

33 Pictet, *supra* note 8, at 407.

34 See K. Dörmann and R. Geiß, 'The Implementation of Grave Breaches into Domestic Legal Orders', in this issue of the *Journal*.

5. The Relationship between *Iudicare* and *Dedere* within the Grave Breaches Regime

A. *The Independence of the Iudicare limb from an Extradition Request*

The early transnational criminal law conventions often make the obligation of the state of custody to adjudicate conditional upon the absence of a valid extradition request from another state with a genuine link to the crime.³⁵ While the issue is not entirely free from controversy under the Hague formula of *aut dedere aut iudicare*,³⁶ there should be no question that there is no such limitation on the functioning of the grave breaches regime.³⁷ According to the relevant provisions of the Geneva Conventions,³⁸ the duty to 'bring such persons ... before its own courts' is the initial obligation and nothing in the subsequent text supports the idea that this duty is conditional on the receipt of an extradition request. A limitation of this sort would also run counter to the basic principle underlying the whole scheme — the exercise of universal jurisdiction in the interest of the international community, rather than the exercise of jurisdiction by representation.

B. *The Question of the Subsidiarity of the Iudicare Limb*

The way the duty *aut dedere aut iudicare* is formulated in the Geneva Conventions³⁹ does not support the view that the obligation of the custodial state to exercise its own criminal jurisdiction could, in certain instances at least, only be subsidiary to extradition, rather, it suggests that the custodial state has a free choice between prosecution and extradition. Marc Henzelin even suggests a priority of the *iudicare* limb:

La lecture ... du texte de l'article 49 Convention I démontre que cette disposition établit une compétence universelle inconditionnelle ainsi qu'une obligation de poursuivre (prosequi) les personnes prévenues d'infractions graves aux Conventions de Genève et non pas une compétence alternative aut dedere aut prosequi, ni même une compétence alternative aut prosequi aut dedere. L'exercice de la compétence n'est pas subsidiaire à une extradition mais absolu. Le terme "extradition" n'est d'ailleurs pas prévu par l'article 49, qui utilise le terme "remettre", bien moins contraignant. En ce sens, l'obligation prévue par la Convention est une obligation de rechercher et de poursuivre en premier lieu, avec la possibilité facultative pour l'État où se trouve le prévenu de le remettre à un autre État, pour autant que celui-ci retienne également des charges suffisantes contre ce prévenu. On se trouve ainsi en présence d'un modèle nouveau ..., à savoir le modèle primo prosequi, secundo dedere.⁴⁰

35 Cf. Art. 9 of the Convention for the Suppression of Counterfeiting Currency (1929).

36 According to the predominant interpretation of the Hague formula, the duty to adjudicate is not dependent on the rejection of an extradition request: Wise, *supra* note 12, at 272.

37 Concurring with Pictet, *supra* note 8, at 411; Maierhöfer, *supra* note 9, at 349.

38 Art. 49(2), GC I; Art. 50(2), GC II; Art. 129(2), GC III; Art. 146(2), GC IV; Art. 85(1), AP I.

39 *Ibid.*

40 M. Henzelin, *Le principe de l'universalité en droit pénal international* (Bruxelles: Bruylant, 2000), at 353.

The idea of *primo prosequi, secundo dedere*, however, poses a logical difficulty. If the primary duty were that of *prosequi* what place could remain for a secondary option of *dedere*? We shall therefore start from the assumption that the principle of free choice applies, but we shall ask whether exceptions from this principle should be admitted, depending either on the jurisdictional title on which the custodial state acts, or on the vertical relationship between this state and an international criminal court.

1. *The Position of the State of Active Personality vis-à-vis the State of Passive Personality*

The Treaty of Versailles established the jurisdictional priority of the 'victim State' over the state of active personality.⁴¹ Germany was placed under the obligation to extradite alleged German war criminals to the states offended by the respective violations of the laws of war. Yet, the subsequent practice has not translated the Versailles model into the form of a customary jurisdictional priority of the 'victim State' in cases of war crimes.⁴² There is thus no need to interpret the grave breaches regime in this light. At the same time, the grave breaches regime does not exclude the Versailles model as a treaty option because the custodial state, in the exercise of its free choice, may well decide to give priority to extradition.

