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National Implementation of the Penal Provisions of Chapter 4 of the Second Protocol of 26 March 1999 to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict

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PART I

INTRODUCTION

Chapter 1

OUTLINE OF THE RELEVANT PROVISIONS OF CHAPTER 4 OF THE SECOND HAGUE PROTOCOL

1. INTRODUCTION

1.1 General

The Second Protocol[1] to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict[2] was adopted at The Hague on 26 March 1999, in order to supplement the provisions of the Convention through measures to reinforce their implementation.[3] The Protocol, which is not yet in force,[4] operates by reference to the Convention, elaborating on and refining its obligations as between States Parties.[5]

One important range of measures introduced by the Protocol as a means of reinforcing the implementation of the Convention are those contained in Chapter 4 of the instrument, entitled 'Criminal responsibility and jurisdiction'.

Chapter 4, like the Protocol as a whole, applies to armed conflicts both of an international and non-international character. Article 22 (1) of the Protocol expressly provides:

> This Protocol shall apply in the event of an armed conflict not of an international character, occurring within the territory of one of the Parties.[6]

The applicability of this article specifically to the penal provisions of Chapter 4 of the Protocol is affirmed by implication in article 22 (4).[7] The application of the Protocol, and thus of Chapter 4, to both international and non-international armed conflicts, without distinction whatsoever, goes beyond the more limited application of the 1954 Hague Convention to conflicts not of an international character, as provided for in article 19 of that instrument.

1.2 Overview of Chapter 4

Chapter 4 of the Protocol imposes on States Parties two distinct sets of obligations. The first mandates legislative measures of a specifically penal nature, the second legislative and other measures which may include those of a penal nature.

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1 Hereafter, 'the Second Hague Protocol' or 'the Protocol'.

2 14 May 1954, The Hague, 249 UNTS 240 ['the 1954 Hague Convention' or 'the Convention'].

3 Protocol, preamble, second recital. Note that States Parties to the Protocol must also be High Contracting Parties to the Convention: see Protocol, arts 40-42.

4 The Protocol will enter into force three months after twenty instruments of ratification, acceptance, approval or accession have been deposited, in accordance with art 43 (1). As at 7 Jan 2002, ten such instruments had been deposited: see www.unesco.org/culture/laws/hague/html_eng/signatories.shtml.

5 See Protocol, art 2.

6 Article 22 (2) makes clear that the Protocol 'shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature'.

7 Article 22 (4) states: 'Nothing in this Protocol shall prejudice the primary jurisdiction of a Party in whose territory an armed conflict not of an international character occurs over the violations set forth in Article 15.'

The first range of obligations are those attaching to the five 'serious violations' of the Protocol defined in article 15 (1). These obligations are to be found articles 15 (2) to 19.

The second set of obligations are those attaching to the two 'other violations' referred to in article 21. These obligations are to be found in article 21 itself.

2. SERIOUS VIOLATIONS

2.1 Definition

Article 15 (1) of the Protocol enumerates the category of offences within the meaning of the Protocol known collectively as 'serious violations'. Article 15 (1) states:

> Any person commits an offence within the meaning of this Protocol if that person intentionally and in violation of the Convention or this Protocol commits any of the following acts:
> (a) making cultural property under enhanced protection the object of attack;
> (b) using cultural property under enhanced protection or its immediate surroundings in support of military action;
> (c) extensive destruction or appropriation of cultural property protected under the Convention and this Protocol;
> (d) making cultural property protected under the Convention and this Protocol the object of attack;
> (e) theft, pillage or misappropriation of, or acts of vandalism directed against cultural property protected under the Convention.

The reference in subparagraphs (a) and (b) to 'cultural property under enhanced protection' is to cultural property protected under the regime provided for in Chapter 3 of the Protocol ('Enhanced Protection').

2.2 Obligations on States Parties

2.2.1 *Criminalisation*

The first limb of the first sentence of article 15 (2) provides:

> Each Party shall adopt such measures as may be necessary to establish as criminal offences under its domestic law the offences set forth in this Article ...

This is the most fundamental obligation imposed on States Parties in respect of the serious violations of the Protocol set forth in article 15 (1). It applies to all the offences defined in subparagraphs (a) to (e) of that article.

2.2.2 *Penalties*

The first sentence of article 15 (2) continues:

> ... and to make such offences punishable by appropriate penalties.

That is, each State Party is obliged to adopt such measures as may be necessary to make serious violations of the Protocol punishable by appropriate penalties.

Article 15 (2) itself contains no indication of the sort of penalties considered 'appropriate'. In this light, the first limb of the second sentence of article 15 (2) is relevant. This provides that, when implementing their obligations under the first sentence of article 15 (2), 'Parties shall comply with general principles of law and international law ...'.

International legal principles regarding the imposition of penalties for war crimes are at present embryonic; *a fortiori*, such principles as may be relevant to war crimes in respect of cultural property.

What is clear at least is that imprisonment is the only appropriate penalty for war crimes.[8] Fines and forfeiture alone are inappropriate, although they may be imposed in addition to a custodial sentence.[9]

As regards the statutory maximum sentence by which States Parties might make serious violations of the Protocol punishable, the Statute of the International Criminal Court—which includes within the Court's jurisdiction offences relevant to the destruction and misappropriation of cultural property, generically speaking—provides, as a general rule, for '[i]mprisonment for a specified number of years, which may not exceed a maximum of 30 years'.[10] It provides additionally for a 'term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person'.[11] Rule 101 (A) of the Rules and Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia[12]—which also enjoys jurisdiction *ratione materiae* over war crimes for the destruction and misappropriation of cultural property, again generically speaking—states that a 'convicted person may be sentenced to imprisonment for a term up to and including the remainder of the convicted person's life'.[13]

2.2.3 *General principles of law and international law*

Overview

The second sentence of article 15 (2) provides in full:

> When doing so [*ie* when adopting such measures as may be necessary to establish as criminal offences under their respective domestic laws the offences set forth in article 15 (1)], Parties shall comply with general principles of law and international law, including the rules extending individual criminal responsibility to persons other than those who directly commit the act.

This sentence is relevant not only to the attachment of penalties under national law to the offences enumerated in article 15 (1), as considered above. On the contrary, it is pertinent to all aspects of national criminalisation of serious violations of the Protocol.

Material scope

The second sentence of article 15 (2) is referable in particular to the material scope of the offences defined in article 15 (1) – that is, to the various forms of conduct for which a person may be held responsible for a

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8 See *eg* Rome Statute of the International Criminal Court (UN Doc A/CONF.183/9, English text as corrected) ['ICC Statute'], art 77 (1); Statute of the International Criminal Tribunal for the former Yugoslavia (UN Doc S/25704, Annex, as amended) ['ICTY Statute'], art 24 (1); Statute of the International Criminal Tribunal for Rwanda (UN Doc S/RES/955 (1994), Annex) ['ICTR Statute'], art 23 (1). Note that these provisions all pertain to trial by international criminal tribunals (and, for that matter, by the specific tribunals in question). All the same, they are indicative of the principles one might expect to be embodied in analogous national legislation.

9 See *eg* ICC Statute, art 77 (2); ICTY Statute, art 24 (3); ICTR Statute, art 23 (3).

10 ICC Statute, art 77 (1)(a).

11 ICC Statute, art 77 (1)(b).

12 As amended, IT/32/Rev.22.

13 It will, of course, be a matter for the court or tribunal in question to determine the sentence to be imposed in each case, 'taking into account such factors as the gravity of the crime and the individual circumstances of the convicted person': ICC Statute, art 78 (1); see also ICTY Statute, art 24 (2); ICTR Statute, art 23 (2).

serious violation of the Protocol.[14] These include both actual participation in the offence and secondary forms of criminal responsibility.

The various modes recognised by international law of participation in an offence are derived from general principles of criminal responsibility common to the various national legal traditions.

The most basic mode of participation in an offence, as recognised by international law, is the actual commission of the offence.[15] That is, in the words of article 15 (2), criminal responsibility attaches under international law to 'those who directly commit the act'. Commission can include omission, in cases where the accused has a legal duty to act.[16]

International law most likely also recognises criminal responsibility for attempt to commit an offence.[17]

The second sentence of article 15 (2) makes special reference to 'the rules extending criminal responsibility to persons other than those who directly commit the act'.

In this respect, an important mode of participation in an offence, as recognised by international law, is ordering, soliciting or inducing the commission of an offence which occurs or is attempted.[18] Responsibility as principal for ordering the commission of an offence is to be distinguished from command and superior responsibility, forms of secondary criminal responsibility involving failure to act.[19]

International law also embodies criminal responsibility where, for the purpose of facilitating the commission of an offence, a person aids, abets or otherwise assists in its commission or attempted commission, including providing the means for its commission.[20]

In addition, international law imposes criminal responsibility in cases where a person contributes in any other way to the commission or attempted commission of an offence by a group of persons acting with a

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[14] Note that the question of the mental element required for serious violations (*viz* intention) is dealt with in the *chapeau* to art 15 (1).

[15] See ICC Statute, art 25 (3)(a), adding the rider 'whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible'; see also ICTY Statute, art 7 (1); ICTR Statute, art 6 (1).

[16] *Tadic*, IT-94-1, Appeals Chamber, Judgment, 15 July 1999, para 188; *Rutaganda*, ICTR-96-3, Trial Chamber, Judgment, 6 Dec 1999, para 41; *Kunarac, Kovac & Vukovic*, IT-96-23 & IT-96-23/1, Trial Chamber, Judgment, 22 Feb 2001, para 390.

See also, in this light, art 86 (1) of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), Geneva, 8 June 1977, 1125 UNTS 3.

[17] See ICC Statute, art 25 (3)(f), adding the rider 'by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions'. The article goes on to say: 'However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up that criminal purpose'.

But note that the inchoate offence of attempt is not embodied in the statute of either the ICTY or ICTR; indeed, reasoning *a contrario*, the ICTR Trial Chamber held in *Rutaganda*, *supra*, at para 34 that 'a person engaging in any form of participation in ... crimes [other than genocide] falling within the jurisdiction of the Tribunal ... could incur criminal responsibility only if the offence were consummated'.

[18] ICC Statute, art 25 (3)(b); see also ICTY Statute, art 7 (1); ICTR Statute, art 6 (1).

[19] See *eg Akayesu*, ICTR-96-4, Trial Chamber, Judgment, 2 Sep 1998, para 471.

[20] ICC Statute, art 25 (3)(c); see also ICTY Statute, art 7 (1); ICTR Statute, art 6 (1).

common purpose.[21] A contribution of this sort must be made either with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of an offence, or be made in the knowledge of the group's intention to commit the offence.[22]

Finally, international law recognises secondary criminal responsibility for offences in the form of command and superior responsibility,[23] forms of criminal responsibility by omission. The most precise formulations of the closely related doctrines are to be found in article 28 of the Statute of the International Criminal Court ('Responsibility of commanders and other superiors'). Article 28 provides:

> (a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:
>
> (i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and
>
> (ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.
>
> (b) With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:
>
> (i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;
>
> (ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and
>
> (iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

Non-prescriptibility

One final question linked, in a broad sense, to general principles of criminal responsibility recognised by international law is the prescriptibility or otherwise of the serious violations of the Protocol set forth in article 15 (1).

Best international practice in this regard is reflected in article 1 of the United Nations Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity 1968,[24] which

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[21] ICC Statute, art 25 (3)(d). This mode of commission is not embodied in the statute of either the ICTY or ICTR; but criminal responsibility for a 'common purpose', 'common design' or 'joint criminal enterprise' has been recognised in the jurisprudence of both tribunals: see *Tadic*, *supra*, paras 185-229; *Kayishema & Ruzindana*, ICTR-95-1-T, Trial Chamber, Judgment, 21 May 1999, paras 199-207.

[22] ICC Statute, art 25 (3)(d)(i) & (ii).

[23] See ICC Statute, art 28. The ICTY Statute, art 7 (3) and ICTR Statute, art 6 (3) refer only to a 'superior'; but it was held by the Appeals Chamber of the ICTY in *Delalic & Delic*, Appeals Chamber, Judgment, 20 Feb 2001, which saw no reason to depart from the Trial Chamber's analysis to this effect, that 'the principle of superior responsibility reflected in Article 7 (3) of the Statute encompasses political leaders and other civilian superiors in positions of authority' (para 195).
See also, in this light, Additional Protocol I, art 86, especially para (2).

[24] UN GA res 2391 (XXIII), 26 Nov 1968, Annex. See also the European Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity 1974, ETS Nº 82, art 1.

provides that no statutory limitation shall apply, *inter alia*, to war crimes. The non-prescriptibility of war crimes is also recognised in article 29 of the Statute of the International Criminal Court.[25]

2.2.4 *Jurisdiction*

Article 16 (1)[26] obliges each State Party to the Protocol to

> take the necessary legislative measures to establish its jurisdiction over the offences set forth in article 15.

The subsequent subparagraphs of the provision distinguish in this regard between the obligations attaching to all serious violations of the Protocol and that attaching only to the serious violations set forth in article 15 (1) subparagraphs (a) to (c) specifically.

As regards all serious violations of the Protocol, article 16 (1) obliges States Parties to establish jurisdiction

> (a) when such an offence is committed in the territory of that State;
> (b) when the alleged offender is a national of that State ...

That is, each State Party must provide for the jurisdiction of its criminal courts over all the offences set forth in article 15 (1) on the basis of territoriality and, in relation to extraterritorial commission, on the basis of nationality.[27]

In addition, as regards only those serious violations of the Protocol defined in article 15 (1) subparagraphs (a) to (c), States Parties are obliged to establish jurisdiction

> (c) when the alleged offender is present in its territory.

That is, each State Party must establish jurisdiction over the offences set forth in article 15 (1)(a) to (c) on the basis of universal jurisdiction, *viz* prescriptive jurisdiction over impugned conduct taking place outside the territory of the prosecuting state by a person not a national of that state, where the conduct does not constitute an attack on the fundamental interests of that state.[28] In this respect, what is mandated by article 16 (1)(c) is what might be called universal custodial jurisdiction – that is, the exercise of universal jurisdiction over offences in the event that the offender is subsequently present in the territory of the

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[25] This provision applies, strictly speaking, only to the International Criminal Court itself. All the same, article 29 might be expected to find reflection in the domestic laws of States Parties to the ICC Statute.

[26] Article 16 (1) is stated to be '[w]ithout prejudice to paragraph 2' of article 16. Paragraph (2) provides:

> 2. With respect to the exercise of jurisdiction ... :
> (a) this Protocol does not preclude the incurring of individual criminal responsibility or the exercise of jurisdiction under national and international law that may be applicable, or affect the exercise of jurisdiction under customary international law;
> (b) Except in so far as a State which is not Party to this Protocol may accept and apply its provisions in accordance with Article 3 paragraph 2, members of the armed forces and nationals of a State which is not Party to this Protocol, except for those nationals serving in the armed forces of a State which is Party to this Protocol, do not incur individual criminal responsibility by virtue of this Protocol, nor does this Protocol impose an obligation to establish jurisdiction over such person or to extradite them.

Paragraph (2) is itself stated to be without prejudice to article 28 of the Convention.

[27] Also known as 'active personality'.

[28] See the definition of universal jurisdiction given in de La Pradelle, 'La compétence universelle', in Ascensio, Decaux & Pellet (eds), *Droit International Pénal* (Paris: Pedone, 2000), Chap 74, §1. The last would justify extraterritorial jurisdiction over non-nationals on the basis of the 'protective principle'.

prosecuting state. There is no obligation on States Parties to make legislative provision, where domestically permissible, for trial *in absentia* pursuant to universal jurisdiction.

2.2.5 *Other obligations*

Overview

In addition to the obligations outlined above in sections 2.2.1 to 2.2.4, the obligations which form the basis of the survey of national legislation contained in Part II below, Chapter 4 of the Protocol imposes a range of other obligations on States Parties in respect of some or all of the serious violations of the Protocol set forth in article 15 (1).

