Repression of breaches of the law of war committed by individuals

by José Luis Fernández Flores

The law of war — international humanitarian law — has a place of its own and its own special characteristics in the general scheme for the repression of offences. International law is, in a sense, on the fringe of the provisions made by States in their domestic law for the repression of unlawful acts. It has its own system of repression, which imposes sanctions for breaches of international law committed by States, international organizations or individuals.

Inasmuch as these breaches may violate the rules that govern armed conflicts, and that the law of war is part of international law, the latter provides sanctions for such violations, whether committed by States, international organizations or individuals.

This article is concerned only with the repression of breaches of the law of war committed by individuals.[1] It will consider the system of repression in general and its substantive and procedural aspects in particular.

I. THE SPECIAL STRUCTURE OF THE SYSTEM OF REPRESSION

At this point we have to distinguish between what may be called the conventional or traditional system, the exceptional system in force at the end of the Second World War, and the mixed system now in force.

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[1] This study was written as part of a general survey of breaches committed by States, international organizations or individuals. That survey proved too long for publication in full in the *Review*. We have therefore published only the part that concerns breaches by individuals.

1. The conventional or traditional system

This may, very roughly, be called the penal international law of war.

A. State systems

The traditional system of repression of breaches of the law of war was essentially an internal or State one. This is shown by the precedents usually quoted[2] and the classical concepts of doctrine.[3] It should therefore more properly be called the international penal law of war.

Only in the nineteenth century did a really international system[4] begin to emerge as a result of domestic legislation;[5] but this did not lead to the inclusion in international instruments of penalties for breaches of international humanitarian law.[6]

B. Non-existence of an international system

What existed, therefore, was not a system. Nor was it truly international; it comprised no international typification, and did not assign penal responsibility or penal sanctions to persons committing breaches. Still less did it provide for tribunals and international procedure for any such purpose.

C. Deadlock

It was accordingly impossible to apply sanctions under international penal law. Breaches of the law of war went unpunished because it was not accepted that States had any penal responsibility for war

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[2] Cherif Bassiouni, *Derecho penal internacional, Proyecto de Código penal internacional*, Tecnos, Madrid, 1984, pp. 60-61.

[3] Spanish "classical" authors, and subsequently authors of other nationalities, did much to lay the foundations of what became the domestic system for the repression of such breaches.

[4] See Alexandre Plawski, who points out on p. 18 of his *Etudes des principes fondamentaux du droit international pénal*, Librairie générale de droit et de jurisprudence, Paris, 1972, that international penal law originated only in the nineteenth century and that previously any such ideas had been only tentatively explored.

[5] E.g. Francis Lieber, *Instructions for the Government of Armies of the United States in the Field*, of 24 April 1863, ordering that soldiers guilty of breaches of the law of war should be prosecuted, whether they belonged to the United States armed forces or were enemy prisoners.

[6] As was done in The Hague Conventions of 1899 and 1907.

crimes or other breaches of international law and because individuals were not regarded as answerable to international law.[7] The only thing that ensured that the laws and customs of war would be internationally observed was good faith.[8]

To avoid this consequence, and because for various reasons it was not possible to prosecute a State, the decisive step was taken of recognizing individuals as subject to penal prosecution under international law, so that they could be indicted under that law.

2. The emergency post-war system

This was in fact done: individuals were recognized as responsible under international law for war crimes. This laid the foundations of the system that was subsequently applied.

A. Its precedents

The forerunner of that system emerged immediately after the First World War. As soon as the war ended on 11 November 1918 an Inter-Allied Commission was formed to establish the responsibility of "war criminals" (a term used for the first time). The Treaty of Versailles proposed to try Kaiser Wilhelm II and other Germans accused of war crimes,[9] and to set up an international court of justice, and national courts, to try all kinds of war criminals. These proposals were not carried out; the Kaiser was by then a refugee in Holland, which refused to extradite him, and the few alleged war criminals put on trial were either acquitted or given only nominal sentences.[10]

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[7] See Antonio Quintano Ripollés (*Criminalidad de Guerra*, Nueva Enciclopedia Jurídica Seix, Editorial Seix, Barcelona, 1954, vol. VI, p. 10), who remarks that attempts to assign responsibility are rarely successful because of the dictum *universitas delinquere non potest*, and that if the State were the only entity answerable to the law but as a State could not commit an offence, and if an individual were not answerable to international law, both would enjoy impunity and anarchy would result.

[8] As stated in Article 851 of the Spanish *Field Service Regulations* of 5 January 1882.

[9] Articles 227, 228 and 229 of the Treaty of Versailles arraigned the Kaiser for "a supreme offence against international morality and the sanctity of treaties".

[10] Some of the accused were tried by German courts, which awarded only light sentences. Others were not handed over to foreign courts for trial. This contravened the spirit of the Treaty.

B. How the system worked

The system really worked at the end of the Second World War, when an effective international system of repression was introduced. It was the result of various documents[11] leading to the London Agreement and its Charter of 8 August 1945, whose most important provision was to establish the tribunal in Nuremberg which tried the "major war criminals" of the Axis countries, whose offences had no particular geographical location. Many other tribunals were also established, some by the Allies in their own occupation zones of Germany,[12] and others in, and by the governments of, the countries formerly occupied by the Germans.[13]

The other major instrument for international repression of wartime offences against international law was the Far Eastern International Military Tribunal set up on 19 January 1946. Sitting in Tokyo, it tried Japanese war criminals, applying the European system with few variations.[14] Other similar tribunals, most of them military, were set up, mainly by the Americans, to sentence persons accused of particular offences.[15]

This special system continued to operate without significant changes until 1949.

a) ***Its substance*** — Its substantive law defined offences, assigned responsibilities, and imposed sentences in a number of cases.

Article 6 of the Charter of the Tribunal regards as "crimes coming within its jurisdiction" "crimes against peace", "war crimes" and "crimes against humanity".[16] It typifies them as follows:

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[11] On 13 January 1942 the governments of the Allied countries occupied by Germany drew up the "Declaration of St. James' Palace" for the punishment of war criminals, and on 1 November 1943 the Allies published the "Moscow Declaration" to the same effect.

[12] These tribunals were standardized by *Kontrollratsgesetz* No. 10 of 20 December 1945, which followed the principles of the International Military Tribunal.

[13] Although the War Crimes Commission was set up in London to order the handover of accused persons, there is no doubt that each country followed its own rules of procedure: Belgium on 20 July 1947, Holland on 10 July 1947, Norway on 4 May 1945, the United Kingdom on 14 June 1945, and France on 28 August 1944.

[14] This Tribunal followed the London Charter, with a few amendments; thus the penal concept of "conspiracy" was dropped, the number of members of the tribunal was increased and its jurisdiction was extended to other individuals and territories.

[15] Such as the tribunals set up to try the persons responsible for the murder on the Jaluit Atoll of three captive American airmen, and to try the Yamashita case (of failure to act to prevent the commission of war crimes).

[16] It also included the concept of criminal "conspiracy" (an Anglo-American innovation later dropped) by providing in the last paragraph of Article 6 that "Leaders,

"• ***Crimes against peace:*** *namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;*

• ***War crimes:*** *namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;*

• ***Crimes against humanity:*** *namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated".*

Article 6, when providing that the Tribunal should have the power to try and punish persons accused of committing crimes, laid down the general principle that "there shall be individual responsibility" for crimes, including, where appropriate, responsibility for membership of a group or organization declared to be a criminal group or organization.[17]

Article 27 of the Charter allowed judges great latitude in awarding sentences; it states that *"The Tribunal shall have the right to impose upon a Defendant, on conviction, death or such other punishment as shall be determined by it to be just."*

b) ***Its procedure*** — With respect to procedure, the Charter established not only the international tribunals but also adequate procedure for their operation.

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organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan".

[17] The first paragraph of Article 9 of the Charter reads: "At the trial of any individual member of any group or organization the Tribunal may declare (in connection with any act of which the individual may be convicted) that the group or organization of which the individual was a member was a criminal organization." See H. de Touzalin, "Réflexions à propos du délit d'appartenance sur un essai d'unification des règles de répression en matière d'infraction aux lois et coutumes de la guerre", *Revue de droit pénal militaire et de droit de la guerre*, Brussels, IV-I, 1965, pp. 133ff.

The Nuremberg Tribunal adopted the title of "International Military Tribunal", and agreed that other tribunals should be set up if necessary whose composition, purpose and procedure should be identical to those of the principal Tribunal.

The Charter also set up a general procedure for prosecuting, bringing to trial and sentencing, without prejudice to the Tribunal's powers to issue regulations for its own procedure.

C. Consequences

Once this complex system of international tribunals and/or tribunals trying offences against international law[18] ceased to operate it left little permanent trace.[19]

As far as what might broadly be called war crimes is concerned, all we now have are the "Nürnberg Principles",[20] the Convention on the Non-Applicability of Statutory Limitations to War Crimes,[21] and the "concern" for the repression of war breaches that has produced the present system.

3. The system now in force

At present the system for the repression of breaches of the law of war committed by individuals is a mixed one, partly international and partly domestic. It comprises a number of basic international principles that form its essential legal framework, and ancillary provisions, contained in legislation, that fit in, or should fit in, with them.

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[18] The Nuremberg Tribunal gave judgment on 1 October 1946 and the Tokyo Tribunal on 12 November 1948. The remaining tribunals ceased to function in 1949, except for a few local ones whose activities continued.

[19] The remaining instruments dealing with the general question of repression of breaches of international law committed by individuals are mentioned above.

[20] The Second Session (5 June to 29 July 1950) of the International Law Commission of the United Nations formulated the seven "Nürnberg Principles", adopting practically the same definition of offences as the London Charter of 1945.

[21] This Convention of 26 November 1968 also applies to crimes against humanity.

Whilst the basic international precepts are shared, their development and the form they actually take depend on various national regulations. The resulting system is a heterogeneous one providing only the illusion of the international repression to which it lays claim. Its consequences are anomalous[22] and the situation cannot be remedied at present.[23]

A. The international framework

Basic international regulations have established only a general scheme of repression based on minimum observable regulations.

a) ***The basic texts*** — The basic international texts now in force (disregarding some previous ones)[24] are the Geneva Conventions of 1949 and Additional Protocol I of 1977.[25]

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[22] Each country has its own regulations and its own ways of applying international law. As a result, a particular offence may be classed as an offence, a crime or a misdemeanour in some national legislations, and simply ignored in others. Consequently some States apply severe penal sanctions, others minor penalties, and still others no penalties at all, and the accused person's fate will depend on where the offence was committed and on the country that has to try him. He may even prefer to be tried by a foreign court rather than by the courts of his own country.