There is no exception to the principle of free choice when the state of custody has ordered the grave breach. This is important in practice because, unfortunately, it will not be an exceptional situation that the leadership of the state of active personality will have ordered the commission of a grave breach. Even in this case, the state concerned will not be precluded from exercising its criminal jurisdiction over the grave breach, although the *Leipzig* Trials conducted after the First World War were vigorously criticized because the state of active personality failed to display a genuine will to adjudicate⁴³ and although the allied practice after the Second World War not to allow Germany to try its war criminals itself must be seen in light of the *Leipzig* precedent.⁴⁴ Contrary to that Post World War II practice, neither the text nor the *travaux préparatoires* of the Geneva Conventions contain any indication that the grave breaches regime suffers from an exception *ratione personae* in case of state-sponsored war criminality. Whatever the merits of the interpretation put forward by the

41 Art. 228(2), Versailles Treaty, 28 June 1919.

42 Even in the case of the First World War, the victorious powers did not insist on their treaty-based priority right, but accepted that Germany took it upon itself to exercise criminal jurisdiction; C. Krefß, 'Versailles — Nuremberg — The Hague: Germany and International Criminal Law', 40 *The International Lawyer* (2005) 15–39, at 17.

43 *Ibid.*, at 16 et seq.

44 See the Opening Speech of Robert Jackson as reported in International Military Tribunal, *Trial of German Major War Criminals by the International Military Tribunal Sitting at Nuremberg Germany* (Buffalo: William S. Hein and Co., 2001), at 5.

United Kingdom and the United States in the *Lockerbie* case that the *aut dedere aut iudicare* regime of the 1971 Montreal Convention is inapplicable to the state that has ordered the commission of the terrorist act,⁴⁵ there is no basis for an analogous view regarding the grave breaches regime.

Of course, the fact remains that the state whose leadership is directly involved in the grave breach (or even the state of active personality more generally), may lack the genuine will to exercise criminal jurisdiction. An appropriate solution to this problem would be the establishment of an impartial monitoring system to assess the genuineness of national criminal proceedings and to confer an *international res judicata* effect to any final decision that passes the test. This is precisely the way the principle of complementarity under the ICC Statute works. Outside the jurisdictional reach of this treaty, however, such a system of international criminal justice does not exist. Here, the ‘victim state’ may only take comfort from the fact that no international principle of *ne bis in idem* will prevent it from instituting its own criminal proceedings where those having been conducted in the state of active personality were not driven by a genuine will to investigate and, where appropriate, prosecute and adjudicate.

2. *The Position of a State of Universal Jurisdiction vis-à-vis States with a Genuine Link*

The more recent state practice reveals a tendency to exercise universal jurisdiction over crimes under international law only on a subsidiary basis.⁴⁶ Priority is given to states with a direct link to the crime. This practice is based on considerations of procedural economy, but, perhaps more importantly, it reflects the recognition of a legitimate primary interest of those states that are directly connected to the crime. According to the predominant view, subsidiary universal jurisdiction, while following a sound judicial policy is not required as a matter of law.⁴⁷ The policy principle is well expressed in the 2005 Institut de droit international resolution on universal jurisdiction:

Any State having custody over an alleged offender, to the extent that it relies solely on universal jurisdiction, should carefully consider and, as appropriate, grant any extradition request addressed to it by a State having a significant link, such as primarily territoriality or nationality, with the crime, the offender, or the victim, provided that such State is clearly able and willing to prosecute the alleged offender.⁴⁸

45 F. Beveridge, ‘The Lockerbie Affaire’, 41 *International and Comparative Law Quarterly* (1992) 907–920, at 910.

46 Kreß (2006), *supra* note 7, at 581.

47 For a very recent confirmation of this position, see ‘The AU-EU Expert Report on the Principle of Universal Jurisdiction’, Council of the European Union, 8672/1/09 REV1, 16 April 2009, §14 (regrettably without reasoning).

48 Institut de droit international, 2005 Resolution on Universal Jurisdiction, available at <http://www.idi-iil.org/idiE/resolutionsE/2005.kra.03.en.pdf> (visited 15 July 2009), Art. 3(c) and (d).

Contrary to the majority position, we have argued elsewhere that the subsidiarity principle already forms part of customary international law.⁴⁹ On that premise, the grave breaches regime should be applied in light of this recent custom. In other words, the custodial state that can rely only on universal jurisdiction, should give priority to any state having a significant link with the crime.