Article 17

As regards those serious violations of the Protocol embodied in article 15 (1) subparagraphs (a) to (c), article 17 (1) imposes on State Parties to the Protocol the obligation to try or extradite any alleged offender found in their respective territories. Each State Party must ,'if it does not extradite [such] person, submit, without exception whatsoever and without undue delay, the case to its competent authorities for the purpose of prosecution, through proceedings in accordance with its domestic law or with, if applicable, the relevant rules of international law'.

Article 17 (2) embodies certain fundamental procedural safeguards for alleged offenders. It stipulates that any person against whom proceedings are commenced in connection with the Convention or Protocol 'shall be guaranteed fair treatment and a fair trial in accordance with domestic law and international law at all stages of the proceedings, and in no cases shall be provided guarantees less favorable ... than those provided by international law'.[29] These guarantees apply to proceedings in respect of all serious violations of the Protocol set forth in article 15 (1). They also apply to proceedings pursuant to legislative measures of a penal nature taken by States Parties in accordance with article 21. The guarantees in question are not restricted to prosecution but apply equally to extradition proceedings.

Article 18

Article 18 contains a range of provisions relevant to extradition. These provisions apply only to those serious violations of the Protocol set forth in article 15 (1) subparagraphs (a) to (c). Article 18 (1) states that such offences are deemed to be included as extraditable offences in any extradition treaty existing between any of the Parties before the entry into force of the Protocol. It also obliges Parties to include such offences in every extradition treaty subsequently concluded between them. Paragraphs (2) to (4) refine this obligation.

Article 19

Article 19 obliges States Parties to 'afford one another the greatest measure of assistance in connection with investigations or criminal or extradition proceedings brought in respect of [all] the offences set forth in Article 15, including assistance in obtaining evidence at their disposal necessary for the proceedings'.

Article 20

Finally, article 20 clarifies the permissible grounds on which a State Party may refuse a request for extradition in respect of those offences set forth in article 15 (1) subparagraph (a) to (c) or for mutual legal assistance in respect of any serious violation set forth in article 15 (1).

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[29] Article 17 (2) is expressly stated to be '[w]ithout prejudice to, if applicable, the relevant rules of international law'.

Article 20 (1) concerns the so-called 'political offence exception' commonly invoked in relation to obligations of extradition and mutual legal assistance. It states that the offences in question 'shall not be regarded as political offences or as offences connected with political offences or as offences inspired by political motives'. As such, article 20 (1) makes it clear that 'a request for extradition or for mutual legal assistance based on such offences may not be refused on the sole ground that it concerns a political offence or an offence connected with a political offence or an offence inspired by political motives'.

Article 20 (2) qualifies article 20 (1) by making savings to that provision in respect of certain human rights guarantees. It provides that nothing in the Protocol 'shall be interpreted as imposing an obligation to extradite or to afford mutual legal assistance if the requested Party has substantial grounds for believing that the request for extradition ... or for mutual legal assistance ... has been made for the purpose of prosecuting or punishing a person on account of that person's race, religion, nationality, ethnic origin or political opinion or that compliance with the request would cause prejudice to that person's position for any of these reasons'.

3. OTHER VIOLATIONS

3.1 Definition

Article 21 of the Protocol enumerates a category of 'other violations', of which there are two. They comprise 'the following acts when committed intentionally':

(a) any use of cultural property in violation of the Convention or [the] Protocol;
(b) any illicit export, other removal or transfer of ownership of cultural property in violation of the Convention or [the] Protocol.

The term 'other violations' in article 21 is used in contradistinction to the 'serious violations' of the Protocol set forth in article 15 (1).

3.2 Obligations on States Parties

Article 21 imposes on States Parties an obligation '[to] adopt such legislative, administrative or disciplinary measures as may be necessary to suppress' the violations defined in the provision.

The measures envisaged in article 21 may clearly encompass measures of a penal nature. Indeed, the imposition of penal sanctions in respect of the violations set forth in article 21 would be an appropriate means of giving effect to the obligation laid down in that article, given the gravity of the violations in question.

First, it would be appropriate for each State Party, in pursuance of the obligation of suppression laid down in article 21, to adopt such measures as may be necessary to establish as criminal offences under its domestic law the violations referred to in that article. The gravity of such offences would properly be reflected in their designation by each State Party as non-prescriptible.

Second, it would be appropriate for each State Party to establish its jurisdiction over the violations set forth in article 21 when such violations are committed in the territory of that State and, in the event of extraterritorial commission, when the alleged offender is a national of that State.

Finally, it would be appropriate for States Parties to deem the violations set forth in article 21 as extraditable offences in any extradition treaty existing between any of them, to include such offences in every extradition treaty subsequently concluded between them and to afford one another the greatest measure of assistance in connection with investigations or criminal or extradition proceedings brought in respect of them, including assistance in obtaining evidence at their disposal necessary for the proceedings. In this regard, such offences should not be regarded as political offences nor as offences connected with political offences nor as offences inspired by political motives.

3.3 Relationship with article 28 of the Convention

The obligation laid down in article 21 of the Protocol is declared to be without prejudice to article 28 of the Convention.

Article 28 of the Convention provides:

> The High Contracting Parties undertake to take, within the framework of their ordinary criminal jurisdiction, all necessary steps to prosecute and impose penal or disciplinary sanctions upon those persons, of whatever nationality, who commit or order to be committed a breach of the present Convention.

The provision reflects a compromise between those states in favour of penal sanctions giving rise to universal jurisdiction and those wanting a more limited regime.

The phrase 'penal or disciplinary' suggests that imprisonment and/or fines and forfeitures are not the only sanctions envisaged by article 28. Other forms of 'disciplinary sanctions', available in the context of each state's military jurisdiction, would be permissible means of giving effect to the obligation imposed.[30]

But, given the gravity of the breaches in question, the imposition of penal sanctions is a more appropriate means of giving effect to the obligation laid down in article 28.

Note that the sanctions envisaged in article 28 are to be imposed not only those persons who actually commit a breach of the Convention but also on those who order such commission.

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[30] The qualification 'within the framework of their ordinary criminal jurisdiction' does nothing to negate this, since many states routinely use military law and tribunals for the prosecution and punishment of certain crimes committed by certain categories of persons, especially in relation to crimes committed during armed conflict.

Chapter 2

BASIS OF COMPARISON WITH OTHER PENAL PROVISIONS OF INTERNATIONAL HUMANITARIAN LAW

1. GRAVE BREACHES OF THE 1949 GENEVA CONVENTIONS AND ADDITIONAL PROTOCOL I

1.1 Introduction

The implementation by states of the grave breaches regime of the 1949 Geneva Conventions and, where the state in question is a party to it, of Additional Protocol I serves as a useful reference point from which to consider national implementation of the penal provisions of Chapter 4 of the Second Hague Protocol. The reason for this is that the obligations imposed on states by the Geneva grave breaches provisions are, in effect, largely the same as those imposed by Chapter 4 of the Protocol. Indeed, the drafters of Chapter 4 modelled many of its obligations on those laid down by the Geneva grave breaches regime.

The Geneva grave breaches provisions of 1949 comprise articles 49 and 50 of 1949 Geneva Convention I;[31] articles 50 and 51 of 1949 Geneva Convention II;[32] articles 129 and 130 of 1949 Geneva Convention III;[33] and articles 146 and 147 of 1949 Geneva Convention IV.[34] In addition, operating by reference to[35] and supplementing the 1949 regime are articles 85 to 88 of Additional Protocol I.

1.2 The prohibitions

It is not essential for present purposes to examine in detail what constitutes a grave breach of the 1949 Geneva Conventions and Additional Protocol I.[36] It is sufficient to say that such breaches encompass a range of acts against the physical integrity and liberty of persons, and against property.

1.3 The relevant state obligations

1.3.1 *Criminalisation*

Article 146 of 1949 Geneva Convention IV[37] states in part:

> 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.

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31 Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva, 12 August 1949, 75 UNTS 31.

32 Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Geneva, 12 August 1949, 75 UNTS 85.

33 Convention (III) relative to the Treatment of Prisoners of War, Geneva, 12 August 1949, 75 UNTS 135.

34 Convention (IV) relative to the Protection of Civilian Persons in Time of War Geneva, 12 August 1949, 75 UNTS 287.

35 See Additional Protocol I, art 85 (1).

36 The respective definitions are contained in 1949 Geneva Convention I, art 50; 1949 Geneva Convention II, art 51; 1949 Geneva Convention III, art 130; 1949 Geneva Convention IV, art 147; and Additional Protocol I, art 85 (3) & (4).

37 See, identically, 1949 Geneva Convention I, art 49; 1949 Geneva Convention II, art 50; and 1949 Geneva Convention III, art 129.

As under the serious violations regime of the Second Hague Protocol, this provision imposes on the High Contracting Parties an obligation, first of all, to make grave breaches of the Convention offences under national law.

1.3.2 *Penalties*

Similar to the obligation on States Parties to the Second Hague Protocol to attach 'appropriate' penalties to its serious violations, article 146 of 1949 Geneva Convention IV, as seen above, also obliges the High Contracting Parties to provide by way of legislation for 'effective' penal sanctions for grave breaches of the Convention. Both obligations imply a commensurability between the gravity of the offence in question and the custodial sentence statutorily prescribed for its punishment.

1.3.3 *Material scope*

As seen above, article 146 of 1949 Geneva Convention IV also obliges High Contracting Parties to provide in legislation for the criminal responsibility of those ordering the commission of a grave breach.

In respect of High Contracting Parties to Additional Protocol I, article 86 of that instrument states further:

> 1. The High Contracting Parties ... 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.
>
> 2. 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.

Paragraph 1 of article 86 obliges High Contracting Parties to the Protocol to impose criminal responsibility in respect of culpable omissions in general. As a species of this general obligation, paragraph 2 obliges Parties to recognise criminal responsibility for grave breaches pursuant to the doctrines of command and superior responsibility respectively.

The obligations laid down in both article 146 of 1949 Geneva Convention IV and article 86 of Additional Protocol I are aspects of the obligation imposed by the second limb of article 15 (2) of the Second Hague Protocol, *viz* to comply, when enacting serious violations into national law, with general principles of international law 'including the rules extending individual criminal responsibility to persons other than those who directly commit the act'.

1.3.4 *Jurisdiction*

Article 146 of 1949 Geneva Convention IV[38] continues:

> Each High Contracting Party ... shall bring [persons alleged to have committed, or to have ordered to be committed, such grave breaches], regardless of their nationality, before its courts.

This compact provision embodies, *inter alia*,[39] an obligation on Parties to establish their jurisdiction over grave breaches on the combined bases, in effect, of territoriality, nationality and universality.[40]

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[38] See identically, 1949 Geneva Convention I, art 49; 1949 Geneva Convention II, art 50; and 1949 Geneva Convention III, art 129.

[39] It also embodies the first limb of the obligation to try or extradite those accused of such breaches. In this regard, art 146 continues: 'It may also, if it prefers, and in accordance with the provisions of its own legislation, hand over such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a *prima facie* case.'. See identically, 1949 Geneva Convention I, art 49; 1949 Geneva Convention II, art 50; 1949 Geneva Convention III, art 129.

The same obligation is imposed by article 16 (1) of the Second Hague Protocol in relation to those serious violations of the Protocol set forth in article 15 (1) subparagraphs (a) to (c). But, in relation to the serious violations provided for in subparagraphs (d) and (e) of article 15 (1), recall that States Parties are obliged to establish their jurisdiction only on the bases of territoriality and nationality.

2. A NOTE ON OTHER RELEVANT CONVENTIONAL PROVISIONS

2.1 *Common article 3*

Article 3 common the 1949 Geneva Conventions, which lays down minimum standards of conduct applicable to non-international armed conflicts, is not encompassed by the grave breaches regime of the Conventions. In other words, the High Contracting Parties to the Conventions are under no specific obligation to criminalise violations of common article 3. *A fortiori*, they are not obliged to provide effective penal sanctions for such violations; to impose criminal responsibility for ordering such violations, as well as criminal responsibility for them on the bases of command and superior responsibility; or to establish universal jurisdiction over such violations.

At the same time, article 146 of 1949 Geneva Convention IV, for example,[41] states in relevant part:

> 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 pursuance of this general obligation, several of the states examined in Part II have chosen to render violations of common article 3 punishable in accordance with domestic law.

Such legislation will be considered below.

2.2 *Additional Protocol II*

In contrast to the 1949 Geneva Conventions and Additional Protocol I, Additional Protocol II[42] to the Conventions—applicable, like common article 3 of the Conventions, to non-international armed conflicts—contains no grave breaches provisions. In short, the High Contracting Parties to Additional Protocol II are under none of the obligations imposed on them[43] by virtue of the grave breaches regime.

That said, article 1 (1) of Additional Protocol II declares the Protocol to develop and supplement article 3 common to the Conventions. In turn, High Contracting Parties to the Conventions are under an obligation, as seen above, to take measures necessary for the suppression of all acts contrary to the provisions of the Conventions other than grave breaches.

In this light, several of the states considered in Part II have chosen to render violations of Additional Protocol II punishable in accordance with domestic law.

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[40] See, if somewhat obliquely, Pictet, *Commentary. IV. Geneva Convention relative to the Protection of Civilian Persons in Time of War* (Geneva: ICRC, 1958), p.592; see also *eg* ICRC, *Advisory Service 1999 Annual Report. National Implementation of International Humanitarian Law* (Geneva: ICRC, 2000), p.4; and de La Pradelle, *supra*, §30.

[41] See, identically, 1949 Geneva Convention I, art 49; 1949 Geneva Convention II, art 50; and 1949 Geneva Convention III, art 129.

[42] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), Geneva, 8 June 1977, 1125 UNTS 609.

[43] States may become parties to Additional Protocol II only if they are parties to the Conventions themselves.

This legislation will also be examined below.

2.3 *The Rome Statute of the International Criminal Court*

The Rome Statute of the International Criminal Court does not oblige States Parties to make crimes within the jurisdiction of the Court punishable as a matter of domestic law.

Nonetheless, in order to avail themselves of the principle of 'complementarity' reflected in the Statute,[44] and in conformity with the Statute's preambular declaration that 'it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes',[45] several of the states looked at in Part II have enacted legislation rendering crimes within the jurisdiction of the Court punishable as a matter of domestic law.

This legislation will also form a basis from which to consider national implementation of Chapter 4 of the Second Hague Protocol.

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44 See ICC Statute, art 17 (1)(a) to (c).

45 ICC Statute, preamble, sixth recital.

PART II

TWELVE NATIONAL CASE-STUDIES

A. THE COMMON LAW TRADITION

Chapter 3

AUSTRALIA

1. GENERAL

1.1 Preface

Australia is a party to the 1954 Hague Convention but is not yet a party to the Second Hague Protocol. It is a party to the 1949 Geneva Conventions and to both of their Additional Protocols.

Although Australia has a system of service tribunals for its armed forces, its substantive military law is not discussed below. Members of the Australian armed forces remain bound by the ordinary[46] criminal law.[47] The grave breaches regime of the 1949 Geneva Conventions and Additional Protocol I has been implemented in Australia through ordinary criminal legislation. National implementation of the Second Hague Protocol would take place the same way.

1.2 Constitutional determinants of national implementation

Under Australian law, a treaty to which Australia is a party can have no effect on the rights and duties of individuals until enacted into domestic law by parliament.[48]

Moreover, the creation of new criminal offences, whether derived from treaty or not, requires legislation.

The penal provisions of Chapter 4 of the Second Hague Protocol would therefore require specific statutory enactment for their national implementation by Australia.

2. THE 1949 GENEVA CONVENTIONS AND ADDITIONAL PROTOCOL I

2.1 Introduction

One instructive model for statutory enactment by Australia of Chapter 4 of the Second Hague Protocol is the country's Geneva Conventions Act 1957, passed in order to give effect to its obligations under the grave breaches regime of the 1949 Geneva Conventions. The Act has subsequently been amended to include those grave breaches provided for in Additional Protocol I.