[23] Various proposals have been put forward to remedy this state of affairs. The most modest is for a "model law" as a basis for governmental action. A rather more ambitious proposal is that there should be an "international law to cover criminal offences". The most ambitious proposal is that an international court be empowered to try at least this kind of breach. But as Henri Bosly observes (in "Responsabilités des Etats Parties à un conflit et des individus quant à l'application des règles de droit humanitaire", *Revue de droit pénal militaire et de droit de la guerre*, XII-2, 1973, pp. 201ff) the first solution "has been sought for several years past", the second is "unlikely in the foreseeable future", and the third is at present impracticable because many States regard it as "an unacceptable limitation of national sovereignty". Accordingly, at present only two kinds of courts can possibly try these breaches: national courts, and perhaps international courts set up *ad hoc* as and when armed conflicts break out. There is no doubt that in this as in many other situations the international community has gone as far as it can, given its present state of maturity.

[24] Previous ones are Articles 27 and 28 of the Geneva Convention of 6 July 1906 for the amelioration of the condition of the wounded and sick in armed forces in the field, Article 46, para. 2, of the Regulations respecting the laws and customs of war on land, annexed to The Hague Convention of 18 October 1907, and Articles 28 and 29 of the Geneva Convention of 27 July 1929 for the amelioration of the condition of the wounded and sick in armed forces in the field.

[25] The Conventions, but not Protocol I, are now binding on practically all States, and this has to be taken into account when considering the effects of international regulations mandatory for all States.

The Geneva Conventions (Article 49 of C I, Article 50 of C II, Article 129 of C III and Article 146 of C IV) contain a general provision in identical terms.[26,27]

The general principles of Protocol I are contained in Article 85, para. 1, which states:

"The provisions of the Conventions relating to the repression of breaches and grave breaches, supplemented by this Section, shall apply to the repression of breaches and grave breaches of this Protocol".

and Article 86, para. 1, which states:

"The High Contracting Parties and the Parties to the conflict shall repress grave breaches, and take measures necessary to suppress all other breaches, of the Conventions or of this Protocol which result from a failure to act when under a duty to do so".

b) ***Comment and conclusions*** — These texts lead to the following conclusions:

The general scheme of repression is the same in the Conventions and in Protocol I; the only variation (which for the moment does not concern us) lies in the nature of the breaches to be punished.[28]

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[26] "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 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".

[27] Articles 105ff. of the Convention of 1949 relative to the treatment of prisoners of war refer to prisoners' rights and means of defence, appeals, notification of sentence and penal regulations.

[28] As stated in the *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ed. Yves Sandoz, Christophe Swinarski, Bruno Zimmermann, ICRC, Martinus Nijhoff Publishers, Geneva, 1987, p. 992, para. 3467, "The system of repression in the Conventions is not to be replaced, but reinforced and developed ... so that it will in the future apply to the repression of breaches of both the Protocol and the Conventions".

The starting point of the system is the basic distinction between grave breaches and other breaches; the only provision in the international regulations concerning "other breaches" is that States should take steps to repress them.

The provisions of international law that deal with the repression of grave breaches are extensive, but cover only some regulations relating to breaches themselves, the responsibility of persons committing them, the penalties to be imposed, the courts that are to try the accused, their competence, and lastly procedure.

In repressing breaches States must conform to this international legal framework and must reinforce and develop it.

B. Supplementary national legislation

Supplementary legislation by States[29] covers a wide spectrum; each State has adopted a different position in developing international regulations.

In spite of the difficulty of knowing the present state of the various national legal provisions in this connection,[30] it is possible to outline a general picture of national legislation, distinguishing between States that have not complied with the requirement in the Conventions (or in Protocol I, if they have ratified it) and States that have, each in its own way, formally met that requirement.

a) ***Some States have not fulfilled the undertaking they have given***, but here we must distinguish between two totally different sets of reasons for their non-compliance:

Certain States have not complied because they believe that it is unnecessary to take further action. They consider that their civil and military law already provides a sufficient basis for penal sanctions against grave breaches or, in other words, that they have already fulfilled that undertaking. This view is open to criticism, because breaches of the law of war are different from other breaches of law, and general domestic legislation does not provide adequate guarantees

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[29] Barras, Raphaël, "Incidences des dispositions pénales du Protocol I additionnel aux Conventions de Genève de 1949 sur le système judiciaire national", *Revue de droit pénal militaire et de droit de la guerre*, Vol. XXI, 1982, p. 416, says that international provisions are "imperfect" and that national legislations "have necessarily to bridge this gap".

[30] For example, the *Société internationale de Droit Militaire et de Droit de la Guerre* has had great difficulty in eliciting national responses to its questionnaire on *Criminalistic and criminological aspects of national repression of grave breaches of humanitarian law.*

that they will be repressed.[31] These countries have generally not ratified Protocol I.[32]

Some other countries have not complied as yet, but since they have introduced Bills in this respect they will presumably meet their obligation at some future date. Meanwhile their previous legislation remains in force. There are also many other States that simply have no plans to comply or, if they have, have not made them known. This delay and, in some cases, the total disregard shown for the commitment they made when they signed and ratified the Conventions can only be regretted. Many of these countries are also party to Protocol I.[33]

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[31] The International Committee of the Red Cross observes that ordinary penal legislation (i.e. the civilian and military penal codes) does not adequately ensure repression of breaches of the Geneva Conventions. See *Respect of the Geneva Conventions — Measures taken to repress violations (Reports submitted to the International Committee of the Red Cross to the XXth and the XXIst International Conferences of the Red Cross)*, Geneva, 1971, vol. I, p. X.

[32] Among these countries are the following. *France*, which let slip the opportunity of ratification offered by the reform of its Code of Military Justice. The projected reforms formally covered breaches of the law of war. Instead the French Government listed in its Code of Military Justice and in the recent General Disciplinary Regulations for the Armed Forces of 12 July 1982 certain offences and misdemeanours which are partly the same as the breaches mentioned in the Conventions and Protocol I. The French Government replied to the ICRC that "Many articles of the Penal Code and Code of Military Justice, although not specifically covering the breaches mentioned in the Geneva Conventions, ensure repression of the crimes and offences prohibited by the Conventions. The French Government accordingly considers that it has duly complied with the undertaking required by the Conventions". *Portugal*, Article 87 of whose Code of Military Justice states in general terms and without specifically referring to the Geneva Conventions that any member of the armed forces "who has committed any act condemned by an international Convention to which the Portuguese Government has acceded" will be punished *"unless such acts are essential to the success of military operations"*. That proviso is evidently not in accordance with the spirit or the letter of the Geneva Conventions. The *United States*, which maintains that the penalties prescribed in its military and civil legislation adequately punish the breaches of the law of war specified in the Geneva Conventions. Under Articles 18 and 21 of the Uniform Code of Military Justice, war crimes committed by persons subject to that Code are punishable by military courts. Similarly, the United States government maintains that many grave breaches, if committed in the United States, are breaches of its domestic legislation and are therefore punishable by civil courts. The United States only punishes war crimes as such when these are committed by enemy nationals or persons in the service of the enemy. There is then no conflict with international law because the circumstances are covered by the country's own legal system. *Japan*, which maintains that since its Constitution condemns resort to war, citizens of Japan can obviously never be in the situation envisaged by the Conventions. It nevertheless also alleges that breaches of the Conventions are punishable under its criminal law. Other countries such as Iraq and South Africa.

[33] Among the countries that have shown by introducing Bills into Parliament that they intend to meet their commitment are the following. *Belgium*, which previously put forward a government Bill which was not approved, and subsequently presented another one comprising eleven articles in two chapters. The first of these lists and typifies grave breaches, and the second covers competence, procedure and the

b) ***Other States have formally complied,*** but in different ways.

In the first place there are the States which by means of special laws or laws supplementing their legislation on repression in general have fully met their undertaking, and in various ways provide for all the grave breaches specified in the Conventions, and in Protocol I if they have ratified it. These are the States which, although possibly open to criticism on technical grounds, have fully complied with the undertaking they gave when ratifying the Conventions, and Protocol I if they did ratify it.[34]

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execution of penalties. That Bill, No. 577, was put before Parliament in its 1962-1963 session in compliance with the obligation undertaken when Belgium ratified the Geneva Conventions. It is a very comprehensive Bill which imposes severe penalties for breaches and even deals with exemption from penal responsibility. The *Federal Republic of Germany*, which although it declared in 1964 that all the breaches of the laws of armed conflicts mentioned in the Conventions are punishable under its ordinary criminal law, has put forward a government Bill relating to offences against the laws and customs of war. This Bill provides for special legislation supplementing ordinary criminal law, in some cases by broadening the definition of offences under ordinary law, and in others defining offences *ex novo* where there are no other means of punishing certain breaches. The penalties prescribed are comparatively moderate. *Italy*'s position is different; it has not brought in any Bill. Its penal laws are insufficient to punish the breaches mentioned in the Geneva Conventions; the Italian wartime Code of Military Justice, dating from 1941, merely contains a number of provisions that whilst repressing acts contrary to the laws and customs of war make no provision for including the breaches specified in the Conventions. Part III, Chapter III of that Code, ambitiously entitled "Prohibited Acts of War", is anything but comprehensive. Nevertheless Italy, which in 1986 ratified both Protocols although with reservations, has not put forward any Bill covering the breaches specified in the Conventions or Protocol I. Many other States are in this situation, which is regrettable, for even a heterogeneous system of organized repression is better than having no provisions at all to supplement international regulations.

[34] This category comprises a long list of countries, among them *Spain*, whose Military Penal Code of 1985, Articles 68-79, mention (in their own words) all the breaches specified in the Conventions; *Switzerland*, which has added the breaches specified in the Conventions to Articles 109ff of its Military Penal Code of 1950; *Holland*, whose Acts of 19 May 1954 and 10 July 1962 have adapted its provisions on war crimes to the provisions of the Geneva Conventions; the *United Kingdom*, whose Geneva Conventions Act of 1957 adapts its legislation to the Geneva Conventions of 1949, repressing the grave breaches specified therein and making rules affecting both the substance and procedure of its penal laws; *Australia*, in an Act of 1957 on the same lines as that of the United Kingdom; *Canada*, which has introduced regulations that are also on the same lines as those of the United Kingdom; *Ireland*, in an Act of 1962 on the British model; *India*, which complied with its undertaking in the same way in an Act of 1960; *New Zealand*, in a special Act of 1958 worded in much the same way as the British one; *Uganda*, in an Act of 1964; *Malaysia*, in an Act of 1962; *Kenya*, in an Act of 1968, and other countries that are members of the British Commonwealth. Much the same lines have been followed in *Sweden*, which carried out a reform of its legislation in 1964, when it introduced far-reaching regulations to comply with its undertaking; *Norway*, which has amended Article 108 of its Military Penal Code to prosecute persons committing any of the grave breaches mentioned in the Conventions; *Denmark*, Chapter 25 of whose Military Penal Code has been brought into line with

Secondly, we have to mention other countries that have partially complied by incorporating some but not all breaches of the Conventions in their domestic legislation.[35]

C. Conclusions

To conclude, some of the States that have ratified the Geneva Conventions and, as the case may be, 1977 Protocol I, have supplemented the international regulations, while others have not. As a result there are differences in the substance and procedure of penal law in various States.

This obliges us to study the two problems separately. As regards the substance of penal law, we have to study the typification of breaches, the consequent penal responsibility, and the penalties applicable. As regards procedure, we have to examine what courts try such cases, the details of their competence, and the procedure they adopt to impose penalties.