3. *The Position of a Custodial State vis-à-vis a Competent International Criminal Court*

The grave breaches regime has not been drafted in a way that would explicitly cater for the possibility of surrendering the suspect to an international criminal jurisdiction. Yet, as Jean Pictet already observed,⁵⁰ the Geneva Conventions should not be interpreted as placing an obstacle to such surrender in case of a grave breach. Instead, the establishment of the ICC demonstrates that states consider the surrender of a person to the Court as another valid form of freely choosing the appropriate *forum* under the grave breaches regime. The grave breaches regime has thus undergone an evolution through subsequent practice.

In two instances, the question arises whether the free choice of the custodial state under the grave breaches regime is limited by the competence of an international criminal court. The first case is that where an international criminal court is vested with a priority competence to exercise its jurisdiction. If such a priority competence flows from an international treaty to which the custodial state is a party, the latter has made a generalized decision to give precedence to a request for surrender. This would not seem to pose a legal difficulty under the Geneva Conventions. Where the priority competence flows from a Security Council resolution under Chapter VII of the United Nations (UN) Charter, as is the case with the ICTY and International Criminal Tribunal for Rwanda (ICTR), it is more difficult to say that the custodial state has freely chosen to give precedence to the international criminal court. We are here confronted with a deviation from the treaty principle of free choice through overriding UN Charter law.

The second instance of a possible limitation of the free choice is that of a custodial state that relies only on universal jurisdiction. As a matter of principle, a properly constituted international criminal court constitutes an organ of the international community whose jurisdiction should have precedence over that of the state acting merely as the international's community trustee. Yet, the ICC Statute's principle of complementarity does not contain any exception and there is not yet any subsequent practice addressing the issue. It follows that, for the time being, the subsidiary exercise of universal jurisdiction over a

49 Kreß (2006), *supra* note 7, at 581.

50 Pictet, *supra* note 8, at 411 et seq.

grave breach vis-à-vis the ICC remains a prudent pragmatism rather than legal obligation.

6. The Scope *Ratione Temporis* of the State's Obligation to Act under the Grave Breaches Regime

Pursuant to the respective provisions of the Geneva Conventions, '[e]ach 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'.⁵¹ Strictly speaking, this obligation precedes and overarches the alternative *aut dedere aut iudicare*.⁵² It also determines the moment in time when a state must become active under the grave breaches regime. It is not easy to define that moment in abstract terms. The most sensible view would appear to be that the obligation is triggered whenever a state has grounds to believe that a grave breach has been committed and that the alleged offender is present on its territory. While the power to initiate an investigation on the basis of universal jurisdiction over war crimes exists irrespective of the location of the alleged offender, the duty to act under the grave breaches regime comes into play only where there are reasons to believe that the alleged offender is present on the territory of the state concerned.⁵³ This limitation of the duty under the grave breaches regime corresponds with its purpose — the exclusion of safe havens for those who have committed serious war crimes.⁵⁴

7. A Duty to Arrest Subject to National Law

The custodial state is under no absolute duty to arrest the person once it has determined his location in its territory.⁵⁵ Although the Geneva Conventions do not contain a provision parallel to that of Article 6 of the 1970 Hague Convention,⁵⁶ it would seem reasonable to apply the same principle with

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

52 The Special Rapporteur of the ILC is thus correct in recognizing a degree of 'mutual relationship and interdependence between the two elements of this obligation — "*dedere*" and "*judicare*"; Z. Galicki, Third Report on the Obligation to Extradite or Prosecute (*aut dedere aut iudicare*); UN Doc. A/CN.4/603, 10 June 2008, §49.

53 Accordingly, the institution of proceedings was denied in the French case *Elvir Javor*, *supra* note 21, because there were no grounds to believe that the alleged offender was present in France.

54 Cutting off safe havens is the *raison d'être* of all *aut dedere aut iudicare* regimes; Maierhöfer, *supra* note 9, at 29.

55 The following formulation in Pictet, *supra* note 8, at 411, is thus too sweeping: '*Dès que l'une d'elles [des Parties contractantes] a connaissance du fait qu'une personne se trouvant sur son territoire aurait commis une telle infraction, son devoir est de veiller à ce qu'elle soit arrêtée et poursuivie rapidement.*'

56 The provision of the Hague Convention reads as follows: 'Upon being satisfied that the circumstances so warrant, any Contracting State in the territory of which the offender or the alleged offender is present, shall take him into custody or take other measures to ensure his presence.

respect to the grave breaches regime. Article 6 of the Hague Convention reads as follows:

Upon being satisfied that the circumstances so warrant, any Contracting State in the territory of which the offender or the alleged offender is present, shall take him into custody or take other measures to ensure his presence. The custody and other measures shall be as provided in the law of that State but may only be continued for such time as is necessary to enable any criminal or extradition proceedings to be instituted.