2.2 Criminalisation

Section 7 (1) of the Geneva Conventions Act makes grave breaches of the 1949 Geneva Conventions and of Additional Protocol I criminal offences under Australian law. It provides:

> A person who, in Australia or elsewhere, commits, or aids, abets or procures the commission by another person of, a grave breach of any of the Conventions or of Protocol I is guilty of an indictable offence.

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[46] The term 'ordinary criminal courts' is used throughout this report to refer to the courts of ordinary criminal jurisdiction, in preference to the term 'civil courts' favoured by military lawyers (but *cf* the Swiss, who refer to the 'ordinary' criminal law). The term 'civil courts' is potentially confusing, at least in the present context, given its common use by way of contrast with 'criminal courts'.

[47] They are also tried by the ordinary criminal courts for such offences. Australian service tribunals enjoy jurisdiction *ratione materiae* only over specifically military crimes.

[48] See *eg Chow Hung Ching v R* (1948) 77 CLR 449 at 478, *per* Dixon J; *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 128 ALR 353 at 370, *per* Toohey J.

The grave breaches referred to in paragraph 1 of section 7 are specified in more detail in paragraph 2.

2.3 Penalties

Section 7 (4) of the Act fixes the penalty to attach on conviction for the offences created in section 7 (1).

Where the offence involves the wilful killing of a person protected by the relevant Convention or by Additional Protocol I, the maximum penalty is imprisonment for life.[49] In any other case, the maximum penalty is imprisonment for fourteen years.[50]

2.4 Material scope and prescriptibility

Section 7 (1) of the Act specifies the various modes of participation that give rise to criminal responsibility for grave breaches under Australian law. As seen above, these comprise actual commission, along with aiding, abetting or procuring the commission of a grave breach.

In addition, the respective criminal laws of the various Australian states[51] recognise criminal responsibility for complicity in, as well as attempt, conspiracy and incitement to commit, an offence, including a statutory offence.[52]

Neither the Act nor Australian common-law principles relating to the imposition of criminal responsibility provide for secondary criminal responsibility via the doctrines of command and superior responsibility.

Crimes are not prescriptible under Australian law.

2.5 Jurisdiction

Section 7 (1) of the Act provides for jurisdiction over grave breaches on the combined bases, effectively, of territoriality, nationality and universality. It states that grave breaches are offences under Australian law whether committed, or aided, abetted or procured 'in Australia or elsewhere', with section 7 (3) making it clear that the provision 'applies to persons regardless of their nationality or citizenship'. Section 7 (1) is reinforced by section 6 (2), which states that '[the] Act has extra-territorial operation according to its tenor'.

The grant of extraterritorial jurisdiction over grave breaches is facilitated by section 10 (2). This states:

> The trial on indictment of an offence against this Act, not being an offence committed within Australia, may be held in any State and the trial on indictment of such an offence committed in a Territory may be held in any State or in that Territory.

Section 10 (2) is to be read in the light of section 10 (1), a vesting provision necessary under Australian constitutional law. This section states:

> Subject to this section and without prejudice to the original jurisdiction of the High Court:
>
> (a) the Supreme Court of each State is invested with federal jurisdiction in trials of offences against section 7, other than offences committed in another State; and

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49 Geneva Conventions Act, s.7 (4)(a).

50 Geneva Conventions Act, s.7 (4)(b).

51 As a matter of Australian constitutional law, while the Commonwealth has power to legislate for crimes in certain cases, the criminal law is generally a matter for the States.

52 See Gillies, *Criminal Law* (4th ed) (Sydney: LBC Information Services, 1997), pp.154-202, 661-751; Fisse, *Howard's Criminal Law* (5th ed)(Sydney: Law Book Company, 1990), pp.317-417.

(b) jurisdiction is conferred on the Supreme Court of each Territory in trials of offences against section 7 committed in that Territory.

Section 10 (5) further clarifies that '[a] person shall not be tried for an offence against section 7 by a court other than the High Court or a Supreme Court referred to in this section'.

Finally, in terms of jurisdiction, it is important to note section 5 (2):

In this Act, unless the contrary intention appears:

... 'court' does not include:

(a) a service tribunal within the meaning of the Defence Force Discipline Act 1982; or
(b) a military court;

In other words, the ordinary criminal courts enjoy exclusive jurisdiction over the offences provided for in section 7 of the Act.

3. THE SECOND HAGUE PROTOCOL

3.1 Criminalisation

Section 7 (1) of the Geneva Conventions Act is a useful model for Australia's implementation of the obligation of domestic criminalisation imposed in respect of the serious violations of the Second Hague Protocol by the first limb of article 15 (2) of that instrument.

Section 7 (1) of the Act would also serve as a good template for the criminalisation by Australia of the other violations set forth in article 21 of the Protocol.

3.2 Penalties

The maximum penalty fixed by the Act of fourteen years' imprisonment for grave breaches not involving wilful killing would equally represent an appropriate penalty for serious violations of the Protocol, as further required by the first limb of article 15 (2), as well as for the other violations set forth in article 21.

3.3 Material scope and prescriptibility

The various modes of participation in grave breaches under the Act, combined with the material scope of statutory crimes under the respective criminal laws of the Australian states, would seem to accord, for the most part, with general principles of international law governing criminal responsibility.

As it is, however, Australia will need to legislate to enact the serious violations of the Protocol as crimes under Australian law. In this light, it would seem no more inconvenient, and legally more certain, for it to provide at the same time for their material scope in a manner expressly in accordance with general principles of international law. That is, in criminalising serious violations as a matter of Australian law, Australia should take the opportunity to legislate explicitly to impose responsibility for attempting to commit a serious violation; for ordering, soliciting or inducing the commission of a serious violation; for aiding, abetting or otherwise assisting in the commission or attempted commission of a serious violation; and for intentionally contributing in any other way to the commission or attempted commission of a serious violation by a group of persons acting with a common purpose. In this way, Australia would unequivocally satisfy, to this extent, the obligation laid down in the second limb of article 15 (2) of the Protocol to comply with general principles of international law when criminalising serious violations as a matter of domestic law.

But in order to accord fully with general principles of international law 'including the rules extending individual criminal responsibility to persons other than those who directly commit the act', Australian

legislation enacting the serious violations of the Protocol would also need to provide for secondary criminal responsibility under the doctrines of command and superior responsibility.

As crimes under Australian law, serious (and other) violations of the Protocol would not be prescriptible.

3.4 Jurisdiction

Section 7 (1) of the Act, in combination with sections 6 (2), 7 (3), 10 (1), 10 (2) and 10 (5), is an instructive example of the establishment by Australia of jurisdiction over offences on the three bases of territoriality, nationality and universality, as is required by article 16 (1)(c) of the Protocol in respect of those serious violations set forth in article 15 (1) subparagraphs (a) to (c).

Sections 7 (1) and 7 (3) of the Act, however, make no distinction between offences subject to universal jurisdiction and offences subject to jurisdiction only on the bases of territoriality and nationality. This is for the simple reason that the grave breaches regime of the 1949 Geneva Conventions and Additional Protocol I necessitates no such distinction.

Legislation enacting into Australian law the serious violations of the Second Hague Protocol would want to distinguish between universal jurisdiction, as attaches to those serious violations set forth in article 15 (1) subparagraphs (a) to (c), and the jurisdiction based solely on territoriality and nationality attaching to the serious violations in article 15 (1)(d) and (e) and as appropriate for the other violations of the Protocol defined in article 21.

4. RECOMMENDATIONS

1. *It is recommended that Australia become a party to the Second Hague Protocol.*

2. *It is recommended that Australia legislate along the lines of its Geneva Conventions Act to enact as crimes under Australian law the serious violations of the Protocol.*

3. *It is recommended that Australia legislate along the lines of its Geneva Conventions Act to make such crimes punishable by imprisonment for an appropriate period.*

4. *It is recommended that Australia legislate to impose criminal responsibility for attempting to commit such crimes; for ordering, soliciting or inducing the commission of such crimes; for aiding, abetting or otherwise assisting in the commission or attempted commission of such crimes; and for intentionally contributing in any other way to the commission or attempted commission of such crimes by a group of persons acting with a common purpose.*

5. *It is recommended that Australia legislate to impose secondary criminal responsibility for such crimes on the bases of command and superior responsibility.*

6. *It is recommended that Australia legislate to establish its jurisdiction over such crimes when they are committed abroad by Australian nationals.*

7. *It is recommended that Australia legislate along the lines of its Geneva Conventions Act to establish its jurisdiction over those crimes corresponding to the serious violations set forth in article 15 (1) subparagraphs (a) to (c) of the Protocol when they are committed abroad by non-nationals and when the alleged offender is subsequently present in Australian territory.*

Chapter 4

CANADA

1. GENERAL

1.1 Preface

Canada is a party to the 1954 Hague Convention but is not yet a party to the Second Hague Protocol. It is a party to the 1949 Geneva Conventions and to both of their Additional Protocols.

While Canada has a system of tribunals for its armed forces, its substantive military law is not discussed below. Members of the Canadian armed forces remain bound by the ordinary criminal law.[53] It is through the ordinary criminal law that Canada penalises war crimes.

1.2 Constitutional determinants of national implementation

Under Canadian law, a treaty to which Canada is party can have no effect on the rights and duties of individuals until enacted into domestic law by parliament.[54]

Moreover, new criminal offences, whether derived from treaty or not, require legislation for their introduction.[55]

In the case of grave breaches, legislation giving effect in Canadian law to the country's obligations under the 1949 Geneva Conventions and Additional Protocol I is indeed in place, in the form of the Crimes Against Humanity and War Crimes Act 2000.[56] The Act was passed to make domestic provision for crimes within the jurisdiction of the International Criminal Court. But the definition of war crimes used in the Act gives it a considerably broader scope.

It is through the operation of the Crimes Against Humanity and War Crimes Act that the Second Hague Protocol would be implemented in Canada.

2. THE 1949 GENEVA CONVENTIONS AND ADDITIONAL PROTOCOL I

2.1 Introduction

The Crimes Against Humanity and War Crimes Act makes separate provision for offences committed respectively in and outside Canada. But the consequences of each are the same, *mutatis mutandis*.

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53 They are also tried by the ordinary criminal courts for such offences. Canadian military tribunals enjoy jurisdiction *ratione materiae* only over specifically military crimes.

54 See *eg Attorney-General for Canada v Attorney-General for Ontario* [1937] AC 326 at 347-348, *per* Lord Atkin.

55 Criminal Code, s.9; see also *Lord's Day Alliance v AG BC* [1959] SCR 497 at 504, *per* Kerwin CJ.

56 Note that in 1965 Canada passed the Geneva Conventions Act to give effect to its obligations under the grave breaches regime of the 1949 Geneva Conventions. The Act was subsequently amended to include those grave breaches provided for in Additional Protocol I.

The Geneva Conventions Act is not considered below, since it is by operation of the subsequent Crimes Against Humanity and War Crimes Act that the Second Hague Protocol would be implemented in Canada.

2.2 Criminalisation

Section 4 (1) of the Act makes war crimes committed in Canada offences under Canadian law. It provides:

> Every person is guilty of an indictable offence who commits
>
> ... (c) a war crime.

No specific territorial restriction is referred to in the provision. But, in the absence of express statutory provision, no person may be convicted under Canadian law of an offence committed outside Canada.[57]

An example of just this sort of express statutory provision is section 6 (1) of the Act, which performs the same function as section 4 (1) but in respect of war crimes committed outside Canada. It provides:

> Every person who ... commits outside Canada
>
> ... (c) a war crime,
>
> is guilty of an indictable offence ...

The provision contains no restriction as to nationality.

Sections 4 (3) and 6 (3) of the Act, applicable respectively to crimes committed in and outside Canada, provide identical definitions of the term 'war crime', as used in sections 4 (1) and 6 (1) respectively. They read in relevant part:

> 'war crime' means an act or omission committed during an armed conflict that, at the time and in the place of its commission, constitutes a war crime according to ... conventional international law applicable to armed conflicts, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission.

The term 'conventional international law', as used in both sections 4 (3) and 6 (3), is defined in section 2 (1) to refer to

> ... any convention, treaty or other international agreement
> (a) that is in force and to which Canada is a party; or
> (b) that is in force and the provisions of which Canada has agreed to accept and apply in an armed conflict in which it is involved.

In short, through sections 4 (1) and 6 (1) of the Act, Canada has provided for the enactment as crimes under Canadian law of those violations of international humanitarian conventions to which it is a party or to which it becomes a party in the future that give rise to individual criminal responsibility under international law.

Grave breaches of the 1949 Geneva Conventions and of Additional Protocol I, as acts or omissions committed during armed conflict that constitute war crimes according to the conventional international law applicable to armed conflicts, are therefore crimes under Canadian law, pursuant to sections 4 (1) and 6 (1) of the Act.

2.3 Penalties

Sections 4 (2) and 6 (2) respectively of the Act impose a penalty of mandatory life imprisonment for war crimes in which intentional killing forms the basis of the offence.[58] For all other war crimes, they provide for imprisonment for a maximum term of life.[59]

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[57] Criminal Code, s.6 (2).

[58] Crimes Against Humanity and War Crimes Act, ss.4 (2)(a) & 6 (2)(a) respectively.

Special provision is made in sections 5 (3) and 7 (4) respectively for cases where responsibility is incurred pursuant to the doctrines of command or superior responsibility. The penalty in such cases is imprisonment for a maximum term of life.

2.4 Material scope and prescriptibility

Sections 4 (3) and 6 (3) respectively of the Act make it clear that commission, within the meaning of sections 4 (1) and 6 (1), encompasses culpable omission.

The Canadian Criminal Code is also relevant to the material scope of offences under the Act. Section 21 of the Code provides for criminal responsibility for aiding or abetting an offence, as well as for the common intention to carry out an unlawful purpose.[60] Section 463 of the Code imposes responsibility for attempt and for being an accessory after the fact. Responsibility for counselling an offence that is not committed is recognised in section 464. And section 465 establishes criminal responsibility for conspiracy.

Section 5 paragraphs (1) and (2) of the Act provide for secondary criminal responsibility for war crimes under the doctrines of command and superior responsibility, in cases where the commander or superior is in Canada:

Breach of responsibility by military commander

... (1) A military commander commits an indictable offence if
- (a) the military commander
  - (i) fails to exercise control properly over a person under their effective command and control or effective authority and control, and as a result the person commits an offence under section 4, or
  - (ii) fails, after the coming into force of this section, to exercise control properly over a person under their effective command and control or effective authority and control, and as a result the person commits an offence under section 6;
- (b) the military commander knows, or is criminally negligent in failing to know, that the person is about to commit or is committing such an offence; and
- (c) the military commander subsequently
  - (i) fails to take, as soon as practicable, all necessary and reasonable measures within their power to prevent or repress the commission of the offence, or the further commission of offences under section 4 or 6, or
  - (ii) fails to take, as soon as practicable, all necessary and reasonable measures within their power to submit the matter to the competent authorities for investigation and prosecution.

Breach of responsibility by a superior

(2) A superior commits an indictable offence if
- (a) the superior
  - (i) fails to exercise control properly over a person under their effective authority and control, and as a result the person commits an offence under section 4, or
  - (ii) fails, after the coming into force of this section, to exercise control properly over a person under their effective authority and control, and as a result the person commits an offence under section 6;

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[59] Crimes Against Humanity and War Crimes Act, ss.4 (2)(b) & 6 (2)(b) respectively.

[60] As regards common intention, section 21 (2) states: 'When two or more persons form an intention in common to carry out an unlawful purpose and to assist each other therein and any one of them, in carrying out the common purpose, commits an offence, each of them who knew or ought to have known that the commission of the offence would be a probable consequence of carrying out the common purpose is a party to that offence.'