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the Conventions by rendering punishable all the breaches mentioned in the Conventions; and *Yugoslavia*, which has added to its Penal Code a series of provisions covering the breaches mentioned in the Conventions. A special case worthy of separate mention as one that most fully complies with the undertaking to introduce regulations supplementing those of international law is *Ethiopia*, whose Penal Code of 1957, drawn up by Professor Jean Graven of Switzerland, "boldly incorporates in the laws of the country, more systematically and completely than some other legislations have done since the Geneva Conventions of 1949, the whole new field of breaches of international law" by adding all the breaches specified in the Geneva Conventions to its Articles 282ff.

Many countries, therefore, have formally complied with their undertaking. But as Georges Levasseur and R. Merle (from whom we have borrowed heavily in drawing up the above classifications of countries) say in *L'état des législations internes au regard des obligations contenues dans les Conventions internationales de droit humanitaire*, Centre de droit international de l'Université de Bruxelles, Brussels, 1970, p. 251, the important thing is "to know whether the countries that have special legislation do in fact apply it effectively, and if so, how". As they point out, it would be difficult to reach a reliable conclusion on this point, because of the lack of information, the ICRC's wholly justified discretion, and the evident unwillingness of the local authorities responsible to comment on violations of the law of war. It has not always been possible for the author to obtain the latest information on the legal situation in various countries, which may have changed since the time of writing.

[35] Those countries include the *USSR*, whose Penal Code of 1960 covers breaches committed by members of the armed forces who are prisoners of war, and offences committed against them. A similar practice was followed by *Hungary*, which punishes breaches committed against prisoners of war and certain breaches committed against the civilian population; and *Czechoslovakia*, whose law of 1961 provides sanctions for offences committed against prisoners of war, the wounded, sick and shipwrecked and the civilian population. In all these countries the special rules refer only to substance, i.e., the breach. No special rules having been adopted for procedure, the usual general rules, or special military rules, are applied.

We shall therefore consider two major headings: penal law, and the relevant procedural law.

II. THE PENAL LAW OF WAR

As just stated, the penal law of war raises three problems: typification of breaches, the consequent penal responsibility, and the penal sanctions applicable.

1. Typification of breaches

Here as in the entire system, the law of armed conflicts contained in the Geneva Conventions of 1949 and the additional provisions contained in Protocol I of 1977 form the legal frame and basis for definition or typification of the breaches that have to be punished. In other words, the international regulations indicate the types of crimes or offences considered as breaches and which by their very nature and enormity cannot go unpunished by States.

Any further typification is a matter for the States themselves. Their only obligation is to list these categories of crimes and offences, either in the form in which they are typified in international law or in a different form having the same content. The goal is the same but the ways of arriving at it may be different.[36]

A. The international basis

The common basis is the international texts, which when carefully considered prove to be quite systematic.

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[36] See *The Geneva Conventions of 12 August 1949 — Commentary* published under the editorship of Jean S. Pictet, ICRC, Geneva, 1962, *First Geneva Convention*, p. 353: "There is no unity of inspiration between the different systems. In the Anglo-Saxon countries it would appear that the existence of a rule of international law, whether explicit or customary, and whether it makes provision for penal sanctions or not, entitles national tribunals to pass sentence when the rule is violated. In the countries of the European continent, on the other hand, a penal law can only be applied if it embodies a normative rule, and further carries explicit provisions with regard to the nature and severity of the penalty. In these latter countries the maxim *nulla pena sine lege* has lost none of its force.

Whatever one's views may be on the repressive action taken after the Second World War, it will be agreed that it would have been more satisfactory, had it been possible to base it on existing rules without being obliged to have recourse to *ad hoc* measures."

a) ***These international texts*** are contained in the Geneva Conventions of 1949 and Protocol I of 1977.

The Geneva Conventions of 1949 (Articles 49 of C I, 50 of C II, 129 of C III, and 146 of C IV) refer to "acts contrary to the provisions of the present Convention".

Article 50 of Convention I and Article 51 of Convention II state in identical terms that:

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

The corresponding article in Convention III is Article 130, which instead of ending with a reference to destruction and appropriation of property replaces it with:

"compelling a prisoner of war to serve in the forces of the hostile Power, or wilfully depriving a prisoner of war of the rights of fair and regular trial prescribed in this Convention".

The corresponding article in Convention IV is Article 147, in which that passage is replaced by:

"unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces or 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".

These Conventions do not mention any "acts contrary" that are not grave breaches.[37]

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[37] To list all the acts regarded by the Conventions as "acts contrary" would be never-ending and would require examination of all the obligations imposed by the treaties.

Because of their special significance, we quote here Article 54 of the First Convention and the corresponding Article 45 of the Second Convention, both of which state that "The High Contracting Parties shall, if their legislation is not already adequate, take measures necessary for the prevention and repression at all times, of the abuses..." of the protective emblem of the Red Cross (even when used only for purposes of indication).

In this connection, Article 11, para. 4, of Protocol I states:

"Any wilful act or omission which seriously endangers the physical or mental health or integrity of any person who is in the power of a Party other than the one on which he depends and which either violates any of the prohibitions in paragraphs 1 and 2[38] *or fails to comply with the requirements of paragraph 3*[39] *shall be a grave breach of this Protocol".*

There is a further list of breaches[40] in Article 85, which reads:

1. The provisions of the Conventions relating to the repression of breaches and grave breaches, supplemented by this Section, shall apply to the repression of breaches and grave breaches of this Protocol.

2. Acts described as grave breaches in the Conventions are grave breaches of this Protocol if committed against persons in the power of an adverse Party protected by Articles 44, 45 and 73 of this Protocol,[41] *or against the wounded, sick and shipwrecked of the adverse Party who are protected by this Protocol, or against those medical or religious personnel, medical units or medical transports which are under the control of the adverse Party and are protected by this Protocol.*

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[38] Article 11, paras. 1 and 2, reads:

"1. The physical or mental health and integrity of persons who are in the power of the adverse Party or who are interned, detained or otherwise deprived of liberty as a result of a situation referred to in Article 1 shall not be endangered by any unjustified act or omission. Accordingly, it is prohibited to subject the persons described in this Article to any medical procedure which is not indicated by the state of health of the person concerned and which is not consistent with generally accepted medical standards which would be applied under similar medical circumstances to persons who are nationals of the Party conducting the procedure and who are in no way deprived of liberty.

2. It is, in particular, prohibited to carry out on such persons, even with their consent:

a) physical mutilations;

b) medical or scientific experiments;

c) removal of tissue or organs for transplantation,

except where these acts are justified in conformity with the conditions provided for in paragraph 1".

[39] Article 11, para. 3, considers a number of commonsense exceptions to the above rules.

[40] See Additional Protocol I, Article 85.

[41] Article 44 of the Protocol protects (and defines) combatants and prisoners of war. Article 45 protects persons who have taken part in hostilities, to whom it grants provisional prisoner-of-war status. Article 73 relates to refugees and stateless persons, specifying that they are protected persons.

3. In addition to the grave breaches defined in Article 11, the following acts shall be regarded as grave breaches of this Protocol, when committed wilfully, in violation of the relevant provisions of this Protocol, and causing death or serious injury to body or health:

a) *making the civilian population or individual civilians the object of attack;*

b) *launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects, as defined in Article 57, paragraph 2* a) *iii),*

c) *launching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects, as defined in Article 57, paragraph 2* a) *iii);*[42]

d) *making non-defended localities and demilitarized zones the object of attack;*

e) *making a person the object of attack in the knowledge that he is* hors de combat*;*

f) *the perfidious use, in violation of Article 37,*[43] *of the distinctive emblem of the red cross, red crescent or red lion and sun or of other protective signs recognized by the Conventions or this Protocol.*

4. In addition to the grave breaches defined in the preceding paragraphs and in the Conventions, the following shall be regarded as grave breaches of this Protocol, when committed wilfully and in violation of the Conventions or the Protocol;

a) *the transfer by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory, in violation of Article 49 of the Fourth Convention;*[44]

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[42] Article 57 relates to precautions in attack and requires that an attack shall not be decided upon if it "may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated".

[43] Article 37 prohibits perfidy in general, including the feigning of protected status by the use of signs or emblems.

[44] Article 49 of the Fourth Convention prohibits individual or mass forcible transfers and deportations other than a total or partial evacuation necessary for the security of the population.

b) *unjustifiable delay in the repatriation of prisoners of war or civilians;*

c) *practices of* apartheid *and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination;*

d) *making the clearly-recognized historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples and to which special protection has been given by special arrangement, for example, within the framework of a competent international organization, the object of attack, causing as a result extensive destruction thereof, where there is no evidence of the violation by the adverse Party of Article 32, sub-paragraph* b),[45] *and when such historic monuments, works of art and places of worship are not located in the immediate proximity of military objectives;*

e) *depriving a person protected by the Conventions or referred to in paragraph 2 of this Article of the rights of fair and regular trial.*

5. Without prejudice to the application of the Conventions and of this Protocol, grave breaches of these instruments shall be regarded as war crimes".[46]

Article 86, para. 1, adds a reference to breaches consisting in failure to act. Paragraph 1 states that:

"The High Contracting Parties and the Parties to the conflict shall repress grave breaches, and take measures necessary to suppress all other breaches, of the Conventions or of this Protocol which result from a failure to act when under a duty to do so".

b) ***Comment and conclusion*** — The following general conclusions may be drawn from the texts just quoted:

As regards the organization and mechanism of repression, the Conventions and Protocol I necessarily start by stating that certain acts contrary to its regulations are illegal and in principle punishable.[47]

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[45] Article 53 of the Protocol prohibits acts of hostility directed against historic monuments, works of art or places of worship. Its sub-paragraph (b) states that it is prohibited "to use such objects in support of the military effort".

[46] What is meant by grave breaches being "regarded as" war crimes is not altogether clear. Perhaps the only reason for this provision is to avoid ambiguity by putting grave breaches of any kind on the same footing as war crimes and using the latter term to cover both.

[47] The regulations relating to repression in the law of war are inevitably on the lines of all punitive systems, which are based on a conditional proposition consisting of a supposition (delinquent conduct) and a consequence (its penal sanction). (See J. M. Rodríguez Devesa: *Derecho Penal Español, Parte General*, Madrid, 1973,

Such unlawful acts are defined by means of what is technically called a "typification" or "Tatbestand"; that is, a process in which all the elements of each unlawful act are reduced to a single whole, always comprising actions or voluntary failure to act, resulting in prejudice to persons or objects specially protected.[48]

These kinds of unlawful acts have been generically designated as "breaches". The word entails no commitment, and was doubtless chosen in order to prevent any confusion that might arise from the use of other words such as "offence", "crime" or "misdemeanour", which have special connotations and very definite meanings in the penal legislation of various States.