The custodial state is thus only bound to apply its national laws on pre-trial or extradition detention including, in particular, the standard of suspicion and the grounds for detention.

8. The Meaning of the Words ‘to Bring such Persons ... Before Its Own Courts’

A. *No Absolute Duty to Punish or to Prosecute*

Hugo Grotius, to whom the principle of *aut dedere aut iudicare* is often, though incorrectly,⁵⁷ attributed, spoke of a duty *aut dedere aut punire*. But, of course, Grotius knew that an obligation to punish can only exist with respect to ‘one who has been found guilty’ and it is in this way that his often cited formula must be understood.⁵⁸ It cannot be otherwise regarding the grave breaches regime: The duty to bring the person concerned ‘before the Courts’ does not imply a categorical duty to punish. Instead, the competent authority may conclude that there are not sufficient reasons to believe that the person concerned has committed the crime or that the evidence available⁵⁹ will not suffice to secure a conviction. Such a judgment may well be formed before bringing an indictment when the competent authority is a public prosecutor and not a judge. The word ‘court’ should therefore be broadly construed to include public prosecutors. In the end, even the reformulation of *aut dedere aut punire* into *aut dedere aut prosequi*⁶⁰ turns out to be slightly misleading. What the *iudicare* limb entails is a duty to investigate and, where so warranted, to prosecute and to convict.

The *iudicare* limb of the grave breaches regime may also require a state to investigate and accumulate evidence in anticipation that a third state might benefit from this evidence at a later stage through legal assistance. In other words, the custodial state must not refuse to become active because it will not

The custody and other measures shall be as provided in the law of that State but may only be continued for such time as is necessary to enable any criminal or extradition proceedings to be instituted.’

57 Maierhöfer, *supra* note 9, at 62, has confirmed the view that had already been expressed before by Wise, *supra* note 12, at 276, that the principle can be traced back to Baldus de Ubaldis.

58 For an enlightening analysis of Grotius’ contribution, see Wise, *supra* note 12, at 277.

59 This includes evidence to be gathered through a request for legal assistance.

60 Such is the proposal made by the Special Rapporteur of the ILC: Galicki, *supra* note 5, §5.

be in a position to gather enough evidence for a prosecution itself, nor because other states seem unwilling to initiate proceedings at that specific moment in time. Instead, it is duty bound to make use of any substantial investigative opportunity that presents itself, which may become highly pertinent in subsequent years as a change of regime in foreign states provides new opportunities for accountability.

The custodial state that has taken a number of investigative steps for the limited purpose of anticipated legal assistance does not thereby exhaust its duties under the grave breaches regime, but remains bound by the regime's *dedere* limb in case a *forum conveniens* seeks extradition. At the same time, and this may be seen as an auxiliary duty to extradition, the custodial state must 'in accordance with the provisions of its own legislation', transfer the results of its prior investigative act to the trial *forum*. The duties to investigate and to extradite are thus not necessarily alternatives, but may exist independently and complement each other depending on the circumstances of a particular case.⁶¹

B. The Exclusion of Prosecutorial Discretion

The last sentence of the Hague formula contains the following national treatment standard:

Those authorities shall take their decision in the same manner as in the case of any ordinary offense of a serious nature under the law of that state.⁶²

This standard can be interpreted to leave room for the exercise of prosecutorial discretion to the extent that the law of the *forum* state generally provides for such discretion.⁶³ The Geneva Conventions do not contain a parallel provision. It is submitted that the Hague national treatment standard is peculiar to the realm of transnational criminal law and that there is therefore no legal basis to apply it *mutatis mutandis* in the context of grave breaches. By definition, a grave breach constitutes a crime under international law and its prosecution is accordingly directed to the protection of a core value of the international legal order. The exercise of prosecutorial discretion based on national interests is inconsistent with such a goal. The textual silence in the Geneva Conventions as regards a national treatment standard is thus in full conformity with its *raison d'être*. It bears mentioning that prosecutorial discretion is not excluded where a state takes, in the exercise of universal jurisdiction over crimes under international law, investigative steps concerning an alleged grave breach in the absence of the alleged offender. The reason for this distinction is simply that such measures fall outside the grave breaches regime and

61 Here again, the Special Rapporteur of the ILC is thus correct in recognizing a degree of 'mutual relationship and interdependence between the two elements of this obligation — "*dedere*" and "*judicare*"; Galicki, *supra* note 52, §49.