(b) the superior knows that the person is about to commit or is committing such an offence, or consciously disregards information that clearly indicates that such an offence is about to be committed or is being committed by the person;
(c) the offence relates to activities for which the superior has effective authority and control; and
(d) the superior subsequently
  (i) fails to take, as soon as practicable, all necessary and reasonable measures within their power to prevent or repress the commission of the offence, or the further commission of offences under section 4 or 6, or
  (ii) fails to take, as soon as practicable, all necessary and reasonable measures within their power to submit the matter to the competent authorities for investigation and prosecution.

Section 7 paragraphs (1) and (2) perform the same function, *mutatis mutandis*, in respect of cases where the commander or superior is outside Canada.

Sections 5 (4) and 7 (6) define the relevant terms identically:

> 'military commander' includes a person effectively acting as a military commander and a person who commands police with a degree of authority and control comparable to a military commander.
>
> 'superior' means a person in authority, other than a military commander.

Finally, crimes are not prescriptible under Canadian law.

2.5 Jurisdiction

Section 4 (1) of the Act, as seen above, renders war crimes committed in Canada punishable under Canadian law.

Section 6 (1), as also seen above, renders war crimes committed outside Canada punishable under Canadian law.

In order to facilitate jurisdiction over the extraterritorial offences created by section 6, and over command and superior responsibility for them pursuant to section 7, section 8 of the Act makes special provision for crimes committed outside Canada. It states:

> A person who is alleged to have committed an offence under section 6 or 7 may be prosecuted for that offence if
> (a) at the time the offence is alleged to have been committed,
> (i) the person was a Canadian citizen or was employed by Canada in a civilian or military capacity,
> (ii) the person was a citizen of a state that was engaged in an armed conflict against Canada, or was employed in a civilian or military capacity by such a state,
> (iii) the victim of the alleged offence was a Canadian citizen, or
> (iv) the victim of the alleged offence was a citizen of a state that was allied with Canada in an armed conflict; or
> (b) after the time the offence is alleged to have been committed, the person is present in Canada.

The first limb of paragraph (a) subparagraph (i) represents the establishment of jurisdiction on the basis of nationality. Paragraph (b) amounts to the establishment of jurisdiction on the basis of universality.

As specifically regards the secondary criminal responsibility of commanders and superiors outside Canada pursuant to the doctrines of command and superior responsibility, section 6 (3) makes it clear that the alleged offender may be prosecuted in accordance with section 8.

Finally, section 9 (1) states:

> Proceedings for an offence under this Act alleged to have been committed outside Canada for which a person may be prosecuted under this Act may, whether or not the person is in Canada, be commenced in any territorial division in Canada and the person may be tried and punished in respect of that offence in the same manner as if the offence had been committed in that territorial division.

This provision facilitates the exercise by the courts of extraterritorial jurisdiction over the offences provided for in sections 6 and 7.

3. THE SECOND HAGUE PROTOCOL

3.1 Criminalisation

Were Canada to become a party to the Second Hague Protocol, the serious violations defined in article 15 (1) would be punishable automatically as crimes under Canadian law by virtue of sections 4 (1) and 6 (1) respectively of the Crimes Against Humanity and War Crimes Act. Every serious violation of the Protocol is characterised in the *chapeau* to article 15 (1) as 'an offence' – in other words, as giving rise to the individual criminal responsibility of the perpetrator under international law. As such, every serious violation of the Protocol constitutes 'an act or omission committed during an armed conflict that, at the time and in the place of its commission, constitutes a war crime according to ... conventional international law applicable to armed conflicts', within the meaning of sections 4 (3) and 6 (3) respectively of the Act. In this way, simply by becoming a party to the Protocol, Canada would fulfil the obligation imposed by the first limb of article 15 (2) of the Protocol to adopt such measures as may be necessary to establish as criminal offences under its domestic law the offences set forth in article 15 (1).

On the other hand, if Canada were to criminalise the other violations of the Protocol set forth in article 21, specific legislation would be needed to this end.

3.2 Penalties

As war crimes within the meaning of the Act not involving intentional killing, the maximum penalty for serious violations of the Protocol would be life imprisonment. This would represent an appropriate penalty for serious violations, as further required by the first limb of article 15 (2).

This would also be an appropriate penalty for the other violations set forth in article 21 of the Protocol, if Canada were to render these punishable under its law.

3.3 Material scope and prescriptibility

The material scope of serious violations of the Protocol, as offences under the Act, would accord in every way with the principles of international law relating to the imposition of criminal responsibility, including the rules extending criminal responsibility to persons other than those who directly commit the act. In this way, Canada would satisfy the obligation laid down in the second limb of article 15 (2) of the Protocol.

Legislative provision along the lines of the relevant sections of the Act would also be an appropriate means of criminalising the other violations defined in article 21 of the Protocol.

As crimes under Canadian law, serious and other violations of the Protocol would not be prescriptible.

3.4 Jurisdiction

Section 4 (1) of the Act would establish Canadian jurisdiction over serious violations of the Protocol, as offences under the Act, on the basis of territoriality, as required by article 16 (1)(a) of the instrument.

Section 6 (1) of the Act, in combination with the first limb of section 8 (a)(i) and with section 9 (1), would serve to establish Canadian jurisdiction over serious violations of the Protocol on the basis of the

nationality of the offender. In this way, Canada would acquit the obligation laid down in article 16 (1)(b) of the Protocol.

Finally, section 6 (1), in combination with sections 8 (b) and 9 (1), would establish Canadian jurisdiction over serious violations on the basis of universality, as required, in respect of those serious violations set forth in article 15 (1) subparagraphs (a) to (c), by article 16 (1)(c) of the Protocol.[61]

4. RECOMMENDATIONS

1. *It is recommended that Canada become a party to the Second Hague Protocol.*

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[61] This would, in the process, establish universal jurisdiction collaterally over those serious violations of the Protocol set forth in article 15 (1) subparagraphs (d) to (e), which are subject to an obligation to establish jurisdiction only on the bases of territoriality and nationality, not universality.

The only alternative to Canada's blanket establishment of universal jurisdiction via the Crimes Against Humanity and War Crimes Act over all violations, serious and other, of the Protocol would be the enactment of discrete legislation, distinct from the Act, specifically in respect of the Second Hague Protocol. Given that Canada's aim in passing the Act was precisely to obviate the necessity for additional war crimes legislation and to codify, in effect, the provisions relating to war crimes as offences under Canadian law, such legislation seems, from a Canadian point of view, highly inconvenient and even undesirable. As such, it is probably distinctly unlikely.

In this light, Canada's establishment, through the mere act of becoming a party to the Protocol, of universal jurisdiction over all violations of the Protocol via the Crimes Against Humanity and War Crimes Act appears the pragmatic alternative.

Chapter 5

INDIA

1. GENERAL

1.1 Preface

India is a party to the 1954 Hague Convention but is not yet a party to the Second Hague Protocol. It is a party to the 1949 Geneva Conventions but to neither of their Additional Protocols.

Although India has a system of courts-martial with jurisdiction over members of its armed forces, its substantive military law is not discussed below. Members of the Indian armed forces remain bound by the ordinary criminal law.[62] The grave breaches regime of the 1949 Geneva Conventions has been implemented in India by way of ordinary criminal statute. National implementation of the Second Hague Protocol would take place the same way.

1.2 Constitutional determinants of national implementation

Under Indian law, a treaty to which India is a party can have no effect on the rights and duties of individuals until enacted into domestic law by parliament.[63]

Furthermore, legislation is required for the creation of new criminal offences, whether derived from treaty or not.

As such, the implementation by India of the penal provisions of Chapter 4 of the Second Hague Protocol would call for specific statutory enactment.

2. THE 1949 GENEVA CONVENTIONS

2.1 Introduction

One useful model for the statutory enactment by India of Chapter 4 of the Second Hague Protocol is the country's Geneva Conventions Act 1960, passed in order to give effect to the country's obligations under the grave breaches regime of the 1949 Geneva Conventions.

2.2. Criminalisation

Section 3 (1) of the Act provides:

> If any person within or without India commits or attempts to commit, or abets or procures the commission by any other person of a grave breach of any of the Conventions he shall be punished ...

This has the effect, first of all, of making grave breaches offences under Indian law. The grave breaches referred to in paragraph (1) are defined in paragraph (3).

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62 Unlike in Australia and Canada, however, the Indian courts-martial enjoy jurisdiction *ratione materiae* over offences against the ordinary criminal law. In other words, Indian service personnel are tried by court-martial for all offences.

63 *Maganbhai v Union* [1969] 3 SCR 254 at 273-274, *per* Hidayatullah CJ and at 297-299, *per* Shah J.

2.3 Penalties

Section 3 (1) also fixes the penalties to attach to the grave breaches as offences under Indian law. Where the offence involves the wilful killing of a person protected by the relevant Convention, the maximum custodial penalty is imprisonment for life.[64] In any other case, the maximum penalty is imprisonment for fourteen years.[65]

2.4 Material scope and prescriptibility

Section 3 (1) also specifies the various modes of commission of a grave breach that give rise to criminal responsibility under Indian law. These are, as seen above, actual commission of the offence, as well as abetting or procuring the commission of the offence. The inchoate offence of attempting to commit a grave breach is also punishable pursuant to this section.

It is unclear whether conspiracy to commit a grave breach is punishable as an offence under Indian law.[66] It would seem not to be.

Nor does the Act provide for secondary criminal responsibility under the doctrines of command and superior responsibility.

Crimes are not prescriptible under Indian law.

2.5 Jurisdiction

Section 3 (1) provides for jurisdiction over grave breaches as offences under Indian law on the combined bases, in effect, of territoriality, nationality and universality. This is made clear by the reference in the provision to commission, *etc* 'within or without India' and by section 3 (2), which states that '[s]ub-section (1) applies to persons regardless of their nationality or citizenship'.

The exercise by the courts of extraterritorial jurisdiction is facilitated by section 4:

> When an offence under this Chapter is committed by any person outside India, he may be dealt with in respect of such offence as if it had been committed at any place within India at which he may be found.

In terms of jurisdiction more generally, section 5 specifies, in a negative manner, the court or courts with authority to try the offences created in section 3 (1):

> No court inferior to that of a Chief Presidency Magistrate or a Court of Session shall try any offence punishable under this Chapter.

Related to the question of the appropriate court, section 2 (b) defines the term 'court' for the purposes of the Act:

> 'court' does not include a court-martial or military court ...

But section 7 further provides:

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64 Geneva Conventions Act, s.3 (1)(a). The provision also provides for the death penalty.

65 Geneva Conventions Act, s.3 (1)(b).

66 Section 120-B of the Indian Penal Code imposes criminal responsibility for conspiracy to commit an offence, as defined in s.120-A. But, in accordance with s.5 of the Penal Code, nothing in the Code affects the provisions of any special laws. This suggests that the modes of participation provided for in the Code are not to be read as applying to the offences created by the Geneva Conventions Act.

> The Army Act, 1959, the Air Force Act, 1950, or the Navy Act 1957, relating to trial by court-martial of persons who commit civil offences shall have effect for the purposes of the jurisdiction of court-martial as if this Chapter had not been passed.

That is, the courts-martial retain their jurisdiction over members of the armed forces in respect of grave breaches as crimes under Indian law.

3. THE SECOND HAGUE PROTOCOL

3.1 Criminalisation

Section 3 (1) of the Geneva Conventions Act represents a useful model for the implementation by India of the obligation of domestic criminalisation imposed by the first limb of article 15 (2) of the Second Hague Protocol in respect of the serious violations of the Protocol set forth in article 15 (1).

It would also serve as an example for the criminalisation by India of the other violations set forth in article 21.

3.2 Penalties

The maximum penalty fixed by the Act of fourteen years' imprisonment for grave breaches not involving wilful killing would equally represent an appropriate penalty for serious violations of the Protocol, as further required by the first limb of article 15 (2), as well as for the other violations set forth in article 21.

3.3 Material scope and prescriptibility

The various modes of participation in grave breaches as offences under Indian law provided for in section 3 (1) of the Act overlap to a certain extent with general principles of international law governing criminal responsibility, although there are doubts as to conspiracy.

As it is, however, India will need to legislate to enact the serious violations of the Protocol as crimes under Indian law. In this light, it would seem no more inconvenient, and legally more certain, for it to provide at the same time for their material scope in a manner expressly in accordance with general principles of international law. That is, in criminalising serious violations as a matter of Indian law, India should take the opportunity to legislate explicitly to impose responsibility for attempting to commit a serious violation; for ordering, soliciting or inducing the commission of a serious violation; for aiding, abetting or otherwise assisting in the commission or attempted commission of a serious violation; and for intentionally contributing in any other way to the commission or attempted commission of a serious violation by a group of persons acting with a common purpose. In this way, India would unequivocally satisfy, to this extent, the obligation laid down in the second limb of article 15 (2) of the Protocol to comply with general principles of international law when criminalising serious violations as a matter of domestic law.

But in order to accord fully with general principles of international law 'including the rules extending individual criminal responsibility to persons other than those who directly commit the act', Indian legislation enacting the serious violations of the Protocol would also need to provide for secondary criminal responsibility for serious violations under the doctrines of command and superior responsibility.

As crimes under Indian law, serious (and other) violations of the Protocol would not be prescriptible.

3.4 Jurisdiction

Section 3 (1) of the Act, in combination with sections 3 (2), 4 and 5, is a blueprint for the establishment by India of jurisdiction over offences on the three bases of territoriality, nationality and universality, as is required by article 16 (1)(c) of the Protocol in respect of those serious violations set forth in article 15 (1) subparagraphs (a) to (c).

Sections 3 (1) and 3 (2) of the Act, however, make no distinction between offences subject to universal jurisdiction and offences subject to jurisdiction only on the bases of territoriality and nationality. This is for the simple reason that the grave breaches regime of the 1949 Geneva Conventions necessitates no such distinction.

Legislation enacting into Indian law the serious violations of the Second Hague Protocol would want to distinguish between universal jurisdiction, as attaches to those serious violations set forth in article 15 (1) subparagraphs (a) to (c), and the jurisdiction based solely on territoriality and nationality attaching to the serious violations in article 15 (1)(d) and (e) and as appropriate for the other violations of the Protocol defined in article 21.

4. RECOMMENDATIONS

1. *It is recommended that India become a party to the Second Hague Protocol.*

2. *It is recommended that India legislate along the lines of its Geneva Conventions Act to enact as crimes under Indian law the serious violations of the Protocol.*

3. *It is recommended that India legislate along the lines of its Geneva Conventions Act to make such crimes punishable by imprisonment for an appropriate period.*

4. *It is recommended that India legislate to impose criminal responsibility for attempting to commit such crimes; for ordering, soliciting or inducing the commission of such crimes; for aiding, abetting or otherwise assisting in the commission or attempted commission of such crimes; and for intentionally contributing in any other way to the commission or attempted commission of such crimes by a group of persons acting with a common purpose.*

5. *It is recommended that India legislate to impose secondary criminal responsibility for such crimes on the bases of command and superior responsibility.*

6. *It is recommended that India legislate to establish its jurisdiction over such crimes when they are committed abroad by Indian nationals.*

7. *It is recommended that India legislate along the lines of its Geneva Conventions Act to establish its jurisdiction over those crimes corresponding to the serious violations set forth in article 15 (1) subparagraphs (a) to (c) of the Protocol when they are committed abroad by non-nationals and when the alleged offender is subsequently present in Indian territory.*

Chapter 6

NIGERIA

1. GENERAL

1.1 Preface

Nigeria is a party to the 1954 Hague Convention. It has signed the Second Hague Protocol but has not yet ratified it. It is a party to the 1949 Geneva Conventions and to both of their Additional Protocols.

Although Nigeria has a system of courts-martial for members of its armed forces, its substantive military law is not discussed below. Members of the Nigerian armed forces remain bound by the ordinary criminal law. The grave breaches regime of the 1949 Geneva Conventions and Additional Protocol I has been implemented in Nigeria via ordinary criminal statute. National implementation of the Second Hague Protocol would take place the same way.