All the breaches have been classified into two major groups of greater or lesser gravity, or in other words according to their enormity, for there is no qualitative or inherent difference between the breaches in the two groups.[49] The first group consists of what the international texts specifically call "grave breaches", and the second of what we may call "minor violations", although this expression is not used in the international texts.

Grave breaches,[50] sometimes also called "serious violations",[51] are those which most seriously prejudice the basic interests protected by

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vol. I, p. 145). It has accordingly been necessary to define certain kinds of behaviour that violate its legal rules, as the basis of the sanction.

[48] In the law of war, generally speaking, the victim of breaches may be an individual or a group, always provided that such individual or group forms part of one of the "categories" defined in the Conventions and Protocol I. It follows that the law of war does not protect all and sundry in a special way, but only persons who are "specially protected" because they are comprised in the said categories. This is no obstacle to the existence of general protection, which is also recognized by humanitarian law. In some cases, belonging to these categories makes no very great difference; but in others, for example where prisoners of war are concerned, inclusion in this category is all-important (see the *Commentary on the Third Geneva Convention*, Geneva, 1960, pp. 50ff).

[49] Here we come upon the difficulty which criminal law in general finds in constructing a concept of its own of what is called the "natural offence" (see Giuseppe Maggiore: "Delitto naturale e delitto legale", *Riv. de Crim. e Diritto Crim.*, 1948), and consequently the difficulty of constructing a separate concept of what might be called a "natural" grave breach.

[50] The *Commentary on the First Geneva Convention, op. cit.*, p. 371, states: "The actual expression 'grave breaches' was discussed at considerable length. The USSR Delegation would have preferred the expression 'grave crimes' or 'war crimes'. The reason why the Conference preferred the words 'grave breaches' was that it felt that, though such acts were described as crimes in the penal laws of almost all countries, it was nevertheless true that the word 'crimes' had different legal meanings in different countries."

[51] As the *Commentary on the Additional Protocols, op. cit.*, para. 3621, p. 1045, explains, "virtually no distinction is made between grave breaches and serious violations in the text of the Conventions or the Protocol, which almost always refers to 'grave breaches' ".

humanitarian law. They are accordingly known as "war crimes".[52] What this term means is not clear, but we interpret it to mean violations of international law seriously affecting the persons and objects protected and, moreover, directly affecting the vital interests of the international community.[53]

Since, as stated above, it is difficult to define grave breaches because they are not in a class of their own, the Conventions and Protocol I enumerate them, but not exhaustively. The list is left open for the possible inclusion of other grave breaches,[54] which may be subject to universal jurisdiction as are those expressly enumerated, under customary law or other treaties.[55]

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[52] Article 85, para. 5, of Protocol I, which contains this term, was criticized. See the *Commentary on the Additional Protocols, op. cit.*, paras. 3521 and 3522, p. 1003: "This paragraph, which was considered indispensable or self-evident by some delegations, seemed out of place or dangerous to others. The former emphasized the need to confirm that there is only one concept of war crimes, whether the specific crimes are defined under the law of Geneva or The Hague and Nuremberg law. Without denying that grave breaches of the Conventions and the Protocol are indeed war crimes, the latter preferred those instruments to stick to their own terminology in view of their purely humanitarian objectives".

[53] The Preamble of the Agreement of 8 August 1945 of the Quadripartite Commission for the prosecution of war crimes states that the four Governments are "acting in the interests of all the United Nations".

Article 19 of the Draft Article on the responsibility of States, approved by the United Nations International Law Commission, states that the internationally unlawful event resulting from violation by a State of an international obligation so essential to the safeguard of fundamental interests of the international community that its violation is recognized as a crime by that community as a whole constitutes an international crime. The inference appears to be that an international crime is a violation of the interests of the international community, which are fundamental. This, in our opinion, is where war crimes should be placed. Furthermore, in legislation that recognizes a difference between "crime" and "offence", "crime" means a more serious violation.

[54] The enumeration of grave breaches in Article 50 of the First Convention (and its corresponding articles in the other three Conventions) begins: "Grave breaches... shall be those involving *any* of the following acts" — "any" being rendered in the French version "l'un ou l'autre" and in the Spanish version "algunos". The enumeration is therefore not exhaustive. The *Commentary on the First Convention, op. cit.*, p. 367, states that "apart from the 'grave breaches' enumerated in Article 50, it is easy to think of other infractions which are also serious, such as the improper use of the red cross emblem in time of war".

[55] In our opinion, grave breaches are not only those explicitly enumerated but also those which may be inferred from the Conventions and from the Protocol (because it refers to the Conventions) or from other texts of customary or treaty law. The *Commentary on the Protocols, op. cit.*, p. 976, note 11, states: "This means that only the conduct included in the list (Article 85, sub-paragraphs 2-4 of the Protocol) is subject to universal jurisdiction under the Conventions and the Protocol. It does not mean that other breaches cannot also be subject to universal jurisdiction by reason of customary or treaty law".

Minor violations, sometimes referred to in the texts merely as "breaches" and in others as "acts contrary" to the Conventions or "other breaches" of the Conventions or the Protocol, are violations of or failures to comply with humanitarian law. They are not included under the heading of grave breaches because they do not fundamentally affect protected interests.

Simple breaches or minor violations have purposely not been expressly enumerated, because it was considered that they were not important enough to call for universal jurisdiction[56] and such a list would have been too long.[57] Undoubtedly many of these violations may be illegal acts, but equally certainly most of them are the result of failure to act when under a duty to do so.[58]

There is no clear distribution between grave and minor breaches, for as stated above there are grave breaches other than those expressly enumerated. Minor violations, if repeated, may be classified as grave breaches in some circumstances.[59]

c) ***Classifying breaches*** — Consequently, and using the proper terms, we can classify breaches of the laws of armed conflicts as follows:

1. GRAVE BREACHES

Expressly mentioned:

In the 1949 Geneva Conventions:

Breaches specified in all four Conventions:

- Wilful killing.
- Torture or inhuman treatment, including biological experiments.

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[56] "Violations of certain of the detailed provisions of the Geneva Conventions might quite obviously be no more than offences of a minor or purely disciplinary nature, and there could be no question of providing for universal measures of repression in their case". (*Commentary on the First Convention, op. cit.*, p. 370).

[57] See Stanislaw E. Nahlik, "Le problème des sanctions en droit international humanitaire", in *Studies and essays on international humanitarian law and Red Cross principles, in honour of Jean Pictet*, ICRC, Martinus Nijhoff Publishers, Geneva, The Hague, 1984, p. 477, who states that it was intended to make such a list of breaches in the 1954 Convention on the protection of cultural property, and that "it only remains for some commentator to make it".

[58] Article 86, para. 1, Protocol I.

[59] At least for the purposes of the competence of the International Fact-Finding Commission mentioned in Article 90, Protocol I, "Minor violations may become serious if they are repeated, and it is then up to the Commission to determine this" (*Commentary on the Protocols, op. cit.*, para. 3621, p. 1045). And, as stated above, a serious violation is a grave breach.

- Wilfully causing great suffering or serious injury to body or health.

Breaches specified in Conventions I, II and III:

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

Breaches specified in Conventions III and IV:

- Compelling a prisoner of war or a protected person to serve in the forces of a hostile Power.
- Depriving a prisoner of war or a protected person of the rights of fair and regular trial prescribed in the Conventions.

Breaches specified in Convention IV:

- Unlawful deportation and transfers.
- Unlawful detention.
- Taking of hostages.

In Protocol I:

- Any wilful act or omission which seriously endangers the physical or mental health or integrity of any person who is in the power of a Party other than the one on which he depends.
- Grave breaches of the Conventions committed against persons in the power of an adverse Party who are protected by Articles 44, 45 and 73 of the Protocol, or against the wounded, sick and shipwrecked of the adverse Party or against those medical and religious personnel, medical units or transports which are under the control of the adverse Party.
- Acts committed wilfully in violation of the Protocol and causing death or serious injury to body or health, consisting in: (a) attacks on the civilian population; (b) indiscriminate attacks on the civilian population or civilian objects; (c) attacks against works or installations containing dangerous forces; (d) attacks on non-defended localities and demilitarized zones; (e) attacks on persons who are *hors de combat*; and (f) the perfidious use of recognized protective signs.
- Acts committed wilfully and in violation of the Conventions or the Protocol, consisting in: (a) the transfer by the Occupying Power of parts of its own civilian population into the territory it occupies, or

the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory; (b) delay in the repatriation of prisoners of war or civilians; (c) practices of *apartheid* and other inhuman and degrading practices based on racial discrimination; (d) attacks on historic monuments, works of art or places of worship; and (f) depriving a person protected by the Conventions or the Protocol of the rights of fair and regular trial.

- Breaches of the Conventions or of the Protocol which result from the failure to act when under a duty to do so are also grave breaches.

Grave breaches which may be tacitly deduced:

- Acts and failures to act which by virtue of the Conventions' "open list" may be considered as grave breaches.

2. MINOR VIOLATIONS

- Acts which are not grave breaches but are contrary to the conduct required by humanitarian law;
- Failures to act, when under a duty to do so expressly established in these regulations, not sufficiently serious to be classed as grave breaches.

B. Supplementary national legislation

National legislation to supplement these international regulations, as regards typification of breaches of the law of armed conflicts, is a matter of each of the States that have ratified the Geneva Conventions and, where appropriate, Protocol I.

a) ***The texts*** — It is worth while pointing out that by virtue of Article 49 (quoted above in its entirety) of the First Convention, and the corresponding articles in the other three Conventions, the High Contracting Parties: *"undertake to enact any legislation necessary to provide effective sanctions for ... any of the grave breaches of the present Convention"*. The Article goes on to state that each Contracting Party *"shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention"*.

Protocol I states in Article 85, para. 1 (also quoted in its entirety) that the provisions of the Conventions *"shall apply to the repression of breaches and grave breaches of this Protocol"*. Article 86, para. 1, adds that the Parties *"shall repress grave breaches and take measures necessary to suppress all other breaches ... which result from a failure to act when under a duty to do so"*.

These paragraphs show the decisive importance of the distinction between grave breaches, against which States are bound to pass punitive legislation, and minor violations, against which States need only take appropriate measures, which need not be legislative. This applies to breaches caused by an act or by failure to act.

Furthermore we may directly deduce that since States have to take legislative or other action to impose penal sanctions or repress acts contrary to the Conventions and Protocol, such measures must begin by typifying — to use the technical term — grave breaches and by giving a broad definition of other breaches.[60]

Consequently, and solely as regards typification or definition of breaches, we shall now examine how States go about the task of supplementing international law.[61]

b) ***Grave breaches*** — In typifying grave breaches their approaches have basically been the following:

First come the countries whose typification is independent of that in the Conventions and the Protocol, being based on concepts of their own that are peculiar to their punitive legislation but are more or less easily comparable in essentials to the international classifications, without making any conclusive reference to them. Basically, this group comprises States that have not discharged the obligation they assumed in ratifying the Conventions and in certain cases Protocol I. Some States have resorted to specific typification of offences, others to a "mixed" system of specific offences plus a general offence or offences. The latter States use two typifications of breaches — the international one taken from the Conventions and Protocol, and their internal one varying from State to State. The typification actually applied is the internal one. Obviously, therefore, if this does not fully

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[60] The substance or penal aspect of sanctions for breaches necessarily has to follow the progression "offence — responsibility — penalty". Clearly therefore, in order to comply with their obligation to enact legislation to punish breaches, States have to begin by designating the offence and, therefore, "typifying" it.