62 Art. 6, Hague Convention.

63 Maierhöfer, *supra* note 9, 381 et seq.

states are thus under no international obligation to take such measures. The new German legislation on the investigation into and prosecution of crimes under international law precisely reflects this distinction. While the Federal Prosecutor will exercise his or her discretion as to whether to initiate an investigation *in absentia* in a case with no link to Germany, the same prosecutor is, subject to the principle of subsidiarity, required to act where the alleged offender is present in Germany.⁶⁴

C. Possible Legal Bars to Prosecution

1. Immunities under International Law

The main international legal obstacle to prosecution is the right to immunity *ratione personae* of another state. The ICJ has rightly confirmed the absence of an international criminal law exception to this traditional immunity protection under international law for the purpose of national proceedings.⁶⁵ The Court has explicitly included heads of state, heads of government and foreign ministers within the scope of the right to immunity *ratione personae* but it has also used the more general formula of ‘certain holders of high-ranking office in a State.’⁶⁶ In doing so, it has left the door open for extending the immunity right in question to other ministers.

Regrettably, the ICJ has failed to authoritatively settle the issue of immunities *ratione materiae*. In an *obiter dictum* that is completely unsupported by legal reasoning, the Court said that after a person ceases to hold an office to which immunity *ratione personae* attaches:

he or she will no longer enjoy all the immunities accorded by international law in other States. Provided that it has jurisdiction under international law, a court of one State may try a former Minister of Foreign Affairs of another State in respect of acts committed prior or subsequent to his or her period of office, as well as in respect of acts committed during that period in office in a private capacity.⁶⁷

In respect of the commission of crimes under international law (grave breaches included) during the period of office, this statement is fundamentally ambiguous: If conduct which is criminal under international law is, by definition, considered to be committed ‘in a private capacity for the purposes of the international law of immunity’, it would fall outside the immunity protection *ratione materiae*.⁶⁸ If the Court was of this view it should have said so, because the ‘official act’ concept is far from evident and subject to a significant amount

64 For the details, see s. 153(f) German *Strafprozessordnung*.

65 *Arrest Warrant Case*, *supra* note 6, §58.

66 *Ibid.*, §51.

67 *Ibid.*, §61.

68 The Joint Individual Opinion of Judges Higgins, Kooijmans and Buergenthal, *ibid.*, §85, and the Dissenting Opinion of Judge van den Wyngaert, *ibid.*, §36, point in this direction.

of scholarly criticism.⁶⁹ If the *dictum* is, accordingly, read with the understanding in mind that the international criminality of a certain conduct of a state official does not affect the conduct's official character in and of itself, the meaning alters drastically. The *dictum* then suggests that the immunity protection *ratione materiae* before national courts prevails even in cases of crimes under international law. It is respectfully submitted that this would be at odds both with international practice,⁷⁰ and, not least, with the very idea underlying international criminal law (*stricto sensu*). This idea is to subject individual conduct, which is typically attributable to a state, to international rules of criminal law. Upholding the state right to immunity *ratione materiae* as a procedural bar to the (extraterritorial) prosecution of crimes under international law would thus run counter to the essence of international criminal law (*stricto sensu*) and it is therefore unsurprising that already the *Nuremberg* judgment dispensed with immunities in cases of crimes under international law:

The principle of international law, which under certain circumstances protects the representative of a state, cannot be applied to acts which are condemned as criminal by international law. The authors of these acts cannot shelter themselves behind their official position in order to be freed from punishment in appropriate criminal proceedings.... On the other hand the very essence of the Charter [of the International Military Tribunal] is that individuals have international duties that transcend the national obligations of obedience imposed by the individual State. He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the State if the State in authorising action moves outside its competence under international law.⁷¹

The ICTY has confirmed the *Nuremberg* precedent and held that:

[E]ach State is entitled to claim that acts or transactions performed by one of its organs in its official capacity be attributed to the State, so that the individual organ may not be held accountable for those acts or transactions. The general rule under discussion is well established in international law and is based on the sovereign equality of States (*par in parem non habet imperium*). The few exceptions relate to one particular consequence of the rule. These exceptions arise from the norms of international criminal law prohibiting war

69 For a powerful recent critique, see H. Kreicker, *Völkerrechtliche Exemtionen: Grundlagen und Grenzen völkerrechtlicher Immunitäten und ihre Wirkungen im Strafrecht*, Vol. 1 (Berlin: Duncker and Humblot, 2007), at 120 et seq.; for a shorter statement to the same effect, see A. Zahar and G. Sluiter, *International Criminal Law* (Oxford: Oxford University Press, 2007), at 505.