1.2 Constitutional determinants of national implementation

Under the constitution of Nigeria, no treaty to which Nigeria is a party has the force of law except to the extent that it has been enacted into law by the National Assembly.[67]

Added to this, the creation of new criminal offences, whether derived from treaty or not, requires legislation.

The penal provisions of Chapter 4 of the Second Hague Protocol would therefore require specific statutory enactment for their national implementation by Nigeria.

2. THE 1949 GENEVA CONVENTIONS

2.1 Introduction

A possible model for the statutory enactment by Nigeria of Chapter 4 of the Second Hague Protocol is the country's Geneva Conventions Act 1960, passed in order to give effect to Nigeria's obligations under the grave breaches regime of the 1949 Geneva Conventions. The Act has not yet been amended to cover grave breaches of Additional Protocol I.

2.2 Criminalisation

Section 3 (1) of the Act provides:

> If, whether in or outside the Federal Republic of Nigeria, any person, whatever his nationality, commits, or aids, abets or procures any other person to commit any such grave breach of any of the Conventions as is referred to in the articles of the Conventions set out in the First Schedule to this Act ... he shall, on conviction thereof [be punished] ...

This has the effect of making grave breaches offences under Nigerian law.

Section 4 of the Act authorises the President to make orders rendering punishable under Nigerian law any breach of the Conventions other than those punishable under section 3. In other words, section 4 envisages the potential punishment under Nigerian law of those violations of the Conventions not characterised as grave breaches – that is, of all other violations of the Conventions.

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67 Constitution of the Federal Republic of Nigeria, art 12 (1).

2.3 Penalties

Section 3 (1) also fixes the penalties to attach to grave breaches under Nigerian law. Where the offence involves the wilful killing of a person protected by the relevant Convention or by Additional Protocol I, the maximum penalty is death.[68] In any other case, the maximum penalty is imprisonment for fourteen years.[69]

2.4 Material scope and prescriptibility

Section 3 (1) also specifies the various modes of participation in a grave breach that give rise to criminal responsibility under Nigerian law. As seen above, these are actual commission, as well as aiding, abetting or procuring the commission of a grave breach.

It is unclear whether attempt and conspiracy to commit a grave breach are punishable under Nigerian criminal law.

Neither the Act nor general principles of Nigerian criminal law relating to the imposition of criminal responsibility provide for secondary criminal responsibility via the doctrines of command and superior responsibility.

Crimes are not prescriptible under Nigerian law.

2.5 Jurisdiction

Section 3 (1) provides for jurisdiction over grave breaches as crimes under Nigerian law on the combined bases, effectively, of territoriality, nationality and universality. This is made clear by the reference in the provision to commission, *etc* 'whether in or outside the Federal Republic of Nigeria' and by the phrase 'any person, whatever his nationality'.

The exercise by the courts of extraterritorial jurisdiction is facilitated by section 3 (2). This states:

> A person may be proceeded against, tried and sentenced in the Federal Capital for an offence under this section committed outside Nigeria as if the offence had been committed in the Federal Capital, and the offence shall, for all purposes incidental to or consequential on the trial or punishment thereof, be deemed to have been committed in the Federal Capital.

As regards the appropriate court to try grave breaches, section 11 (2) provides:

> Notwithstanding anything in any other written law, neither a magistrate's court nor a court martial convened under any enactment applicable to the members of the armed forces of Nigeria shall have jurisdiction to try any person for an offence under section 3 of this Act or under an order made under section 4 of this Act.

That is, *vis à vis* the courts martial, the ordinary criminal courts have exclusive jurisdiction over grave breaches as crimes under Nigerian law.

3. THE SECOND HAGUE PROTOCOL

3.1 Criminalisation

Section 3 (1) is a good model for the implementation by Nigeria of the obligation of domestic criminalisation imposed by the first limb of article 15 (2) of the Second Hague Protocol in respect of the serious violations of the Protocol set forth in article 15 (1).

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68 Geneva Conventions Act, s.3 (1)(i).

69 Geneva Conventions Act, s.3 (1)(ii).

Section 3 (1) would also serves as a useful model for the domestic criminalisation by Nigeria of the other violations of the Protocol set forth in article 21.

3.2 Penalties

The maximum penalty fixed by the Act of fourteen years' imprisonment for grave breaches not involving wilful killing would equally represent an appropriate penalty for serious violations of the Protocol, as further required by the first limb of article 15 (2), as well as for the other violations set forth in article 21.

3.3 Material scope and prescriptibility

The various modes of participation in grave breaches as offences under Nigerian law provided for in section 3 (1) are consonant to some extent with general principles of international law governing criminal responsibility, although seemingly not as regards attempt and conspiracy.

As it is, however, Nigeria will need to legislate to enact the serious violations of the Protocol as crimes under Nigerian law. In this light, it would seem no more inconvenient, and legally more certain, for it to provide at the same time for their material scope in a manner expressly in accordance with general principles of international law. That is, in criminalising serious violations as a matter of Nigerian law, Nigeria should take the opportunity to legislate explicitly to impose responsibility for attempting to commit a serious violation; for ordering, soliciting or inducing the commission of a serious violation; for aiding, abetting or otherwise assisting in the commission or attempted commission of a serious violation; and for intentionally contributing in any other way to the commission or attempted commission of a serious violation by a group of persons acting with a common purpose. In this way, Nigeria would unequivocally satisfy, to this extent, the obligation laid down in the second limb of article 15 (2) of the Protocol to comply with general principles of international law when criminalising serious violations as a matter of domestic law.

But in order to accord fully with general principles of international law 'including the rules extending individual criminal responsibility to persons other than those who directly commit the act', Nigerian legislation enacting the serious violations of the Protocol would need to establish secondary criminal responsibility for serious violations under the doctrines of command and superior responsibility.

As crimes under Nigerian law, serious (and other) violations of the Protocol would not be prescriptible.

3.4 Jurisdiction

Sections 3 (1) and 3 (2) of the Act are a handy template for the establishment by Nigeria of jurisdiction over offences on the three bases of territoriality, nationality and universality, as is required by article 16 (1)(c) of the Protocol in respect of those serious violations set forth in article 15 (1) subparagraphs (a) to (c).

Sections 3 (1) and 3 (2), however, make no distinction between offences subject to universal jurisdiction and offences subject to jurisdiction only on the bases of territoriality and nationality. This is for the simple reason that the grave breaches regime of the 1949 Geneva Conventions does not call for such a distinction.

Legislation enacting into Nigerian law the serious violations of the Second Hague Protocol would want to distinguish between universal jurisdiction, as attaches to those serious violations set forth in article 15 (1) subparagraphs (a) to (c), and the jurisdiction based solely on territoriality and nationality attaching to the serious violations in article 15 (1)(d) and (e) and as appropriate for the other violations of the Protocol defined in article 21.

4. RECOMMENDATIONS

1. *It is recommended that Nigeria ratify the Second Hague Protocol.*

2. *It is recommended that Nigeria legislate along the lines of its Geneva Conventions Act to enact as crimes under Nigerian law the serious violations of the Protocol.*

3. *It is recommended that Nigeria legislate along the lines of its Geneva Conventions Act to make such crimes punishable by imprisonment for an appropriate period.*

4. *It is recommended that Nigeria legislate to impose criminal responsibility for attempting to commit such crimes; for ordering, soliciting or inducing the commission of such crimes; for aiding, abetting or otherwise assisting in the commission or attempted commission of such crimes; and for intentionally contributing in any other way to the commission or attempted commission of such crimes by a group of persons acting with a common purpose.*

5. *It is recommended that Nigeria legislate to impose secondary criminal responsibility for such crimes on the bases of command and superior responsibility.*

6. *It is recommended that Nigeria legislate to establish its jurisdiction over such crimes when they are committed abroad by Nigerian nationals.*

7. *It is recommended that Nigeria legislate along the lines of its Geneva Conventions Act to establish its jurisdiction over those crimes corresponding to the serious violations set forth in article 15 (1) subparagraphs (a) to (c) of the Protocol when they are committed abroad by non-nationals and when the alleged offender is subsequently present in Nigerian territory.*

Chapter 7

THE UNITED KINGDOM

1. GENERAL

1.1 Preface

The United Kingdom of Great Britain and Northern Ireland is not yet a party to either the 1954 Hague Convention or the Second Hague Protocol. It is a party to the 1949 Geneva Conventions and to both of their Additional Protocols.

While the UK has a system of courts-martial with jurisdiction over members of its armed forces, its substantive military law is not discussed below. Members of the UK's armed forces remain bound by the ordinary criminal law.[70] The grave breaches regime of the 1949 Geneva Conventions and of Additional Protocol I has been implemented in the UK by way of ordinary criminal statute. National implementation of the Second Hague Protocol would take place the same way.

1.2 Constitutional determinants of national implementation

Under the law of the UK, a treaty to which the UK is a party can have no effect on the rights of individuals until enacted into domestic law by parliament.[71]

In addition, new criminal offences, regardless of whether they are derived from treaty, require legislation for their introduction.[72]

As such, the penal provisions of Chapter 4 of the Protocol require specific statutory enactment for their national implementation by the UK.

2. THE 1949 GENEVA CONVENTIONS AND ADDITIONAL PROTOCOL I

2.1 Introduction

One attractive model for statutory enactment by the UK of Chapter 4 of the Second Hague Protocol is the country's International Criminal Court Act 2001, applicable to England and Wales and to Northern Ireland, as well as its International Criminal Court (Scotland) Act 2001. (Note that there are three separate bodies of criminal law in the UK: the law of England and Wales, the law of Northern Ireland and the law of Scotland respectively.) Both Acts were passed to make domestic provision for crimes within the jurisdiction of the International Criminal Court.[73]

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[70] War Office, *Manual of Military Law. Part I* (London: HMSO, 1956), §2. UK service personnel are tried for ordinary offences by military courts.

[71] See *eg The Parlement Belge* (1879) 4 PD 129; *J H Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1989] 3 WLR 969 at 1002, *per* Lord Oliver.

[72] See *eg Knuller* [1973] AC 435; *Withers* [1975] AC 842.

[73] Note that in 1957 the UK enacted the Geneva Conventions Act, in order to give effect to its obligations under the grave breaches regime of the 1949 Geneva Conventions. The Act was subsequently amended to include those grave breaches provided for in Additional Protocol I.

The Geneva Conventions Act is not considered below, for the reason that the two International Criminal Court Acts would serve as better models for implementation by the UK of Chapter 4 of the Second Hague Protocol.

2.2 Criminalisation

Section 51 (1) of the International Criminal Court Act states in relevant part:

> It is an offence against the law of England and Wales for a person to commit ... a war crime.

Section 58 (1) of the Act performs the same function for the law of Northern Ireland. Section 1 (1) of the International Criminal Court (Scotland) Act makes war crimes offences under the law of Scotland.

Section 50 (1) of the International Criminal Court Act and section 1 (4) of the International Criminal Court (Scotland) Act make it clear that the term 'war crime', as used in their respective provisions, means a war crime as defined in article 8 (2) of the Statute of the International Criminal Court.

For its part, section 8 (2)(a) of the Statute of the International Criminal Court defines the term 'war crimes' to include grave breaches of the 1949 Geneva Conventions.

In sum, section 51 of the International Criminal Court Act and section 1 (1) of the International Criminal Court (Scotland) Act combine to make grave breaches of the 1949 Geneva Conventions offences against all three bodies of UK law.

2.3 Penalties

Section 53 paragraphs (5) and (6) of the International Criminal Court Act fix the penalties to attach to the offences against the law of England and Wales created by the Act, including grave breaches of the 1949 Geneva Conventions. These provisions state:

> (5) A person convicted of –
> (a) an offence involving murder, or
> (b) an offence ancillary to an offence involving murder,
> shall be dealt with as for an offence of murder or, as the case may be, the corresponding ancillary offence in relation to murder ...[74]
>
> (6) In any other case a person convicted of an offence is liable to imprisonment for a term not exceeding 30 years.

The penalty for murder under the law of England and Wales is imprisonment for a mandatory sentence of life. Section 60 paragraphs (5) and (6) perform the same function in respect of the law of Northern Ireland. Section 3 paragraphs (4) and (5) of the International Criminal Court (Scotland) Act do the same for Scots law.

2.4 Material scope and prescriptibility

Both Acts recognise criminal responsibility for culpable omissions.[75]

More generally, section 56 (1) of the International Criminal Court Act, applicable to the law of England and Wales, states that '[i]n determining whether an offence under this Part has been committed the court shall apply the principles of the law of England and Wales'; and section 56 (2)(b) makes it clear that nothing in the Act 'shall be read as restricting the operation of any enactment or rule of law relating to ... offences ancillary to offences' under the Act. In turn, section 55 (1) states that reference to an ancillary offence under the law of England and Wales is to

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[74] Section 53 (5) continues: 'In this subsection "murder" means the killing of a person in such circumstances as would, if committed in England and Wales, constitute murder.'

[75] See International Criminal Court Act, s.69 (applicable to England and Wales and to Northern Ireland); International Criminal Court (Scotland) Act, s.28 (1).

(a) aiding, abetting, counselling or procuring the commission of an offence,
(b) inciting a person to commit an offence,
(c) attempting or conspiring to commit an offence, or
(d) assisting an offender or concealing the commission of an offence.[76]

In short, the Act recognises criminal responsibility for all these modes of participation in grave breaches of the 1949 Geneva Conventions. Sections 63 (1) and 63 (2)(b), combined with section 62, perform the same function with respect to the law of Northern Ireland. Sections 9 (1) and 9 (5)(b) of the International Criminal Court (Scotland) Act, combined with section 7, do the same in relation to Scots law.

In addition, section 65 of the International Criminal Court Act provides for secondary criminal responsibility under the laws of England and Wales and of Northern Ireland pursuant to the doctrines of command and superior responsibility respectively. The section reads:

(1) This section applies in relation to:
  (a) offences under this Part, and
  (b) offences ancillary to such offences.

(2) A military commander, or a person effectively acting as a military commander, is responsible for offences committed by forces under his effective command and control, or (as the case may be) his effective authority and control, as a result of his failure to exercise control properly over such forces where:
  (a) he either knew, or owing to the circumstances at the time, should have known that the forces were committing or about to commit such offences, and
  (b) he failed to take all necessary and reasonable measures within his power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

(3) Within respect to superior and subordinate relationships not described in subsection (2), a superior is responsible for offences committed by subordinates under his effective authority and control, as a result of his failure to exercise control properly over such subordinates where:
  (a) he either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such offences,
  (b) the offences concerned activities that were within his effective responsibility and control, and
  (c) he failed to take all necessary and reasonable measures within his power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

(4) A person responsible under this section for an offence is regarded as aiding, abetting, counselling or procuring the commission of the offence.

* * *

(6) Nothing in this section shall be read as restricting or excluding:
  (a) any liability of the commander or superior apart from this section, or
  (b) the liability of persons other than the commander or superior.

Section 5 of the International Criminal Court (Scotland) Act provides similarly for command and superior responsibility under the law of Scotland.

Finally, crimes are not prescriptible under the laws of England and Wales, Northern Ireland or Scotland.

2.5 Jurisdiction

Section 51 (2) of the International Criminal Court Act provides the jurisdictional element to the offences under the law of England and Wales created in section 51 (1). It states:

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[76] These terms are used within the meaning of the relevant enactments and rules of law specified in section 55 paragraphs (2) to (5).