[61] In principle, classification of States according to their attitude to typification of breaches is independent of the general classification according to their attitude to fulfilling their obligation; but these classifications of course overlap.

cover international breaches the State concerned is not fully complying with its obligation to pass the necessary legislation.[62]

Secondly must be mentioned other countries which, so to speak, go half way towards the international rules governing violations: they typify offences in their domestic legislation in a way that follows the international instruments, but use concepts of their own peculiar to their internal system of repression. In other words, they take into account international definitions of breaches so as to adapt to them, but express them in their own words and fit them into their own conception of punishment. There are therefore two typifications, an international one, and a domestic "retypification". As in the previous case, there are variants of this attitude — State typification may be global, or detailed, or mixed.[63]

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[62] This group includes the following countries: very significantly, the *United States*, whose doctrine is that violations of the law of war committed by persons subject to the military law of the United States are usually violations of the Uniform Code of Military Justice and have therefore to be punished as offences contained in that Code. Violations of the law of war by persons not subject to military law, within the United States, are usually violations of Federal law or of State criminal law and must be prosecuted as offences covered by such law. The only offences prosecuted under international law are violations of the law of war committed by enemy nationals or persons serving the interests of an enemy State, in accordance with the old principle that "international law is part of the law of the land". *France*, whose Code of Military Justice and Regulations for General Discipline of the Armed Forces establish prohibitions that in part coincide with international breaches. Articles 407ff of the French Code of Military Justice typify some offences in detail and Article 445 of that Code appears also to adopt a global typification. Barras (*op. cit.*, pp. 422-423) states that there is also still repression by analogy, basing this opinion on the Ordinance of 28 August 1944 relating to the repression of war crimes, which was only temporarily in force but could be used as a system of analogy if needed. The *Federal Republic of Germany* introduced a Bill which appears to be formulated independently of the typification of international breaches but has its own detailed system of typification. In many ways it goes further than the Conventions or even Protocol I in providing for the protection of individuals. *Belgium* also introduced a Bill which with regard to typification of offences follows more or less the same lines. There is however some doubt that it can form part of this group of countries, for it seems to follow the definitions of grave breaches used in the Conventions and Protocol more closely than the German Bill. *Italy* must also be included; its Military Penal Code of 1941 contains a series of precepts for the repression of offences against the laws and customs of war. These naturally bear no relation to international breaches.

[63] Many countries may be included in this group, but because of its significance in relation to typification of punishable war offences *Ethiopia* may be singled out. As stated above, its Penal Code was drawn up by Professor Jean Graven, and adopts in detail all the breaches of the Conventions but with its own typification or re-typification. Another is *Spain*, Articles 68 to 79 of whose recent Military Penal Code of 9 December 1985 contain a somewhat controversial re-typification of many internationally defined breaches, adding other offences and ending with a general provision relating to the other acts contrary to the prescriptions of the international Conventions ratified by Spain. *Yugoslavia* has similarly inserted into its Penal Code, in Articles 124ff, a series of offences practically the same as all those classed as grave

The third and last group comprises countries that have most closely followed the international system of repression. Instead of adopting their own typification or re-typification, they have referred to the breaches contained in the international texts, thus adopting a policy of reference, or "renvoi", to the international system.[64] What this actually means is acceptance of the international typification or adopting its wording by global reference, detailed reference or a combination of both.[65]

c) ***Minor violations*** — As far as minor violations are concerned the problem facing States is clear, for States are not obliged to take legislative measures, nor are they duty bound to impose penal sanctions. They need only take such measures as are generally necessary to repress such breaches. The result is that:

- Since the international system does not oblige States to apply penal sanctions to minor violations, States are under no obigation to typify them; this technical problem only arises for subsequent penal purposes.

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breaches in the Conventions, but like Spain reformulating them. *Holland*, soon after ratifying the Geneva Conventions, enacted a new "Act on War Criminal Law", modifying and supplementing its previous legislation and adapting it to the international texts by a general provision repressing violations of the laws and customs of war, and inserting into its ordinary Penal Code a series of specific provisions for the repression of certain violations. Finally, *Norway*'s Military Penal Code gives a general typification and the civil Penal Code maintains specific typifications.

[64] The use of the word "renvoi" is acceptable only with reservations, because of its specific meaning in private international law. In any case, taking into account the reference of the international system to the domestic system of a State, and vice versa, one might speak of a "return renvoi".

[65] There are many countries in this group: the *United Kingdom*, whose Geneva Conventions Act of 1957 punishes globally all the grave breaches enumerated in the Geneva Conventions and actually refers to the list of those breaches contained in each of those Conventions; *Ireland*, whose Act of 1962 follows the British model of general typification and as well as this reference to grave breaches contains other rules punishing "minor violations"; *Denmark*, Article 25 of whose Penal Code contains a global typification that refers to international regulations; *Australia*, whose Act of 1957 follows the British example; *Canada*, whose Act if worded in much the same way as the British one; *India, New Zealand, Uganda, Kenya, Nigeria* and *Malaysia*, that have more or less adopted the British example and approach; *Brazil*, Articles 400 to 408 of whose Military Penal Code adopted a system of global typification by reference to the breaches specified in the international texts; and *Switzerland*, where the Military Penal Code in force since 1968 adopts a general typification referring to the international Conventions on the conduct of war, undoubtedly because it considers that the typification in the Geneva Conventions is itself sufficiently clear.

The above list of countries is not exhaustive, any more than are the lists of countries adopting the other methods described above. Direct documentary sources are scanty, incomplete and unreliable, and some countries may therefore have been wrongly classified in the above groups.

- Nevertheless, since international regulations do not and cannot prevent States from adding (on their own responsibility and at their own risk) penal provisions to repress minor breaches, either punishing them as breaches or converting them into offences, if they adopt such provisions they will presumably have to typify the breaches.[66]

C. Conclusions

To sum up, international humanitarian law has established a number of "universal types" of grave breaches that States are obliged to take up in their domestic legislation for any of the procedures just mentioned. If they do not do so they fail to comply with the undertaking they gave in ratifying the Geneva Conventions and, where appropriate, Protocol I. The international regulations do not require penal repression of other breaches and have therefore not established specific types. States are free merely to repress them or to impose penal sanctions for them. In the latter case they will have to adopt a classification of their own.

2. Penal responsibility

Responsibility is the consequence of conduct, and penal responsibility is the liability or duty to answer for the consequences of the offence. According to this general proposition, persons committing breaches of the law of war incur responsibility. For grave breaches that responsibility is necessarily a penal one. In principle it is not penal for other breaches.[67]

As in the previous case, the present problem of penal responsibility arises basically at international level and for supplementary purposes at national level.

A. The international basis

At international level the law of war contains few rules, and many of these are only generic deductions.

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[66] The need to typify any breach of the regulations when a penal sanction is to be imposed stems directly from the principle *nullum crimen sine lege*, which means that no offence is committed unless the law has previously stated that the action taken is an offence.

[67] Disregarding matters of theory which belong rather to any penal system, the three questions raised by the element of responsibility are: the persons who commit or take part in the offence, the degree of commission of the offence, and the extenuating circumstances or absence of civil responsibility. In certain cases (not considered here) there is civil as well as penal responsibility.

a) ***The texts*** of the Conventions and the Protocol quoted above contain occasional expressions referring to our present problem, and a few other international texts may be summoned to our aid.

The clause of Article 49 of the First Convention (and the identical articles in the other three Conventions) that refers to the necessary legislation to be enacted by States to provide penal sanctions specifies that these are *"for persons committing, or ordering to be committed, any of the grave breaches of the present Convention"*.

As previously stated, this is also applicable to grave breaches of the Protocol.

Article 86, para. 2, of Protocol I also raises the question of penal or disciplinary responsibility; it refers to a specific circumstance in which such responsibility is not waived, namely:

"The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach".

It is also germane to our purposes to quote the Convention on the Non-Applicability of Statutory Limitations to War Crimes (and crimes against humanity) approved by Resolution 2391 (XXIII) of the General Assembly of the United Nations on 26 November 1968. Article Ia declares that no statutory limitation shall apply to war crimes as defined in the Charter of the Nuremberg Tribunal, and particularly *"the 'grave breaches' enumerated in the Geneva Conventions of 12 August 1949 for the protection of war victims"*.

Article II adds:

"If any of the crimes mentioned in Article I is committed, the provisions of this Convention shall apply to representatives of the State authority and private individuals who, as principals and accomplices, participate in or who directly incite others to the commission of any of those crimes, or who conspire to commit them, irrespective of the degree of completion, and to representatives of the State authority who tolerate their commission".

b) ***Comment and conclusion*** — The following general rules may be deduced from these texts:

- The question of penal responsibility[68] arises in international law solely in relation to grave breaches, whether of commission or omission.
- The international law explicitly concerned with penal responsibility is scanty and the gaps therefore have to be filled by deduction or by applying general principles.
- Making allowances for this, penal responsibility for grave breaches raises the three traditional practical problems of responsibility of persons, responsibility for the degree of execution, and in certain cases extenuating circumstances or exemption from responsibility.
- As regards the persons responsible, the general principle is that all persons who in any way take part in the breach are responsible. That is, first, those persons who materially commit the breach, whether they are subordinates, private individuals, superiors or representatives of State authority; secondly, persons who take part in its commission in any way, e.g. accomplices, and persons inciting or conspiring for commission of the breach; and thirdly, persons ordering the commission of the breach and the superiors and authorities that tolerate it although they are able to prevent it, or fail to repress it.[69] This was the position adopted by the Charter of the Nuremberg Tribunal.[70]

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[68] The distinction between disciplinary and penal responsibility is a matter for each lawgiver to decide, to allow for the quantitative difference of the breach. We therefore refrain for the present from drawing any distinctions in international terms. In principle, all that is said of penal responsibility is applicable to disciplinary responsibility; more will be said on this later.

[69] Referring exclusively to the Conventions, as is only logical, the *Commentary on the First Convention, op. cit.*, p. 364, reads: "The penal sanctions which are to be provided for are for persons committing grave breaches or ordering them to be committed. The joint responsibility of the author of an act and the person ordering its commission is thus established. They are both liable to prosecution as accomplices. ... But there is no reference to the responsibility of those who fail to intervene, in order to prevent or suppress an infraction." This is undoubtedly true in the Conventions and has therefore been corrected in Article 86, para. 2, of Additional Protocol I (quoted above), to which the *Commentary on the Protocols, op. cit.*, para. 3540, p. 1011, refers as follows: "The recognition of the responsibility of superiors who, without any excuse, fail to prevent their subordinates from committing breaches of the law of armed conflict is therefore by no means new in treaty law. However, this principle was not specifically governed by provisions imposing penal sanctions". It is clear from this that responsibility has been extended to include persons "tolerating" breaches of Protocol I and of the Conventions, taking into account the terms of Article 86, para. 2, of Protocol I.