70 For instructive analyses of this practice, see A. Cassese, *International Criminal Law* (2nd edn., Oxford: Oxford University Press, 2008), at 305 et seq.; D. Robinson in R. Cryer, H. Friman, D. Robinson and E. Wilmschurst, *An Introduction to International Criminal Law and Procedure* (Cambridge: Cambridge University Press, 2007), at 428 et seq. In the recent US case *Matar v. Dichter* (Docket No. 07-2579-cv), the US Court of Appeals for the Second Circuit held on 16 April 2009 that a former official of a foreign state is immune under common-law principles even if the official is accused of acts that violate *jus cogens* norms. While the reasoning is framed in rather broad terms, it should be noted that it was not a criminal case but one over a claim for damages. Accordingly, the decision does not deal at all with the points made and the practice referred to in the following text and it is thus not weighty enough to cast substantial doubt on the conclusion reached in the text.

71 Judgment of the International Military Tribunal for the Trial of German Major War Criminals, Cmd. 6964, Miscellaneous No. 12 (1946), repr. 1962, Her Majesty's Stationary Office, London, 42.

crimes, crimes against humanity and genocide. Under these norms, those responsible for such crimes cannot invoke immunity from national or international jurisdiction even if they perpetrated such crimes while acting in their official capacity.⁷²

It is thus submitted that there is no right to immunity *ratione materiae* under current international law in cases of crimes under international law. Accordingly, no such legal bar to the prosecution of a grave breach exists.

2. Immunities under National Law

Immunities defined by international law must be distinguished from immunities under the national law, which typically derive from the terms of state constitutions. Article IV of the Genocide Convention states that '[p]ersons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.' This precludes the territorial state from relying on its national immunity law to avoid the *iudicare* duty under Article VI of the Genocide Convention. Conversely, the Geneva Conventions are silent on the matter. Yet, it would be too simple to conclude from this *e contrario* that a state⁷³ may invoke the immunity protections contained in its constitution with respect to its head of state and its members of parliament⁷⁴ in order to avoid the obligation to investigate and prosecute contained within the grave breaches regime. Instead, the fact that grave breaches also belong to the category of international crimes supports a parallel interpretation of both *iudicare* regimes. The same is true for the facts that both crimes are very often committed with the implication of those protected by the constitutional immunity provisions and that the persons concerned will often be most responsible for the crimes in question. To exclude those persons from the grave breaches regime would yield the unjust result that the state would be required to prosecute its low- and mid-level war criminals while being prevented to prosecute some of the high-level offenders. It cannot be assumed that the Geneva Conventions' grave breaches regime requires states to act accordingly. It is therefore submitted that the international legal duty under the grave breaches regime is not subject to constitutional immunity protections.⁷⁵ That means that reliance on an absolute constitutional immunity to avoid a prosecution would amount to a breach of the Geneva Conventions.

72 Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, *Blaškić* (IT-95-14-AR108bis), Appeals Chamber, 29 October 1997, §41.

73 The state concerned would typically be that of active nationality.

74 For a comparative overview of such immunity provisions, see the contributions collected in C. Kreß and F. Lattanzi (eds), *The Rome Statute and Domestic Legal Orders*, Vol. 1 (Baden-Baden/Ripa di Fagnano Alto: Nomos Verlagsgesellschaft/Editrice il Sirente, 2000); Kreicker, *supra* note 69, at 293 et seq.

75 Concurring with Kreicker, *ibid.*

3. Statutes of Limitation

The Geneva Conventions are also silent as to whether a national statute of limitation contained in the law of the custodial state may be relied upon by that state as a bar to prosecution without violating its *iudicare* duty under the grave breaches regime. The Genocide Convention, while being rather specific in other respects, does not explicitly exclude a national statute of limitation. Thus, an argument similar to that made above regarding constitutional immunities cannot be made here. It would also be far too simplistic to claim that statutes of limitation are inapplicable to grave breaches based only on the seemingly absolute wording of the obligation to search for and prosecute grave breaches contained in the Geneva Conventions. Treaty-based *aut dedere aut iudicare* regimes are simply not interpreted this way in state practice.⁷⁶ What may perhaps be said, giving an *effet utile* to the Geneva Conventions in this context, is that a national statute of limitation which drastically reduces the time span for the institution of criminal proceedings precludes the state concerned from effectively complying with its *iudicare* duty under the grave breaches regime.