> This section [*ie* section 51] applies to acts committed –
>
> (a) in England and Wales, or
>
> (b) outside the United Kingdom by a United Kingdom national, a United Kingdom resident or a person subject to UK service jurisdiction.[77]

Section 52 makes special jurisdictional provision for conduct ancillary to such offences.[78] Sections 58 (2) and 59 of the Act do the same in respect of the offences under the law of Northern Ireland created in section 58 (1). These jurisdictional functions are performed for Scots law by sections 1 (2) and 2 of the International Criminal Court (Scotland) Act.[79]

The net result of these various sections is that the Acts establish jurisdiction over grave breaches, conduct ancillary to grave breaches and ancillary offences related to both on the twin bases of territoriality and nationality, the latter in an expansive form.

But neither Act provides for universal jurisdiction over grave breaches as offences under domestic law.

The exercise by the courts of the extraterritorial jurisdiction provided for by the Act over grave breaches as offences under the law of England and Wales is facilitated by section 53 (4). This states:

> If the offence is committed in England and Wales –
>
> (a) proceedings may be taken, and
>
> (b) the offence may for incidental purposes be treated as having been committed,
>
> in any place in England and Wales.

Section 60 (4) of the Act and section 3 (3) of the International Criminal Court (Scotland) Act do the same in relation to grave breaches as offences under the laws of Northern Ireland and Scotland respectively.

3. THE SECOND HAGUE PROTOCOL

3.1 Criminalisation

The relevant provisions of the International Criminal Court Act and the International Criminal Court (Scotland) Act are good models for the implementation by the United Kingdom of the obligation of domestic criminalisation imposed by the first limb of article 15 (2) of the Second Hague Protocol in respect of the serious violations of the Protocol set forth in article 15 (1).

They also serve as useful examples for the criminalisation by the UK of the other violations of the Protocol set forth in article 21.

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77 The terms 'UK National', 'UK resident' and 'person subject to UK service jurisdiction' are defined in section 67. Note that section 68, applicable to both the law of England and Wales and of Northern Ireland, provides for jurisdiction over persons who become residents of the United Kingdom subsequent to the commission of the acts constituting the offence in question.

78 It provides that such conduct constitutes an offence if committed in England and Wales or outside the United Kingdom by a UK national, *etc*, even if the war crime to which the conduct in question is ancillary is committed outside the United Kingdom by a non-UK national, *etc*, and so does not itself constitute an offence under section 51 (1). For examples of the operation of this provision, see *Explanatory Notes. International Criminal Court Act 2001. Chapter 17* (Norwich: HMSO, 2001), para 93.

79 The terms 'UK national' and 'UK resident' are defined in section 28 (1). Section 6 provides for jurisdiction over persons who become residents of the UK subsequent to the commission of the acts constituting the offence in question.

3.2 Penalties

The maximum penalty fixed by the Acts of thirty years' imprisonment for war crimes not involving murder would equally represent an appropriate penalty for serious violations of the Protocol, as further required by the first limb of article 15 (2), as well as for the other violations set forth in article 21.

3.3 Material scope and prescriptibility

The material scope of offences under the Acts accords in every way with the principles of international law relating to the imposition of criminal responsibility, including the rules extending criminal responsibility to persons other than those who directly commit the act. If legislation to enact the serious violations of the Protocol were to mirror the Acts in this respect, the UK would satisfy the obligation laid down in the second limb of article 15 (2) of the Protocol.

Legislative provision along the lines of the relevant sections of the Acts would also be an appropriate means of criminalising the other violations defined in article 21 of the Protocol.

As crimes under UK law, serious and other violations of the Protocol would not be prescriptible.

3.4 Jurisdiction

The relevant provisions of the Acts are good illustrations of the establishment by the UK of jurisdiction over offences on the twin bases of territoriality and nationality, as is required in respect of serious violations of the Protocol by articles 16 (1)(a) and 16 (1)(b) respectively.

But the Acts make no provision for universal jurisdiction. Such provision would need to be made in any UK legislation implementing Chapter 4 of the Protocol for the UK to fulfil the obligation laid down in article 16 (1)(c) to extend jurisdiction on the basis of universality over those serious violations set forth in article 15 (1)(a) to (c).

One example of such statutory provision is to be found in the UK's Geneva Conventions Act 1957 (as amended). Section 1 (1) of the Act provides:

> Any person, whatever his nationality, who, whether in or outside the United Kingdom, commits, or aids, abets or procures the commission by any other person of, a grave breach of any of the scheduled conventions or the first protocol shall be guilty of an offence ...

The exercise by the courts of universal jurisdiction pursuant to section 1 (1) is facilitated by section 1 (2) of the Act but would equally be effected by provisions reproducing sections 53 (4) and 60 (4) of the International Criminal Court Act and section 3 (3) of the International Criminal Court (Scotland) Act.

4. RECOMMENDATIONS

1. *It is recommended that the UK become a party to the 1954 Hague Convention and to the Second Hague Protocol.*

2. *It is recommended that the UK legislate along the lines of its International Criminal Court Act and International Criminal Court (Scotland) Act to enact as crimes under UK law the serious violations of the Protocol.*

3. *It is recommended that the UK legislate along the lines of its International Criminal Court Act and International Criminal Court (Scotland) Act to make such crimes punishable by imprisonment for an appropriate period.*

4. *It is recommended that the UK legislate along the lines of its International Criminal Court Act and International Criminal Court (Scotland) Act to recognise criminal responsibility for aiding, abetting,*

counselling or procuring the commission of such crimes; for inciting a person to commit such crimes; for attempting or conspiring to commit such crimes; and for assisting an offender or concealing the commission of such crimes.

5. *It is recommended that the UK legislate along the lines of its International Criminal Court Act and International Criminal Court (Scotland) Act to impose secondary criminal responsibility for such crimes on the bases of command and superior responsibility.*

6. *It is recommended that the UK legislate along the lines of its International Criminal Court Act and International Criminal Court (Scotland) Act to establish its jurisdiction over such crimes when they are committed abroad by UK nationals.*

7. *It is recommended that the UK legislate along the lines of its Geneva Conventions Act to establish its jurisdiction over those crimes corresponding to the serious violations set forth in article 15 (1) subparagraphs (a) to (c) of the Protocol when they are committed abroad by non-nationals and when the alleged offender is subsequently present in UK territory.*

Chapter 8

THE UNITED STATES OF AMERICA

1. GENERAL

1.1 Preface

The United States of America is not yet a party to the 1954 Hague Convention or to the Second Hague Protocol. It is a party to the 1949 Geneva Conventions but to neither of their Additional Protocols.

The implementation by the US of the international law of armed conflict is shared between its ordinary criminal law and military law. Both are considered below.

1.2 Constitutional determinants of national implementation

Article VI of the US Constitution provides that, in addition to the Constitution itself and to Acts of Congress, treaties in force to which the US is a party 'shall be the supreme law of the land'. But although treaties have the force of US law, it does not necessarily follow that they are directly applicable by the US courts. This is only the case in respect of those treaty provisions that are 'self-executing' – that is, that can be said to operate of themselves without the aid of legislative provision.[80]

Whether a particular treaty is self-executing or not in the US legal order is matter for determination by the US courts. But US judicial authority makes it is clear that when States Parties undertake in a treaty provision to perform a particular act, that provision is not self-executing; rather, Congress must pass legislation to give it effect.[81] The non-self-executing nature of a treaty provision is even clearer when it expressly calls for implementing legislation.[82] In this light, the relevant obligations embodied in the 1949 Geneva Conventions and in the Second Hague Protocol would appear to be classic non-self-executing treaty provisions for the purposes of US law.[83]

But, as it is, Congress—pursuant to the power conferred on it by Article 1 §8 clause 10 of the Constitution '[t]o define and punish ... offenses against the law of nations'[84]—has enacted two pieces of legislation directly relevant to the question of the implementation by the United States of the grave breaches of the

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80 *Foster and Elam v Neilson*, 27 US 253, 314 (1829), *per* Marshall CJ.

81 *Ibid*.

82 *Aerovias Interamericanas de Panama, SA v Board of County Commissioners of Dade County, Florida*, 197 F Supp 230, 245 (S D Fla 1961).

83 Recall that the relevant grave breaches provisions of the 1949 Geneva Conventions provide identically: '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 ...': see 1949 Geneva Convention I, art 49; 1949 Geneva Convention II, art 50; 1949 Geneva Convention III, art 129; 1949 Geneva Convention IV, art 146.

Article 15 (2) of the Second Hague Protocol states that '[e]ach Party shall adopt such measures as may be necessary to establish as criminal offences under its domestic law ...'; article 16 (1) provides that 'each Party shall take the necessary legislative measures to establish its jurisdiction over offences ...'; and, pursuant to article 21, 'each Party shall adopt such legislative ... measures as may be necessary to suppress the following acts ...'.

84 The promulgation of the Uniform Code of Military Justice is also, and more directly, an exercise of congressional authority under Art I §8 cl 14 '[t]o make rules for the government and regulation of the land and naval forces'.

1949 Geneva Conventions and of Chapter 4 of the Second Hague Protocol. These are the Uniform Code of Military Justice[85] and the War Crimes Act 1996 (as amended by the Expanded War Crimes Act 1997).[86]

2. THE 1949 GENEVA CONVENTIONS

2.1 Introduction

Both the military law and the ordinary criminal law of the US provide for the punishment of war crimes, including grave breaches of the 1949 Geneva Conventions. They attach similar penalties to and provide for a similar material scope in respect of such crimes.

The substantive point of distinction between the two bodies of law as specifically regards war crimes is their respective applications *ratione personae* and *ratione loci.*

The difference in terms of procedure is that US military law falls within the jurisdiction of the US courts-martial, whereas the war crimes provisions of the ordinary criminal law are triable by the US federal courts.

In order to see the overall picture of the implementation by the US of the grave breaches provisions of the 1949 Geneva Conventions, its military law and ordinary criminal law must be read in tandem.

2.2 Uniform Code of Military Justice

2.2.1 *Criminalisation*

Article 18 clause 2

Clause 2 of article 18 of the Uniform Code of Military Justice (UCMJ) states in relevant part:

> General courts-martial ... have jurisdiction to try any person who by the law of war is subject to trial by a military tribunal and may adjudge any punishment permitted by the law of war.

The term 'law of war' is not limited to customary international law: the effect of the provision is, *inter alia*, to grant the US general courts-martial jurisdiction to try war crimes created by international conventions to which the US is a party.

In terms of their formal juridical quality, war crimes established by international law (conventional or customary) are triable under UCMJ, article 18 clause 2 *as* international law.[87] Unlike the range of crimes enumerated in subchapter X of the UCMJ, they are not defined and tried as crimes under US law.[88]

The application of UCMJ, article 18 clause 2 is not restricted to war, in the formal legal sense of the term, but extends to the contemporary notion of armed conflict. Nor does it appear restricted to armed conflicts to which the US is a party. [89] Rather, the war crimes punishable under this provision would seem to be so

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85 Codified at 10 USC §§801 *et seq* [hereafter, 'UCMJ'].

86 18 USC §2441.

87 See Aldykiewicz & Corn, 'Authority to Court-Martial Non-US Military Personnel for Serious Violations of International Humanitarian Law Committed During Internal Armed Conflicts' (2001) 167 *Mil L Rev* 74 at 87 & 148; see also Department of the Army, *The Law of Land Warfare. Department of the Army Field Manual FM 27-10* (Washington, DC: USGPO, 1956), §505 (e).

88 Aldykiewicz & Corn, *idem*, at 148. The US Supreme Court stated in In re *Yamashita*, 327 US 1, 16 (1945): 'We do not make the laws of war but we respect them so far as they do not conflict with the commands of Congress or the Constitution.'.

89 See Aldykiewicz & Corn, *idem*, at 81, 83.

regardless of the parties to the conflict in which they occurred. Finally, the provision does not appear limited to armed conflict of an international character. On the contrary, it would seem that as long as the relevant international convention to which the US is a party is applicable to non-international armed conflict, war crimes defined in the convention would be punishable under UCMJ, article 18 clause 2.[90]

As a result of UCMJ, article 18 clause 2, grave breaches of the 1949 Geneva Conventions are punishable by the US general courts-martial.[91]

Article 18 clause 1

In addition to the jurisdiction granted by article 18 clause 2, article 18 clause 1 of the UCMJ grants the US general-courts martial jurisdiction to try persons subject to the UCMJ for any offence made punishable by it.[92] (The range of persons subject to the UCMJ is spelled out in article 2 (a) and comprises members of the US armed forces and a host of related personnel, as well as prisoners of war in the custody of the US armed forces.) In practice, a person subject to the UCMJ who is accused of a war crime will not be tried for it as a war crime, pursuant to article 18 clause 2, but rather for an analogous crime found in subchapter X of the UCMJ,[93] *eg* murder[94] or manslaughter.[95] That is, he or she will be tried for a crime under US law, not for a war crime *quâ* international law, as would be the case under UCMJ, article 18 clause 2.[96]

Most, if not all conduct amounting to a grave breach of the 1949 Geneva Conventions would equally constitute a crime embodied in UCMJ, subchapter X.

2.2.2 ***Penalties***

Article 18 clause 2

As seen above, article 18 clause 2 of the UCMJ grants the US general courts-martial the power to 'adjudge any punishment permitted by the law of war'. In this way, the penalty to attach to a war crime, including to a grave breach of the 1949 Geneva Conventions, is determined, at least in a negative sense, by reference to international law. International law does not permit the imposition of a merely disciplinary sanction for the commission of a war crime. But, as to sentencing, international law is far less clear on what it does and does not permit.[97] The matter would, in practice, be left to the discretion of the US general courts-martial.[98]

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90 See *idem*, at 81-82.

91 As specifically regards grave breaches, see Department of the Army, *supra*, §506 (c); see also the view of the House Judiciary Committee cited in Aldykiewicz & Corn, *idem*, at 146.

92 Violations of the laws of war are not embodied as such in the UCMJ; *a fortiori*, grave breaches of the 1949 Geneva Conventions.

93 See *Manual for Courts Martial, United States* (2000 ed), Rule for Courts-Martial (RCM) 307 (c)(2) discussion, para (D): 'Ordinarily persons subject to the code should be charged with a specific violation of the code rather than a violation of the law of war'.

94 UCMJ, art 118.

95 UCMJ, art 119.

96 Aldykiewicz & Corn, *supra*, at 148.

97 See *supra*, Chapter 1, para 2.2.2.

98 See, in this regard, Department of the Army, *supra*, §508 to the effect that '[t]he punishment imposed for a violation of the law of war must be proportionate to the gravity of the offence'.

Article 18 clause 1

The maximum sentences available for offences punishable under the UCMJ obviously vary according to the offence.[99] By way of examples relevant to grave breaches of the 1949 Geneva Conventions, murder is punishable by imprisonment for a maximum term of life, and voluntary manslaughter by fifteen years' imprisonment.[100]

2.2.3 *Material scope and prescriptibility*

Article 18 clause 2

As war crimes are triable pursuant to UCMJ, article 18 clause 2 *quâ* international law, the material scope of each offence is determined by reference to international law itself. As such, the material scope of grave breaches of the 1949 Geneva Conventions as conventional war crimes triable by the US general courts-martial would equate to their scope under international law. This would include the recognition of secondary criminal responsibility on the bases of command and superior responsibility.[101]

It is unclear whether the prescriptibility or otherwise of war crimes punishable in accordance with UCMJ, article 18 clause 2 is determined by reference to international or US military law. In practice, it is largely immaterial. The preferable view as to the prescriptibility of war crimes under international law is that they are not prescriptible. Nor are crimes prescriptible under US military law.

Article 18 clause 1

As regards war crimes, including grave breaches, triable as crimes under subchapter X of the UCMJ itself, the UCMJ imposes criminal responsibility for attempt to commit an offence punishable under its provisions,[102] as well of course for its actual commission.[103] It also recognises responsibility for aiding, abetting, counselling, commanding or procuring the commission of an offence punishable under the UCMJ;[104] for causing an act to be done which if directly performed would be so punishable;[105] for being an accessory after the fact;[106] and for conspiracy.[107]

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99 In accordance with art 56 of the UCMJ, the penalty that a court-martial may impose for an offence punishable under the UCMJ may not exceed such limits as the President may prescribe for that offence.