[70] Article 6 of the Charter adopted the principle of individual responsibility for the commission of any of the war crimes it defined, in addition to the responsibility of the leaders, organizers, instigators and accomplices in the formulation or execution of a common plan or conspiracy to commit the said crimes, and in all acts performed by any persons in execution of such plans.

- Penal responsibility is present at all degrees of execution of the breach, i.e., whether the breach was in fact committed, or whether it failed or never went beyond a mere attempt, although naturally the degree of responsibility will not be the same and the consequences will be different.
- Neither the Conventions nor Protocol I consider extenuation, aggravation or exemption from penal responsibility and only touch on it incidentally when they provide that the penal responsibility of a person committing a breach does not exempt a superior who tolerates the breach from penal responsibility. This question is therefore in the hands of national legislation.[71] This represents a retreat from the Nuremberg position[72] set out in the principles of international law recognized in the Nuremberg Charter.[73]

B. Supplementary national legislation

The supplementary work of government legislation concerning penal responsibility is, as the above explanations will have made clear,

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[71] What the *Commentary on the First Convention, op. cit.*, p. 365 says on the question of guilt for acts committed on the orders of a superior may be regarded as generally applicable: "The Diplomatic Conference did not pursue this idea, however, preferring to leave the solution of the problem to national legislation".

[72] At the Nuremberg and Tokyo trials the lawyers for the defence raised a number of objections to the requirement of penal responsibility, all of which were rejected as contrary to international law. These were (1) the principle *nullum crimen sine lege*, which was rejected by a broad interpretation of the law, to the effect that laws are not only written regulations but also customary laws; (2) that penal laws were not retroactive; this was also rejected for similar reasons, i.e., on the grounds that such crimes had already been recognized as such when they were committed; (3) the exculpatory circumstances that the acts were committed under orders from a superior, i.e., the defence of due obedience. This objection was overcome by enacting Article 8 of the Charter, providing that due obedience did not relieve the defendant of responsibility but was at most an extenuating circumstance; and (4) the objection of state of necessity, which was rejected because that excuse had never been accepted in international law and had been condemned by the civilized world.

[73] The *Principles of international law recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal*, adopted in 1950 by the United Nations International Law Commission, reject certain objections to the requirement of penal responsibility. Principle II states that "The fact that internal law does not impose a penalty for an act that constitutes a crime under international law does not relieve the persons who committed the act from responsibility under international law". Principle III states that "The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law". And Principle IV establishes that "The fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him".

very great. The scarcity of international regulations on this point has to be remedied by an abundance of national laws.

a) ***The texts*** — The general principles on the subject already quoted (Article 49 of the First Convention and the corresponding articles in the other three Conventions, and Protocol I, Articles 85, para. 1, and 86, para. 1) say nothing about penal responsibility in particular. However, it is clear from the general provision, i.e., that States *"undertake to enact any legislation necessary ... to provide penal sanctions for grave breaches"* and *"measures necessary"* to suppress minor violations, that States are obliged to take whatever measures are necessary for those purposes, including those referring to penal responsibility although, as stated above, they are not specifically mentioned.

To summarize, as far as possible,[74] the position of various governments in this matter the starting point has to be the fundamental distinction between grave breaches and other breaches.

b) ***Grave breaches*** — On the subject of grave breaches (the only breaches for which there is penal responsibility under international law) governments have adopted one or other of three main positions:

- Some States treat penal responsibility under their domestic legislation, making no concessions to the fact that whatever the form in which the breaches appear in it they are breaches of international law. This applies to the declaration of individual responsibility, the degree of execution of the act, and the extent to which penal responsibility is affected by extenuating, aggravating or exculpatory circumstances.[75]

- Some States have, in widely differing ways, adopted special regulations on penal responsibility for breaches of international humanitarian law. Sometimes these regulations reiterate principles that form part of the State legal system. In other cases they modify

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[74] The necessary documentation is hard to come by.

[75] This is the position of nearly all States, although it often poses difficult problems. A typical case is that of the *United States*, which applies its domestic law, military or civil, to punish persons guilty of breaches equivalent to breaches under international law; at present the defence of due obedience is contested. Another State in this position is *France*. France too applies its domestic law on the matter of responsibility, sometimes its civil laws and at other times its military rules, whichever apply to the acts committed contrary to the laws and customs of war.

those principles in relation to individuals, to the act itself, or to non-responsibility.[76]

- Lastly, some countries have taken up one or other of the few international rules on penal responsibility, applying their domestic legislation modified if necessary by the international regulations.[77]

c) ***Minor violations*** — As regards minor violations and other breaches that are not grave breaches, and "acts contrary":

- Since penal responsibility does not give rise to penal sanctions under international law, it is not a pressing problem for States.
- Nevertheless, when States convert these breaches into offences, establishment of penal responsibility in the same terms as for grave breaches becomes unavoidable.[78]

C. Conclusions

To conclude, the international law of war makes little reference to penal responsibility for grave breaches, so practically all regulations on grave breaches have to be established by domestic legislation. As with the types of offence, the resultant disparities between the positions of various governments can only lead to inequities. As regards minor violations, only States that treat these as offences are obliged to deal with the question of penal responsibility.

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[76] Some countries have introduced their own modifications of responsibility, among them *Spain*, which has restricted penal responsibility to members of the armed forces, and *Portugal*, which has done the same. This position is very much open to criticism, as persons who violate the laws and customs of war have to be tried for responsibilities that are hard to fit into other codes of punishment. The *United Kingdom* expressly establishes the responsibility of persons committing or taking part in, or acting as accomplices in or abettors of, breaches wherever committed (so rejecting its old territorial tradition); and *Holland* expressly assigns responsibility to a person giving an unlawful order.

Thorough examination of the texts (unfortunately not available) of other countries would probably lead to their inclusion in this list.

[77] *Sweden*, which has adopted the international rules on the penal responsibility of superiors for a breach committed by a subordinate, when the superior, although aware of it, did not repress it or did not prevent it if it had not yet taken place, and *Norway*, which assigns responsibility to persons committing breaches of the Conventions and to their accomplices, may be included in this group.

[78] As the *Commentary on the Protocols, op. cit.*, p. 976, Note 11, observes: "Nor does it prevent Contracting Parties from providing in their national legislation for the penal repression of yet other breaches; those, however, would only be punishable if committed by members of their own armed forces". This was the position adopted by the Italian delegate to the Diplomatic Conference on Humanitarian Law of 1974-1977 (CDDH/SR.44).

3. Penal sanctions

The penal provisions of the law of war follow the general principle that the penal sanction is the immediate consequence of penal responsibility and the ultimate or intermediate consequence of the breach.

As in the whole system, the international basis of this principle is not at all clearly defined and it is absolutely essential to supplement it by domestic legislation.

A. The international basis

The international basis is so scanty as to be hardly more than an indication of a general principle.

a) ***The texts*** — The basic provisions referred to above (Article 49 of the First Convention and corresponding articles in the other three Conventions, and Articles 85 and 86, para. 1, of Protocol I) require States to enact any legislation necessary *"to provide effective penal sanctions"* for grave breaches. They go on to say that States must *"take measures necessary for the suppression of all acts contrary* (to the Conventions and Protocol) *other than ... grave breaches"*.

Protocol I merely broadens the scope of sanctions for the breaches it mentions.

b) ***Comment and conclusion*** — It follows that:

International law requires States to impose penal sanctions only for the breaches described as grave breaches in the Conventions and Protocol I.

- As for breaches not expressly described as grave, i.e., other acts contrary to international law, the only obligation required of States is to repress them. States are not obliged to fix penalties, but there is nothing to prevent them from doing so if they wish.[79]
- The penal sanctions to be fixed by States for grave breaches have to be proportionate or adequate to the gravity of the breach.[80] This means that States have to establish a scale of penalties of various

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[79] This only arises if States convert what international law regards as breaches other than grave breaches into offences or crimes. They can do this, and some of them have done it.

[80] The *Commentary on the First Convention, op. cit.*, p. 364, observes that "The legislation enacted on the basis of this paragraph should, in our opinion, specify the nature and extent of the penalty for each infraction, taking into account the principle of due proportion between the severity of the punishment and the gravity of the offence."

degrees of severity and perhaps even of different kinds, following their usual internal methods.[81]

- These principles are applicable both to penalties for the grave breaches specified in the Conventions and to penalties for the grave breaches specified in Protocol I, since, as stated above, the system is the same for the Conventions and the Protocol.
- Needless to say, this — so to speak — complete delegation of the authority of international law to domestic legislation in the matter of penalties has caused complete anarchy in the system, with countless ill effects.[82]

B. Supplementary national legislation

It is for States to supplement these principles in their domestic legislation.

a) ***The texts*** — As is clear from the general provisions under consideration, States *"undertake to enact any legislation necessary"* to provide penal sanctions for grave breaches and to take *"measures necessary"* to repress other breaches.

Under these international obligations, States undertake to adopt against grave breaches measures different from those they take against minor violations. We must therefore take this distinction as the starting point of our study of the measures taken.

b) ***Grave breaches*** — States imposing penalties for grave breaches in accordance with their undertaking generally take measures that are of three kinds:

In some countries the penalties for grave breaches or breaches rated as such because they are offences under ordinary law are severe or very severe. In exceptional circumstances, or when the breach has

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[81] A penalty is a creation of the law. Therefore, technically, a penalty is only a penalty if national legislation regards it as such. There is no international concept of penalty. Therefore penalties inevitably differ widely from one national legislation to another. Furthermore, breaches of the law of war have special connotations in relation to ordinary offences in all national legislations. Probably, therefore, it is not appropriate to apply only ordinary penalties to persons guilty of such breaches. (See J. Y. Dautricourt, "La protection pénale des Conventions internationales humanitaires", *Revue de droit pénal et de criminologie*, vol. 35, No. 9, June 1955).

[82] Although we previously referred to this matter in connection with differences between States in typifying breaches, it may be as well to recall that different States impose vastly different penalties for the same act. International law has just not succeeded in improving on this.

very serious consequences, the death penalty may be imposed.[83] Some of this group of countries impose their penalties by means of a global severe, or relatively severe, penal sanction, others by separate sanctions for offences specified in detail. A mixed system is sometimes adopted.[84]

Another group imposes penalties that are relatively light in comparison with the seriousness of the offence.[85] As in the previous group, some of these countries fix a global penalty with a comparatively low upper limit; others provide penalties — none of them severe — for specific offences.[86]

In some other countries[87] (whose system of penalties may be global, individual or mixed), penalties range from extremely light to extremely severe.

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[83] Article 69 of the *Spanish* Military Penal Code, for example, provides that any person guilty of an act of violence against an enemy who has surrendered or is defenceless shall be imprisoned for a period of not less than four months and not exceeding four years. If he causes serious injury the penalty is from five to 15 years' imprisonment; and if he causes death, from 15 to 25 years' imprisonment, or even the death penalty.