The question remains whether customary international law goes further and precludes states from applying statutes of limitations to grave breaches altogether, and whether the Geneva Conventions' grave breaches regime should be interpreted in conformity with such a custom and/or subsequent practice. The authors of the ICRC study maintain that, under customary international law, '[s]tatutes of limitation may not apply to war crimes.'⁷⁷ It is respectfully submitted that this conclusion is at best premature.⁷⁸ The ICRC study does not fairly consider the relatively limited success of both the 1968 UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity and the European Convention on the Non-Applicability of Statutory Limitations to Crimes Against Humanity and War Crimes of 25 January 1974 (which has even proven an almost complete failure with no more than five ratifications to date⁷⁹). Article 29 of the ICC Statute on the non-applicability of statutes of limitations only binds the ICC and does not imply a parallel obligation of states parties. Quite a few states parties have recently enacted special war crimes statutes and have adopted a provision that mirrors Article 29 of the ICC Statute, but it would be wrong to interpret this recent legislative trend as recognition of a corresponding duty flowing from the grave breaches regime. Instead, what drives the legislators concerned is the wish to avoid a determination of inability by the ICC.⁸⁰ In all,

⁷⁶ *Ibid.*

⁷⁷ Henckaerts and Doswald-Beck, *supra* note 16, at 614.

⁷⁸ For a concurring view based on an excellent analysis including a rich comparative survey, see Kreicker, *supra* note 69, at 300.

⁷⁹ See further <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=082&CM=8&DF=7/3/2009&CL=ENG> (visited 15 July 2009).

⁸⁰ The German legislator has pronounced itself explicitly in this sense, see *Bundestags-Drucksache* 14/8524, at 12, 19.

it at least appears arguable that in certain relatively limited circumstances, statutes of limitations may absolve a state of the obligation to investigate and prosecute.

D. International Legal Constraints at the Sentencing Stage in Case of a Conviction?

The *iudicare* limb of the grave breaches regime does not impose any legal obligations on the custodial state that would, in the case of a conviction, apply at the sentencing stage. In particular, there is no duty to provide for special and higher penalties in the case of grave breaches in comparison with ordinary crimes. It is thus basically a national treatment standard that applies at the sentencing stage. The absence of international legal restraints at the sentencing stage is to be commended. The specific circumstances under which grave breaches may be committed vary greatly. It is thus wise to have a sufficiently wide sentencing range in place to reflect the individual guilt in all cases.

A special consideration applies with respect to capital punishment. While this penalty does not per se violate internationally recognized human rights, as is implicitly recognized by Article 80 of the ICC Statute, it is rejected in all texts establishing international criminal jurisdictions as an inappropriate punishment. The international community has thus taken the position that an international judicial organ created to preserve the fundamental international legal values underlying crimes under international law should not resort to capital punishment in pursuing that goal. It is submitted that in adjudicating a crime under international law, a custodial state that relies exclusively on universal jurisdiction should equally refrain from imposing the death penalty.

9. Procedural Safeguards

The Geneva Conventions contain the following provision:

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, 1949.⁸¹

As a result, those responsible for drafting the Geneva Conventions intended that the ‘fight against impunity’ is subject to certain limitations. From this reflection, Jean Pictet has derived a far-reaching caveat concerning proceedings during ongoing hostilities that is worth remembering:

[O]n doit encore se demander si les personnes inculpées de crime de guerre peuvent et doivent être jugées pendant les hostilités. Le Comité International de la Croix-Rouge a eu l'occasion de faire

81 Art. 49(4), GC I; Art. 50(4), GC II; Art. 129(4), GC III; Art. 146(4), GC IV.

*valoir à plusieurs reprises ... combien il est difficile, pour un inculpé jugé par un tribunal ennemi, de préparer sa défense pendant les hostilités.*⁸²

The procedural guarantees, referred to in the grave breaches regime, are contained in the Prisoners of War Convention. These guarantees must be read together with those listed in Article 75(4) of Additional Protocol I. The latter apply in the absence of a more favourable treatment (Article 75(7)[b] of Additional Protocol I). It is not certain whether the protective scheme under the Prisoners of War Convention is more favourable to the defendant in all respects.⁸³ The custodial state should therefore respect the guarantees listed in Article 75(4) of Additional Protocol I, wherever they prove more favourable than those of the Prisoners of War Convention.⁸⁴ The remarkable result is the applicability of standards inspired by international human rights, but with no possibility of derogation.