100 See, generally, the Maximum Punishment Chart found at *Manual for Courts-Martial, United States* (2000 ed), Appendix 12.

101 Indeed, it was the US that first gave judicial effect to the international legal doctrine of command responsibility for war crimes: see *Yamashita* at 13-18 (1945), affirming the decision of a US military commission.

102 UCMJ, art 80.

103 UCMJ, art 77 (1).

104 UCMJ, art 77 (1).

105 UCMJ, art 77 (2).

106 UCMJ, art 78.

107 UCMJ, art 81.

Secondary criminal responsibility for war crimes under the doctrines of command and superior responsibility is not embodied in the UCMJ.[108]

Crimes are not prescriptible under US military law.

2.2.4 *Jurisdiction*

Article 18 clause 2

Pursuant to article 18 clause 2 of the UCMJ, the US general courts-martial have jurisdiction to try any person accused of a violation of the laws of armed conflict.[109] The provision is not limited by reference to the place of commission or the nationality of the accused.[110] Nor does it stipulate that the accused be a member of any armed force: on its own terms, article 18 clause 2 affords the US general courts-martial jurisdiction to try civilians for war crimes.[111]

At the same time, while the point is unsettled as regards war crimes specifically, it is highly unlikely that US constitutional law would permit a US civilian to be tried by court-martial even in respect of violations of the laws of armed conflict;[112] indeed, the perceived obstacle posed by constitutional limitations of this nature explains in part the passage of the War Crimes Act, with its applicability to all US nationals, military and civilian.[113]

Article 18 clause 1

Article 5 of the UCMJ makes it clear that the UCMJ applies without territorial limitation.[114] The range of persons subject to the UCMJ is spelled out in article 2 (a) and comprises, in short, members of the US armed forces and a host of related personnel, as well as prisoners of war in the custody of the US armed forces.

2.3 War Crimes Act (18 USC §2441)

2.3.1 *Criminalisation*

Subsection (a) of section 2441 (the War Crimes Act) of title 18 of the US Code provides:

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108 As a result, although US military tribunals apparently recognised command responsibility prior to the codification of US military law in the UCMJ (see *Yamashita* at 16, especially footnote 3), the doctrine would no longer seem applicable to crimes embodied in UCMJ, subchapter X.

109 See also *Manual for Courts-Martial, United States* (2000 ed), RCM 201 (f)(1)(B)(i)(a).

110 Aldykiewicz & Corn, *supra*, at 81 & 83.

111 Aldykiewicz & Corn, *supra*, at 81; see also *eg* Department of the Army, *supra*, §498: 'Any person, whether a member of the armed forces or a civilian, who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment ...'; see also *ibid*., §499: 'The term "war crime" is the technical expression for a violation of the law of war by any person or persons, military or civilian. ...'.

112 See Yost & Anderson, 'The Military Extraterritorial Jurisdiction Act of 2000: Closing the Gap' (2001) 95 *AJIL* 445 at 447-448; Amnesty International, *Universal Jurisdiction: The duty of states to enact and implement legislation* (AI Index: IOP 53/002-018/2001), Sep 2001, Chapter Four, Part B, pp.100-102.

113 See *infra*.

114 Note, however, that '[v]iolations of the law of war committed within the United States by [persons not subject to the UCMJ] will usually constitute violations of federal or state criminal law and preferably will be prosecuted under such law': Department of the Army, *supra*, §507 (b).

> Whoever, whether inside or outside the United States, commits a war crime, in any of the circumstances described in subsection (b), shall be fined under this title or imprisoned for life or any term of years, or both, and if death results to the victim, shall also be subject to the penalty of death.

This has the effect, first of all, of making war crimes offences under US federal law, as triable by the US federal courts.

The term 'war crimes' is defined in paragraph (c) of the section. It reads in relevant part:

> As used in this section the term "war crime" means any conduct –
>
> (1) defined as a grave breach in any of the international conventions signed at Geneva 12 August 1949, or any protocol to such convention to which the United States is a party;
>
> * * *
>
> (3) which constitutes a violation of common Article 3 of the international conventions signed at Geneva, 12 August 1949, or any protocol to such convention to which the United States is a party and which deals with non-international armed conflict ...

As such, grave breaches of the 1949 Geneva Conventions constitute crimes under the ordinary criminal law of the US; and grave breaches of Additional Protocol I would do so by the mere act of US accession to that instrument. In addition, violations of article 3 common to the four Geneva Conventions, applicable to non-international armed conflict, are punishable under the War Crimes Act; and, were the US to become a party to Additional Protocol II, violations of its provisions, to the extent that they are capable of giving rise to individual criminal responsibility, would be punishable in the same way.

2.3.2 *Penalties*

Section 2441 (a) of title 18 also fixes the penalties to attach to war crimes, including grave breaches and violations of common article 3 of the 1949 Geneva Conventions. As seen above, it provides for fines and/or imprisonment for life or for any term of years for war crimes not resulting in the victim's death; and for the availability of the death penalty where death does result.

2.3.3 *Material scope and prescriptibility*

The material scope of the offences created by title 18, section 2441 of the US Code is to be established by reference to the general provisions of that title.

As well as providing for the criminal responsibility of those who actually commit an offence within the meaning of the title,[115] title 18 recognises the criminal responsibility of persons who aid, abet, counsel, command, induce or procure such commission[116] or who cause an act to be done which if directly performed by them or another would be an offence.[117] It also imposes responsibility for being an accessory after the fact;[118] and for conspiracy to commit an offence punishable under the title.[119]

Attempts to commit offences contained in title 18 are punishable only where this is expressly stated in the specific provisions defining those offences; and section 2441 makes no reference to attempts to commit war

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115 18 USC §2 (a).

116 *Ibid*.

117 18 USC §2 (b).

118 18 USC §3. Note, however, that the punishment of an accessory is less than that of a principal.

119 18 USC §371.

crimes. As such, attempts to commit grave breaches and violations of common article 3 of the 1949 Geneva Conventions are not punishable under the War Crimes Act.

Title 18 does not recognise secondary criminal responsibility under the doctrines of command and superior responsibility.[120]

Crimes are not prescriptible under the ordinary law of the US.

2.3.4 *Jurisdiction*

Section 2441 (b) of title 18 provides:

> The circumstances referred to in subsection (a) are that the person committing such war crime or the victim of such war crime is a member of the Armed Forces of the United States or a national of the United States (as defined in section 101 of the Immigration and Nationality Act).[121]

This has the effect of establishing the extraterritorial jurisdiction of the US federal courts over war crimes as offences under US law, including over grave breaches and violations of common article 3 of the 1949 Geneva Conventions, on the basis of an expansive form of nationality, as well as on the basis of so-called 'passive personality' (*ie* on the basis of the nationality of the victim).

Insofar as 18 USC §2441 (b) grants the US federal courts jurisdiction over members of the US armed forces and foreign nationals accused of war crimes, this jurisdiction is concurrent with that enjoyed by the US general courts-martial pursuant to the UCMJ. But as regards US civilians, federal court jurisdiction is effectively exclusive, given the likely constitutional bar to court-martial jurisdiction in this regard.

Subsection (b) of section 2441 does not provide for universal jurisdiction over war crimes.[122]

2.4 Summary of US jurisdiction *ratione personae* and *ratione loci*

Reading together the jurisdictional provisions of the UCMJ and the War Crimes Act, note that the US—taken as a whole—establishes its jurisdiction over grave breaches of the 1949 Geneva Conventions on the combined bases of territoriality, nationality and universality.

3. THE SECOND HAGUE PROTOCOL

3.1 Introduction

As with the grave breaches of the 1949 Geneva Conventions, implementation by the US of Chapter 4 of the Second Hague Protocol can only adequately be discussed by considering the combined effect of the UCMJ and the War Crimes Act.

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120 Note that the finding in *Yamashita*, *supra*, related to responsibility directly under the laws of armed conflict. Criminal responsibility under title 18 of the US Code may be imposed only on the grounds codified in that title.

121 Also relevant in this context is the Military Extraterritorial Jurisdiction Act 2000 (18 USC §§3261-3267) which grants the US federal courts extraterritorial jurisdiction over war crimes committed by persons who, *inter alia*, were subject to the UCMJ at the time of the offence's commission but who have ceased to be subject to it in the meantime. In relevant cases, this jurisdiction is concurrent with that of the US courts-martial: see 18 USC §3261 (c).

122 Nor does 18 USC §2441 (b) establish jurisdiction over war crimes, as crimes under US law, on the basis of territoriality. But war crimes committed on US territory by non-members of the US armed forces and by non-US nationals would almost certainly involve a victim who is so. Anyway, most if not all conduct amounting to a war crime would, if committed on US territory, equally constitute a common crime under US federal or state law. In addition, such conduct would be punishable as a war crime pursuant to UCMJ, art 18 cl 2.

3.2 Criminalisation

3.2.1 *UCMJ*

Article 18 clause 2

A person who commits one of the serious violations of the Protocol would constitute a 'person who by the law of war is subject to trial by a military tribunal', within the meaning of UCMJ, article 18 clause 2. Every serious violation of the Protocol is characterised in the *chapeau* to article 15 (1) as 'an offence' – in other words, as giving rise to the individual criminal responsibility of the perpetrator under international law.

As a result, by the mere act of becoming a party to the Protocol, the US would render the serious violations set forth in article 15 (1) of that instrument triable by the US general courts-martial.

Article 18 clause 1

Unless Congress were to enact legislation to amend subchapter X of the UCMJ, serious violations of the Protocol would not as such be crimes under the UCMJ.

Some conduct amounting to a serious violation would constitute the crime of wilfully and wrongfully destroying or damaging property other than military property of the United States;[123] and pillage of cultural property, defined as a serious violation in article 15 (1)(e), would be punishable under the UCMJ as pillage.[124] As a result, persons subject to the UCMJ could be tried for such conduct by the US general courts-martial pursuant to UCMJ, article 18 clause 1.

Not every serious violation of the Protocol, however, would amount to an offence under subchapter X of the UCMJ.[125] As a consequence, not every serious violation of the Protocol would be triable under UCMJ, article 18 clause 1.

But the strictly legal significance of this is nil. The trial under article 18 clause 1 of persons subject to the UCMJ for conduct amounting to a war crime is no more than a policy preference.[126] All serious violations of the Protocol, by whomever committed, remain triable by the US general courts-martial in accordance with UCMJ, article 18 clause 2.

3.2.2 *War Crimes Act*

The trial by the US federal courts of the serious violations set forth in article 15 (1) of the Protocol would require legislation to amend the War Crimes Act. Express reference to serious violations of the Protocol would need to be inserted among the paragraphs of subsection (c) of 18 USC §2441.[127]

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123 UCMJ, art 109.

124 UCMJ, art 103 (b)(3).

125 As it is, the maximum penalty for the offence of wilfully and wrongfully destroying or damaging property other than military property of the United States under UCMJ, art 109 (*ie* 1 or 5 years, depending on its value: see *Manual for Courts Martial, United States* (2000 ed), Appendix 12) would not reflect the gravity of a serious violation of the Protocol, as required by the first limb of Protocol, art 15 (2). But the penalty for pillage under UCMJ, art 103 (b)(3) (imprisonment for life: see *ibid*.) would be appropriate.

126 Note the wording of *Manual for Courts Martial, United States* (2000 ed), RCM 307 (c)(2) discussion, para (D): '*Ordinarily* persons subject to the code *should* be charged with a specific violation of the code rather than a violation of the law of war' [emphasis added].

127 At present, such reference would constitute 18 USC §2441 (c)(5).

3.2.3 *Summary*

In order to fulfil the obligation imposed by the first limb of article 15 (2) of the Protocol to establish as crimes under domestic law the serious violations of the Protocol, the US would need to enact amending legislation to the War Crimes Act inserting reference to these violations in 18 USC §2441 (c).

Such legislation might usefully include reference to the other violations of the Protocol set forth in article 21.

3.3 Penalties

3.3.1 *UCMJ*

Article 18 clause 2 of the UCMJ would empower the US general courts-martial to 'adjudge any punishment permitted by the law of war' in respect of serious violations of the Protocol.

There is every reason to expect that custodial sentences imposed in this regard would be appropriate to the gravity of such violations.

3.3.2 *War Crimes Act*

18 USC §2441 (a) provides for a maximum penalty of imprisonment for life or any term of years in respect of war crimes not resulting in death. Were the War Crimes Act to be amended to criminalise, as a matter of US federal law, the serious (and other) violations of the Protocol, such violations would be punishable in this way.

3.3.3 *Summary*

No further action would be required by the US to acquit the obligation laid down in the first limb of article 15 (2) of the Protocol to make the serious violations set forth in article 15 (1) punishable by appropriate penalties when criminalising them as a matter of domestic law.

3.4 Material scope and prescriptibility

3.4.1 *UCMJ*

As punishable in accordance with article 18 clause 2 of the UCMJ, the material scope of serious violations of the Protocol would be their material scope under international law.

3.4.2 *War Crimes Act*

The material scope of serious (and other) violations of the Protocol as war crimes punishable under the War Crimes Act would, by reference to the general provisions of title 18 of the US Code, be largely consonant with their material scope as a matter of international law.

The two exceptions are the failure of 18 USC §2441 to impose criminal responsibility for attempts to commit war crimes and the non-recognition, under either title 18 generally or 18 USC §2441 specifically, of secondary criminal responsibility on the bases of command and superior responsibility. The correcting of the former would require legislative amendment of the War Crimes Act. The latter would, as a matter of policy and convenience, be better overcome by amending the War Crimes Act itself, rather than the general provisions of title 18.

3.4.3 *Summary*

In order to satisfy the obligation imposed by the second limb of article 15 (2) of the Protocol to comply, when criminalising serious violations under domestic law, with general principles of international law 'including the rules extending individual criminal responsibility to persons other than those who directly commit the offence', the US would need to amend 18 USC §2441 to impose responsibility, first, for attempt and, second, on the bases of command and superior responsibility.

3.5 Jurisdiction

3.5.1 *UCMJ*

The jurisdiction of the US general-courts martial over war crimes pursuant to UCMJ, article 18 clause 2 is unrestricted as to the place of commission of the offence and the nationality of the offender. The general-courts martial have jurisdiction over any person 'who by the law of war is subject to trial by a military tribunal'. Any violation of the law of armed conflict, to the extent that it is capable of giving rise to individual criminal responsibility, renders the individual responsible for the violation subject to trial by a military tribunal, regardless of whether the prosecuting state is obliged to exercise its jurisdiction only on given bases. As such, the US general courts-martial enjoy jurisdiction over war crimes in accordance with UCMJ, article 18 clause 2 on the combined bases of territoriality, nationality and universality.

A person who commits any serious violation of the Protocol is subject to trial by a military tribunal,[128] within the meaning of UCMJ, article 18 clause 2. As a result, the US general courts-martial would enjoy jurisdiction over such violations on the three bases of territoriality, nationality and universality.[129]

Recall, however, that the US Constitution would appear to restrict the exercise of court-martial jurisdiction over US civilians. Such persons are, in practice, triable solely by the US federal courts in accordance with the War Crimes Act.

3.5.2 *War Crimes Act*

Were the US to amend 18 USC §2441 (c) to render serious (and other) violations of the Protocol punishable under the War Crimes Act, these violations would be triable by the US federal courts on the basis of nationality and, insofar as a member of the US armed forces or a US national were injured in their commission, on the basis of passive personality.

3.5.3 *Summary*

By inserting reference to serious violations of the Protocol into 18 USC §2441 (c), the US would fulfil the obligation imposed by article 16 (1) to establish its jurisdiction over these violations on the bases prescribed by article 16 (1) subparagraphs (a), (b) and (c) respectively.

4. RECOMMENDATIONS

1. *It is recommended that the US become a party to the 1954 Hague Convention and to the Second Hague Protocol.*

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[128] Recall that every serious violation is characterised in art 15 (1) of the Protocol as 'an offence' within the meaning the Protocol, *ie* as giving rise to the individual criminal responsibility of the perpetrator under international law.