[84] The countries that might be described as "severe penalty countries" are: the *United Kingdom*, which, for example, punishes the wilful murder of a person protected by one of the Conventions with life imprisonment; *Holland*, whose penalties vary from ten years' imprisonment to death, according to the seriousness of the breach and its consequences; *Australia*, where the maximum penalty for the wilful murder of a person protected by any of the Conventions is life imprisonment or death; *Canada*, which in similar circumstances can pass a death sentence; *Czechoslovakia, Hungary* and the *USSR*, which may pass the death sentence in certain cases; *Spain*, as stated above; and many other countries which we are unable to list.

[85] In fixing penalties for breaches of the law of war, States are conditioned by their penal systems and especially by their immediate past. Cf. Levasseur and Merle, *op. cit.*, p. 229: "It is apparently difficult to insert penalties for breaches of humanitarian law into a national system of penalties in a way sufficiently in harmony with the context. Such insertions recall the recent past: the severity of penalties varies greatly from State to State according to whether a large number of its nationals have been victims or perpetrators of breaches".

[86] In this group may be included *Norway*, where the maximum penalty in the Military Penal Code is four years' imprisonment but may undoubtedly be increased by applying special provisions; *Denmark*, where the maximum penalty is twelve years' imprisonment; *Switzerland*, where the term of imprisonment varies from three days to three years, and in serious cases from one year to twenty years; *Thailand*, which reports that its maximum penalty is seven years' imprisonment and, clearly, *Germany*, which has a Bill imposing a maximum penalty of ten years' imprisonment, which Levasseur and Merle: (*op. cit.*, p. 230) call "astonishingly moderate". Generally speaking, these penalties are lenient in comparison with those of other countries, but can in certain cases be heavy.

[87] *Sweden*, whose penalties for such breaches vary from two years' to life imprisonment; and *Brazil*, where they range from light to the death penalty. *Spain* (already referred to) might also be included; and — this classification being only approximate and somewhat capricious — so might some other countries.

c) ***Minor violations*** — The following rules for minor violations may be inferred from the preceding pages:

States are not obliged to fix any penalty for breaches of the law of war other than the grave breaches specified in the Conventions of 1949 and Protocol I of 1977.

They can, however, fix penalties and disciplinary sanctions if they convert breaches other than grave breaches into offences, or if they regard them merely as misdemeanours and include them in their regulations in order to repress them or make them liable to disciplinary sanctions.

C. Conclusion

To conclude, fixing penalties is entirely a matter for the States; international law imposes no limits; to say that sanctions have to be adequate is to give national legislation a blank cheque, as we have just seen.[88] For minor violations States have still greater freedom, being not even obliged to fix penalties for them.

III. THE PROCEDURAL LAW OF WAR

We now come to adjective or procedural rules, whose purpose is to apply the penal or substantive provisions of the law of war. It raises the fundamental problems of what courts are to try breaches, the competence of those courts and, lastly, the procedure to be followed.

1. The competent courts

It has not yet been settled what courts are to impose penalties for breaches. Indeed, the matter has hardly been raised. It will therefore have to be settled by rational interpretation of the subject matter rather than by reference to the very few relevant provisions.

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[88] Again, it is distressing to see the great disparities in the penalties fixed, although the acts and their consequences are similar. Perhaps international law could not go any further; here too it seems that the thorny issue of national sovereignty is involved.

A. Relevant international law

In addition to some rare references to the subject in the general provisions on repression, the international treaties contain several other provisions that give invaluable guidance.

a) ***The texts*** — Under Article 49 of the First Convention (and its corresponding articles in the other Conventions), each Contracting Party is under the obligation to search for persons accused of grave breaches "and shall bring such persons before its own courts". It may also, if it so prefers, "hand such persons over for trial to another High Contracting Party concerned" rather than, it is implied, trying them in its own courts.

Article 84 of the Third Convention of 1949, relative to prisoners of war, contains a rule that can shed light on the attitude of international law to this question; it says:

"A prisoner of war shall be tried only by a military court, unless the existing laws of the Detaining Power expressly permit the civil courts to try a member of the armed forces of the Detaining Power in respect of the particular offence alleged to have been committed by the prisoner of war.

In no circumstances whatever shall a prisoner of war be tried by a court of any kind which does not offer the essential guarantees of independence and impartiality as generally recognized".

In connection with another kind of breach, Article 66 of the Fourth Convention relative to civilian persons requires the courts to be "properly constituted, non-political military courts".

Article 75, para. 4, of Protocol I, which deals with the treatment of civilian persons who are in the power of a party to the conflict, states that:

"No sentence may be passed and no penalty may be executed on a person found guilty of a penal offence related to the armed conflict except pursuant to a conviction pronounced by an impartial and regularly constituted court".

b) ***Comment and conclusion*** — All these provisions appear to indicate a general policy in international law regarding courts, which is basically as follows:

- The courts that are to try persons committing one of the grave breaches specified in the Conventions or Protocol I shall be the national courts of the Power in whose hands the accused persons

are, or the national courts of another Power to which those persons are handed over in circumstances we shall mention below.[89]

- These national courts may be military or civil, depending on the existing laws of the Detaining Power, and there is accordingly no need of special courts for the grave breaches mentioned in the international texts.
- The national tribunals must offer the essential guarantees of independence and impartiality as generally recognized and be constituted in accordance with the law.
- Consequently, courts that on account of their composition or activities may be described as political courts may in no circumstances be used.
- The courts trying aliens must be the same as those trying nationals of the country for the same kind of grave breaches.[90]

B. National courts

The supplementary regulations to be enacted by States on this subject present no difficulty, as the general delegation of powers to national courts means that States will use their own legal systems.

All States have, in principle, civil and military courts. Military courts try military personnel, their scope varying according to the criteria adopted. They may also try civilians in certain circumstances. However, since grave breaches of the Conventions and Protocol I can be committed only in wartime, we are at present concerned only with finding out what kind of courts exist in wartime.

Very briefly, and to give a few examples, in this respect States fall into three groups:

- States which in wartime have military courts to try breaches of the

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[89] On various occasions the United Nations has envisaged setting up an "international judicial organ" or "Criminal Chamber of the International Court of Justice" (see the UN Resolutions of 11 December 1946 (No. 95(1)), 9 December 1948, and 11 December 1957). This has not yet been set up and is unlikely to be established in the near future. The law of war therefore has to resort to national tribunals.

[90] The *Commentary on the First Convention, op. cit.*, p. 366, observes that "Proceedings before the courts should be uniform in character, whatever the nationality of the accused. Nationals, friends and enemies should all be subject to the same rules of procedure, and should be judged by the same courts".

law of war, and also civil courts to try breaches committed by civilians;[91]

- States that have military courts in time of war and still have civil courts that in principle are competent to try these breaches, although part of their competence is taken over by the military courts;[92]
- States that in time of war have only military courts to try persons accused of the breaches mentioned in the Conventions and Protocol I.[93]

C. Conclusions

To conclude, the international law of war puts States under the obligation of acting through their national courts, which must offer as a minimum the guarantees mentioned above. To adapt to international law, States need not alter their legal system; all they have to do is use it to punish breaches of international law.[94]

2. The competence of the courts

The competence of national courts is a matter to be settled by domestic legislation, but a number of international regulations will also be found useful in this respect.

A. International regulations

Of the international texts, only the Conventions are relevant here.

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[91] This group includes the *United States*, which in wartime has both kinds of courts and may set up other civil courts, *Ireland*, the *Federal Republic of Germany*, *Spain*, *Belgium* and *Denmark*.

[92] As in the *United Kingdom*, which in wartime has military courts for military personnel and civil courts for civilians, although some civilians may be transferred to the competence of military courts, and *Norway*, whose practice is similar to that of the United Kingdom, military courts trying civilians in time of war for breaches committed in the theatre of war.

[93] For example, *Switzerland*, which in time of war and in the present context has only military courts, and *Italy*, where in time of war civilians accused of such breaches are tried by military courts.

[94] As stated above, because of the paucity of pertinent data we can present only a few examples, and these are disputed. This is also true of the competence of the courts, which will be examined below.

a) ***The texts*** — The second paragraph of Article 49 of the First Geneva Convention (and the corresponding articles in the other three Conventions) requires each High Contracting Party to search for persons accused of grave breaches,

"... and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, ... hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie *case"*.

b) ***Comment and conclusion*** — The effects of this provision may be summarized as follows:

- It establishes a rule of national jurisdiction rather than a rule of competence, for it does not determine the competence of each and every national court but does determine, much more fully, the jurisdiction of the State.
- State jurisdiction in relation to grave breaches is determined in accordance with the physical whereabouts of the accused persons, irrespective of their nationality.
- International law establishes the obligation to try persons accused of grave breaches but does not specify in which country they should be tried. It therefore leaves the State detaining the accused person to decide whether to try him in its own courts or hand him over to another State concerned.
- The only thing that the State holding the accused person may not do is to refrain from bringing him before its national courts whilst also refraining from handing him over. It must apply the old Roman adage *aut judicare aut dedere*.

B. The competence of national courts

Thus the entire problem of the competence of national courts is to be settled by each State as it sees fit. All States have their own rules regarding competence, which in time of war place them in one of two groups:

- Countries which have military courts to try military personnel accused of grave breaches, and only exceptionally hand over those persons to civil courts.[95]

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[95] This group comprises *Switzerland*, whose Military Penal Code declares that military jurisdiction is in all cases competent to try either military personnel or

- Countries which have civil courts to try civilians accused of grave breaches, but in some circumstances bring them before military courts.[96]

C. Conclusions

To conclude, what international law establishes is the national jurisdiction of each State. The determining factor is the presence of the accused person on the territory of the State, irrespective of his nationality and of where the breach was committed. The competence of each court is a matter of national legal organization and depends on the existence of a state of war.[97]

3. Judicial procedure

The question of what judicial procedure is to be followed in order to punish grave breaches of the Conventions of 1949 and Protocol I of 1977 is settled by reference to a number of international texts which establish minimum degrees of State action and of the procedural provisions that each State applies in this connection. In general, the greater part of this question appears to be regulated by national legislation.

A. Judicial procedure under international law

The international regulations are not really rules of procedure, but more exactly rules providing procedural guarantees; for international law does not establish the procedure itself.

a) ***The texts*** — The international provisions are contained in Article 49 of the First Convention (and its corresponding articles in the other three Conventions), reading:

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civilians; *Turkey, Denmark, Belgium,* by virtue of the Bill put before Parliament; *France,* which brings its military personnel, persons treated as French military personnel and, in the absence of any document assigning competence, civilian persons also, before military courts; *Norway, Ireland,* the *United Kingdom, Canada, Brazil* and the *United States,* which in time of war try military personnel in civilian courts if no military court is available.

[96] *Denmark,* the *United States* (unless special courts are set up), *Ireland, Canada,* the *Federal Republic of Germany,* and *Brazil.*

[97] The legal organization of many of the States referred to is more complex, but we have purposely simplified it because grave breaches can be committed only in time of war.