If the custodial state cannot guarantee criminal proceedings before an impartial and regularly constituted court it is thus faced with a conflict of international legal duties — the duty to adjudicate and that to respect basic international human rights standards. This conflict must not be resolved to the detriment of the accused. The latter duty thus prevails and the custodial state must refrain from ‘bringing the person before its courts’. The way the scenario of conflicting obligations must be solved calls for the recognition of quite an important supplementary duty: States must have a criminal justice system in place that ensures that proceedings for grave breaches can be conducted in compliance with the applicable international human rights standards.

10. *In lieu of a Conclusion: ‘Exceptions of Necessity’ from the ‘Iudicare’ Duty?*

The Geneva Conventions do not provide for any ‘exception of necessity’ from the duty of the custodial state to exercise criminal jurisdiction over a grave breach. The predominant view takes this silence to mean that the duty flowing from the *iudicare* limb of the grave breaches regime is absolute.⁸⁵ In a similar vein, it is argued that the grave breaches regime constitutes *ius cogens*.⁸⁶ This

82 Pictet, *supra* note 8, at 415.

83 C. Pilloud and J. de Preu, in Sandoz et al., *supra* note 24, at 889.

84 Pilloud and de Preu, *ibid.*, basically take the same view; they make an exception, however, for prisoners of war; yet, the wisdom of this exception may be doubted because it is difficult to see why unprivileged combatants should benefit from Art. 75(4) while prisoners of war do not.

85 M.P. Scharf, ‘The Amnesty Exception to the Jurisdiction of the International Criminal Court’, 32 *Cornell International Law Journal* (1999) 507–527, at 521.

86 Domb, *supra* note 2, at 264 et seq.

would categorically preclude a custodial state from handing over an alleged war criminal to his state of nationality (which is unwilling to prosecute), even when the foreign state threatens to abuse prisoners of war if the detainee is not repatriated.⁸⁷ Perhaps more importantly, an absolute and peremptory duty *aut dedere aut iudicare* would also preclude international settlements that include a hybrid accountability system to facilitate the desperately needed transition to peace. We recognize that both the text of the grave breaches regime and the widespread inclination to elevate the bulk of international humanitarian law to the level of *ius cogens*⁸⁸ support the majority view.

Yet, we would like to conclude this study with a small word of caution in that respect: In the context of war crimes committed in non-international armed conflicts and of crimes against humanity, the view gains ground that it is more accurate to speak of an international legal presumption in favour of prosecution rather than to insist on an absolute legal duty. Such a presumption would exclude blanket amnesties for those who bear the greatest responsibility for the systemic commission of such crimes, but it would leave room for principled exceptions that include, for example, hybrid accountability models.⁸⁹ It is readily conceded that, in the absence of a grave breaches regime, the starting point of the legal analysis is different in the case of war crimes committed in non-international armed conflicts and of crimes against humanity. It must also be recognized that almost by definition a grave breach directly concerns at least two states, that is the national state of the offender as well as the national state of the victim. It follows, that a decision to establish a hybrid accountability system is an even more complex one at the end of an international armed conflict.

Nonetheless, it is worth considering whether the international practice might slowly be evolving towards a converging legal regime on the duty to exercise criminal jurisdiction over crimes under international law; a regime that reflects the political complexities of almost any transition from armed conflict to peace.

87 Cf. Art. 26 of the ILC's Articles on State Responsibility; this provision excludes the application of circumstances precluding wrongfulness to *ius cogens* norms: J. Crawford (ed), *The International Law Commission's Articles on State Responsibility* (Cambridge: Cambridge University Press, 2002), at 187.

88 *Nuclear Weapons Advisory Opinion*, *supra* note 15, §83.

89 For a detailed analysis of the existing law, see C. Kreß and L. Grover, 'International Criminal Law Restraints in Peace Talks to End Armed Conflicts of a Non-International Character', in M. Bergsmo and P. Kalmanovitz (eds), *Law in Peace Negotiations* (Oslo: FICHL Publications Series No. 5, 2009) 29–53.