"Each High Contracting Party shall be under the obligation to search for (accused) persons" for trial by its own courts or, if it prefers, *"in accordance with the provisions of its own legislation, hand such persons over to another High Contracting Party concerned, provided such High Contracting Party has made out a* prima facie *case"*.

The last paragraph of the Article adds that:

"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".

These refer to the right of defence (Article 105), the right of appeal (Article 106), notification of sentence (Article 107) and execution of penalties (Article 108).

Article 52 of the First Convention, Article 53 of the Second Convention, Article 132 of the Third Convention and Article 149 of the Fourth Convention, which refer to the procedure for enquiry into violations of the Conventions, are also applicable.

Protocol I contains regulations directly concerning procedure:[98]

"...

3. Any person arrested, detained or interned for actions related to the armed conflict shall be informed promptly, in a language he understands, of the reasons why these measures have been taken. Except in cases of arrest or detention for penal offences, such persons shall be released with the minimum delay possible and in any event as soon as the circumstances justifying the arrest, detention or internment have ceased to exist.

4. No sentence may be passed and no penalty may be executed on a person found guilty of a penal offence related to the armed conflict except pursuant to a conviction pronounced by an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure, which include the following:

a) *the procedure shall provide for an accused to be informed without delay of the particulars of the offence alleged against him and shall afford the accused before and during his trial all necessary rights and means of defence;*

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[98] See Protocol I, Article 75.

b) *no one shall be convicted of an offence except on the basis of individual penal responsibility;*

c) *no one shall be accused or convicted of a criminal offence on account of any act or omission which did not constitute a criminal offence under the national or international law to which he was subject at the time when it was committed; nor shall a heavier penalty be imposed than that which was applicable at the time when the criminal offence was committed; if, after the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby;*

d) *anyone charged with an offence is presumed innocent until proved guilty according to law;*

e) *anyone charged with an offence shall have the right to be tried in his presence;*

f) *no one shall be compelled to testify against himself or to confess guilt;*

g) *anyone charged with an offence shall have the right to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;*

h) *no one shall be prosecuted or punished by the same Party for an offence in respect of which a final judgement acquitting or convicting that person has been previously pronounced under the same law and judicial procedure;*

i) *anyone prosecuted for an offence shall have the right to have the judgement pronounced publicly; and*

j) *a convicted person shall be advised on conviction of his judicial and other remedies and of the time-limits within which they may be exercised.*

5. Women whose liberty has been restricted for reasons related to the armed conflict shall be held in quarters separated from men's quarters. They shall be under the immediate supervision of women. Nevertheless, in cases where families are detained or interned, they shall, whenever possible, be held in the same place and accommodated as family units.

6. Persons who are arrested, detained or interned for reasons related to the armed conflict shall enjoy the protection provided by this Article until final release, repatriation or re-establishment, even after the end of the armed conflict.

7. In order to avoid any doubt concerning the prosecution and trial of persons accused of war crimes or crimes against humanity, the following principles shall apply:

a) *persons who are accused of such crimes should be submitted for the purpose of prosecution and trial in accordance with the applicable rules of international law; and*

b) *any such persons who do not benefit from more favourable treatment under the Conventions or this Protocol shall be accorded the treatment provided by this Article, whether or not the crimes of which they are accused constitute grave breaches of the Conventions or of this Protocol.*

8. No provision of this Article may be construed as limiting or infringing any other more favourable provision granting greater protection, under any applicable rules of international law, to persons covered by paragraph 1".

Paragraph 1 refers to persons who are in the power of a party to the conflict and do not benefit from more favourable treatment.

Articles 89 and 90 of Protocol I also apply. They relate to co-operation with the United Nations and the International Fact-Finding Commission.

Lastly, Article 88 of Protocol I, referring to mutual assistance in criminal matters, reads:

"1. The High Contracting Parties shall afford one another the greatest measure of assistance in connexion with criminal proceedings brought in respect of grave breaches of the Conventions or of this Protocol.

2. Subject to the rights and obligations established in the Conventions and in Article 85, paragraph 1, of this Protocol, and when circumstances permit, the High Contracting Parties shall co-operate in the matter of extradition. They shall give due consideration to the request of the State in whose territory the alleged offence has occurred.

3. The law of the High Contracting Party requested shall apply in all cases. The provisions of the preceding paragraphs shall not, however, affect the obligations arising from the provisions of any other treaty of a bilateral or multilateral nature which governs or will govern the whole or part of the subject of mutual assistance in criminal matters".

b) ***Comment and conclusion*** — The following international rules of procedure may be deduced from the above provisions:

- The first obligation of States is to search for persons accused of having committed grave breaches. This may be done *ex officio* or at the request of one of the parties,[99] whether or not the accused persons are on its territory.[100]

- This obligation is the direct consequence of the existence of a grave breach. To establish that such a breach has been committed, the parties may resort to the enquiry procedure laid down in the Conventions or to the procedure of the International Fact-Finding Commission established in Protocol I and already considered above.[101]

- Once the existence of a breach has been established, and once the persons accused of the breach have been found, the State concerned is under an obligation to bring them before its courts, whatever the nature of the breach and the nationality of the accused, unless it prefers to hand them over to another State concerned for trial.

- If the State proposes to bring the accused persons before its own courts, due process shall be followed in accordance with the State's civil or military laws of procedure, as appropriate, but the following minimum safeguards established by international law must be observed:

  — as a general rule, all accused persons shall in all circumstances benefit by the safeguards of proper trial and defence, which shall not be less favourable than those specified for prisoners of war in Articles 105ff of the Third Convention (see above).[102]

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[99] The *Commentary on the First Convention, op. cit.*, p. 366, states: "It is not, therefore, merely at the instance of a State that the necessary police searches should be undertaken; they should be undertaken automatically."

[100] For this, recourse may be had to what is known as mutual legal assistance, or to Interpol (the International Criminal Police Organization, ICPO) or on specific points to the *Asistencia mutua judicial en materia penal.*

[101] This procedure is applicable both to breaches committed by States and breaches committed by individuals. Accordingly, our previous remarks referring to States in this connection also apply.

[102] Cf. the *Commentary on the First Convention, op. cit.*, p. 369: "The Diplomatic Conference acted wisely when it decided to refer to the rules already established for prisoners of war. It preferred not to make new law, but to refer instead to an existing body of law which had stood the test of time and would provide the accused with sure and certain safeguards." In our view it would perhaps have been preferable to adopt the contrary course of establishing the general safeguards in Article 49 of the First Convention (and the corresponding articles in the other Conventions) and referring to them in the Convention relative to prisoners of war.

— If the accused persons have prisoner-of-war status they must be afforded at least the guarantees stipulated for judicial proceedings in Articles 99ff of the Third Convention.

— Where the accused persons are in the hands of the Power that is to try them, are affected by the state of war and do not benefit by more favourable treatment, the procedural guarantees offered by paragraphs 3ff of Article 75 of Protocol I must be observed. The categories of persons protected by these guarantees are: nationals of States which are not party to the Conventions, nationals of States not party to the conflict, nationals of allied States, refugees and stateless persons, mercenaries, persons who have been refused prisoner-of-war status and persons who, because they are engaged in activities hostile to the security of the State, are not entitled to claim the protection of Article 5 of the Fourth Convention. Such garantees are therefore only minimal.[103]

- If the State holding the accused persons prefers to hand them over to another Contracting Party, it must do so in accordance with the provisions of its own legislation and only if that other party is concerned in the trial and has brought a *prima facie* case ("sufficient charges") against the accused.[104] These conditions are merely safeguards in the event of extradition, which for that matter appear in nearly all treaties of this kind.

- Furthermore, the Parties must cooperate in the matter of extradition and give due consideration to the request of the State on whose territory the alleged offence was committed. The law of the Contracting Party to which the request is made shall apply in all cases. This shall not affect the obligations arising from the provisions of any other treaty on the subject of mutual assistance in criminal matters.

- In general, and not only in cases of extradition, the High Contracting Parties must afford one another the greatest measure

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[103] See the *Commentary on the Protocols, op. cit.*, pp. 869-870.

[104] The meaning of "*prima facie* case" has been interpreted by doctrine. Thus the *Commentary on the First Convention, op. cit.*, p. 366, states: "But what exactly is meant by 'sufficient charges'? The answer will as a rule rest with national legislation, but in general it may be assumed to mean a case in which the facts would justify proceedings being taken in the country to which application is made for extradition. Legal authorities in the Anglo-Saxon countries speak in such cases of *prima facie* case... and this term is used in the English text of the Article."

of assistance in connection with criminal proceedings brought in respect of grave breaches.

B. National procedure

It is not, in principle, vitally important to refer to the position of States regarding procedure for the punishment of grave breaches, since each organizes its procedure as it sees fit; but they fall into two groups, as follows:

- Countries which have added to their internal legislation, in whatever form, provisions for punishment of the grave breaches specified in the Conventions and Protocol, but have not amended their relevant procedural legislation and therefore apply whatever general rules of procedure they see fit.[105]

- Countries which have added to their legislation provisions for punishment of the grave breaches specified in the Conventions, and in the Protocol if they have ratified it, and have at the same time regulated the relevant procedure either independently or by modifying existing procedure.[106]

C. Conclusions

To conclude, international law does not establish any procedure to enforce penal responsibility for commission of a grave breach. This is not surprising when it is realized that there are no international courts and no international competence. The procedure applicable is therefore that of each State whose courts deal with these breaches. International law merely establishes minimum procedural safeguards. These are usually present, at least formally, in the procedural legislation of nearly all States.

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[105] The immense majority of countries are in this group. They include *Spain, Switzerland, Norway, Sweden* (which follows the British model in typification but not in procedure), *France, Italy, Portugal* and many others.

[106] These include *Holland,* which institutes special courts and procedure, the *United Kingdom,* which in its Geneva Conventions Act of 1957 goes further in adopting procedure for trial than in the offences themselves, and deals with nearly all the procedural problems touched on by international law, *Ireland, Canada, India, New Zealand* (which exactly follow the British model as far as procedure is concerned), and other countries, mainly members of the Commonwealth.

GENERAL CONCLUSIONS

The internal legislation of States provides for repression of breaches of its laws. International law too has in its own way a system of punishment; and as under international law unlawful acts can be committed by States, international organizations and individuals, repression of such acts is directed at these three classes of offenders.

The law of war is part of international law; it therefore shares all the problems of international law and can have recourse to general international regulations of all types. The system to repress breaches of the law of war is therefore, with variants, merely part of the system to repress violations of international law in general.

Evidently, States cannot only commit acts contrary to international law in general but also, specifically, unlawful acts of war when taking part in an armed conflict. International organizations are in the same situation, for, through the intermediary of the troops put at their disposal, they can take part in operations that are clearly warlike.

However, the most disquieting problem, and the one that prompts most questions, is that of breaches, and specifically breaches of the law of war, committed by individuals who are thus in violation of international law. The present system in that respect is a mixed one. International law provides the legal basis for repression and the States build on it with their own internal regulations. This raises many difficulties for which there is no easy solution at the present time.

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