[129] This would involve establishing universal jurisdiction collaterally over those serious violations of the Protocol set forth in article 15 (1) subparagraphs (d) to (e), which are subject to an obligation to establish jurisdiction only on the bases of territoriality and nationality, as well as over the other violations set forth in article 21.

But it appears established US policy, as reflected in art 18 cl 2 of the UCMJ itself, to exercise universal jurisdiction over all war crimes established by international conventions to which the US is a party.

2. *It is recommended that the US legislate to insert into 18 USC §2441 (c) a paragraph referring to serious violations of the Protocol.*

3. *It is recommended that the US legislate to amend 18 USC §2441 to impose criminal responsibility for attempts to commit serious violations of the Protocol.*

4. *It is recommended that the US legislate to amend 18 USC §2441 to impose criminal responsibility for serious violations of the Protocol on the bases of command and superior responsibility.*

B. THE CIVIL LAW TRADITION

Chapter 9

ARGENTINA

1. GENERAL

1.1 Preface

Argentina is a party to the 1954 Hague Convention and to the Second Hague Protocol. It is a party to the 1949 Geneva Conventions and to both of their Additional Protocols.

Argentine criminal law and jurisdiction comprises, on the one hand, the ordinary criminal law and courts and, on the other, military criminal law and military tribunals. The latter are not treated below, for several reasons. First, the grave breaches regime of the 1949 Geneva Conventions and Additional Protocol I is given no more effect in Argentine military law than it is the ordinary criminal law. Second and more significantly, as regards national implementation of the Second Hague Protocol, Argentine military law is insufficiently general in its scope of application *ratione personae*[130] and *ratione materiae*[131] adequately to fulfil the range of jurisdictional obligations imposed by article 16 (1) of the Protocol. Moreover, as it is, persons subject to the military law of Argentina remain bound by the ordinary Penal Code where the latter embraces conduct not punished by military law.

1.2 Constitutional determinants of national implementation

Article 31 of the Constitution of the Argentine Nation states that, in addition to the Constitution itself and to laws enacted by Congress pursuant to it, treaties are the supreme law of the land. That is, international conventions to which Argentina is a party, duly approved by Congress in accordance with article 75 (22) of the Constitution, enter into the domestic legal order without the need for further legislative action and occupy a position in the hierarchy of norms equal to that of the Constitution and statute.[132] Article 75 (22) of the Constitution provides further that treaties approved by the Congress take precedence over laws.

But merely because they enjoy the force of law does not necessarily mean that all treaties are capable of being applied directly by the Argentine courts. Given treaty provisions will be applicable without need for legislative intervention only if they are self-executing. Whether or not a treaty is self-executing in the Argentine legal order is a question for the Argentine courts.

Moreover, the domestic applicability of treaty provisions of a specifically penal nature, such as the serious violations of the Second Hague Protocol and the grave breaches of the 1949 Geneva Conventions and Additional Protocol I, is complicated by principles peculiar to the criminal law. Specifically, under Argentine law, no person may be punished for a crime that is not recognised and defined in advance by way of statute.[133] In other words, unless a crime and its penalty are found in the Penal Code or in penal provisions found in a separate statute,[134] it cannot be tried in Argentina.

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130 For example, and not least, in its very limited application to civilians.

131 Especially in its non-applicability to armed conflicts (including, obviously, non-international armed conflicts) to which Argentina is not a party.

132 Article 31 of the Constitution is given effect to by article 116, pursuant to which the Argentine courts enjoy jurisdiction over treaties.

133 Constitution, art 18.

134 Article 4 of the Penal Code states that, unless otherwise provided, the general provisions of the Code are applicable to crimes established by separate laws.

Argentina has not yet enacted into domestic law the grave breaches provisions of the 1949 Geneva Conventions and Additional Protocol I.

2. THE 1949 GENEVA CONVENTIONS AND ADDITIONAL PROTOCOL I

2.1 Criminalisation

Since they are not included in the Argentine Penal Code[135] or in any separate statute, the grave breaches provisions of the 1949 Geneva Conventions and Additional Protocol I do not constitute crimes *eo nomine* punishable by the Argentine criminal courts.

But certain acts amounting to grave breaches constitute common crimes embodied and defined in the Penal Code, *eg* homicide.[136] As such, most if not all grave breaches are, at least in principle, amenable to trial in Argentina.

2.2 Penalties

The common crimes to which grave breaches of the 1949 Conventions and Additional Protocol I would amount are punishable by imprisonment for varying periods.[137]

2.3 Material scope and prescriptibility

In addition to criminal responsibility for the actual commission of an offence, the Penal Code recognises criminal responsibility for attempt[138] and for being an accessory to an offence.[139] The latter covers participation in the commission of an act or the rendering of any assistance or co-operation without which commission would not have been possible,[140] as well as co-operation in any other way in such commission and the rendering of assistance after commission by virtue of a prior promise.[141]

The criminal law of Argentina does not recognise secondary criminal responsibility under the doctrines of either command or superior responsibility.

Criminal offences are prescriptible in Argentina.[142] No exception is made for war crimes.

2.4 Jurisdiction

The ordinary criminal law of Argentina applies to offences committed in Argentine territory or in territory subject to Argentine jurisdiction.[143] Conduct amounting to a grave breach that satisfies the definition of a common crime is thus triable in Argentina if so committed.

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135 Or, for that matter, in the Military Penal Code.

136 See Penal Code, arts 79 to 82.

137 For example, homicide is punishable by a maximum penalty of imprisonment for, alternatively, twenty-five years or life: see Penal Code, arts 79 & 80.

138 Penal Code, art 42; see also arts 43 & 44.

139 Penal Code, arts 45 & 46; see also arts 47 to 49.

140 Penal Code, art 45.

141 Penal Code, art 46.

142 Penal Code, art 59 (3).

143 Penal Code, art 1 (1).

The possibility of the exercise by the criminal courts of jurisdiction over extraterritorial conduct also exists, in accordance with article 118 of the Constitution, where such conduct is contrary to international law.[144] No judicial authority exists to indicate whether the term 'international law' can be taken to include international conventions to which Argentina is a party. But it is logical to assume that it can.

Article 118 of the Constitution would seem therefore to provide, at least in principle, for extraterritorial jurisdiction over offences against international law committed abroad by Argentine nationals, in cases where international law itself provides for jurisdiction on the basis of nationality. In addition, judicial authority suggests that article 118 would also permit the exercise by the Argentine criminal courts of universal jurisdiction, *ie* jurisdiction over non-nationals for crimes committed abroad, where the crimes in question are contrary to international law and international law itself provides for universal jurisdiction.[145]

But a crucial limitation on the exercise of extraterritorial jurisdiction pursuant to article 118 of the Constitution is that the treaty in question must be self-executing in the Argentine legal order. Whether or not this is the case is a matter for the Argentine courts.[146]

It is unclear whether extraterritorial jurisdiction would attach to grave breaches as common crimes, whether on the basis of nationality or universality, in accordance with article 118 of the Constitution. There is no judicial authority to say whether or not the grave breaches regime of the 1949 Geneva Conventions and Additional Protocol I is self-executing.[147]

3. THE SECOND HAGUE PROTOCOL

3.1 Criminalisation

When the Second Hague Protocol enters into force, the serious violations set forth in article 15 (1) of the Protocol will not be punishable as such in Argentina unless enacted; *a fortiori*, the other violations set forth in article 21. Some of the serious violations of the Protocol will fall within the definition of the common crime of destruction or damage to another's property found in the Penal Code.[148] But the common crimes currently embodied in the Penal Code do not encompass every act amounting to a serious violation of the Protocol. As such, the obligation imposed by the first limb of article 15 (2) of the Protocol to establish as

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144 Article 118 requires that Congress determine, by way of special law, the place where an extraterritorial offence against international law is to be tried. The Supreme Court has held that it has done so by way of article 21 of Law 48 of 1863: see *Peyrú*, 23 Feb 1995, cited in Amnesty International, *supra*, Chapter Four, Part A, pp.8-9.

145 See the cases quoted in Amnesty International, *idem*, pp.8-10. Note, however, that the cases in question all relate to extradition of suspects by the Argentine courts for trial in a foreign state and not to their trial by the Argentine courts themselves. As such, they are not conclusive of the issue of trial in Argentina pursuant to universal jurisdiction.

146 Note that the cases cited by Amnesty International, *ibid*, all apply to universal jurisdiction under customary international law, rather than to crimes in respect of which treaty imposes an obligation on states to establish universal jurisdiction.

Elsewhere, noting 'the text of a government statement to the Committee against Torture indicating that jurisdictional provisions of the Convention against Torture are self-executing', Amnesty International concludes: '*A fortiori*, the jurisdictional provisions concerning grave breaches of the Geneva Conventions and Protocol I are self-executing under Argentine law': *ibid*., p.13 note 31. But this seems an over-determined assessment, given the lack to date of judicial authority on point.

147 See, however, the dicta of Judges Nazareno and O'Connor in the *Priebke* judgment of 23 Feb 1995, quoted in Amnesty International, *supra*, Chapter Four, Part A, p.13, note 32.

148 Penal Code, art 183.

crimes under domestic law the serious violations of the instrument will necessitate specific legislation on the part of Argentina.

The same goes for the recognition as crimes under Argentine law of the violations embodied in article 21 of the Protocol.

3.2 Penalties

Without specific statutory enactment, serious violations of the Protocol will not be punishable by appropriate penalties if tried as common crimes under the Penal Code. Article 184 (5) of the Penal Code fixes, in relevant cases, the maximum penalty for the crime of destroying or damaging another's property at four years' imprisonment. This sentence does not reflect the gravity of a serious violation of the Protocol. The other obligation imposed by the first limb of article 15 (2) of the Protocol, *viz* to punish by appropriate penalties the serious violations of the instrument, will be acquitted by Argentina only through express statutory enactment.

3.3 Material scope and prescriptibility

The scope of criminal responsibility under Argentine law for serious violations of the Protocol, whether as tailor-made offences or as analogous common crimes, will not adequately reflect the scope of criminal responsibility under international law unless provision is made for secondary responsibility under the twin doctrines of command and superior responsibility. In other words, the requirement laid down in the second limb of article 15 (2) of the Protocol—*ie* to comply with general principles of law and international law, including the rules extending individual criminal responsibility to persons other than those who directly commit the act, when enacting as domestic crimes the serious violations of the Protocol—will only be met through legislative enactment by Argentina of criminal responsibility in accordance with these doctrines.

In addition, in the absence of provision to the contrary, serious violations of the Protocol will remain prescriptible under Argentine law.

3.4 Jurisdiction

Serious violations of the Protocol, whether *eo nomine* or in the form of common crimes, will be punishable under Argentine law if committed in Argentine territory or in territory under Argentine jurisdiction.

But it is unclear whether, in the absence of explicit legislative provision, extraterritorial jurisdiction will attach, whether on the basis of nationality or universality, to serious violations of the Protocol pursuant to article 118 of the Constitution. This is because it is uncertain whether the penal provisions of the Protocol will be regarded by the Argentine courts as self-executing in the Argentine legal order. Legislation is advisable in this regard, in order for Argentina unambiguously to establish its jurisdiction over serious violations of the Protocol on the basis of nationality, as required by article 16 (1)(b); and, in respect of those serious violations of the Protocol defined in article 15 (1) subparagraph (a) to (c), on the basis of universality, as required by article 16 (1)(c).

4. RECOMMENDATIONS

1. *It is recommended that Argentina legislate to define as crimes under its Penal Code the serious violations of the Protocol.*

2. *It is recommended that Argentina legislate to make such crimes punishable by imprisonment for an appropriate period.*

3. *It is recommended that Argentina legislate to impose secondary criminal responsibility for such crimes on the bases of command and superior responsibility.*

4. *It is recommended that Argentina legislate to render such crimes imprescriptible.*

5. *It is recommended that Argentina legislate to establish its jurisdiction over such crimes when committed abroad by Argentine nationals.*

6. *It is recommended that Argentina legislate to establish its jurisdiction over those crimes corresponding to the serious violations set forth in article 15 (1) subparagraphs (a) to (c) of the Protocol when such crimes are committed abroad by non-nationals and when the alleged offender is subsequently present in Argentine territory.*

Chapter 10

FRANCE

1. GENERAL

1.1 Preface

France is a party to the 1954 Hague Convention but is not yet a party to the Second Hague Protocol. It is a party to the 1949 Geneva Conventions and to both of their Additional Protocols.

The criminal law and criminal jurisdiction of France encompasses the ordinary criminal law and courts, as well as military criminal law and military tribunals. But, for several reasons, the latter are not dealt with below in any detail. First, the grave breaches regime of the 1949 Geneva Conventions and Additional Protocol I is given no more effect in French military law than it is the ordinary criminal law. Second and more significantly, as regards national implementation of the Second Hague Protocol, French military law is insufficiently general in its scope of application *ratione personae*[149] and *ratione materiae*[150] adequately to fulfil the jurisdictional obligations imposed by article 16 (1) of the Protocol. Moreover, as it is, persons subject to French military law remain bound by the ordinary Penal Code in respect of conduct not covered by the Military Penal Code.

1.2 Constitutional determinants of national implementation

Article 55 of the Constitution of France provides that, upon publication, treaties or agreements duly ratified or approved enjoy an authority superior to that of statute. In other words, international conventions to which France is a party form part of the domestic legal order without need for further legislative action and occupy a position in the hierarchy of norms above that occupied by statute.

But just because they enjoy the force of law does not automatically mean that all treaties are capable of direct application by the French courts. Specific treaty provisions will only be applicable without need for legislative interposition if they are self-executing. Whether or not a treaty is self-executing in the French legal order is a question for the French courts.

Furthermore, the applicability in France of treaty provisions of a specifically penal nature, such as the serious violations of the Second Hague Protocol and the grave breaches of the 1949 Geneva Conventions and Additional Protocol I, is complicated by considerations unique to the criminal law. Specifically, it is a basic principle of French criminal law that crimes are created and their penalties fixed by statute.[151] As a corollary of this principle, no person may be punished for a crime the elements of which are not defined by statute and no punishment may be imposed unless by statute.[152] In short, unless a crime and its penalty are found in the Penal Code,[153] or in provisions of another Code or separate statute cross-referable to the Penal Code, it cannot be tried by the French criminal courts.

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149 For example, and not least, in its very limited application to civilians.

150 Especially in its non-applicability to armed conflicts (including, obviously, non-international armed conflicts) to which France is not a party.

151 Penal Code, art 111–2.

152 Penal Code, art 111–3.

153 Or, in the context of specifically military offences, in the Code of Military Justice, Third Book, Second Title.

France has enacted no legislation embodying in domestic law the grave breaches provisions of the 1949 Geneva Conventions and Additional Protocol I. That is, it has amended neither the Penal Code[154] nor the Code of Criminal Procedure to include grave breaches.

2. THE 1949 GENEVA CONVENTIONS AND ADDITIONAL PROTOCOL I

2.1 Criminalisation

Since they are not found in the French Penal Code, the grave breaches provisions of the 1949 Geneva Conventions and of Additional Protocol I are not punishable in France *eo nomine*.

But certain acts amounting to grave breaches constitute common crimes that are embodied and defined in the Penal Code, *eg* homicide.[155] As such, most if not all grave breaches should, at least in principle, be triable by the French criminal courts.

2.2 Penalties

The common crimes to which grave breaches of the 1949 Conventions and Additional Protocol I would amount are punishable by imprisonment for varying periods.[156]

2.3 Material scope and prescriptibility

In addition to responsibility for the actual commission of an offence,[157] French criminal law recognises responsibility for attempt[158] and complicity.[159] The latter is defined so as to include aiding or assisting in the preparation or completion of an offence, as well as procuring an offence through enticements, promises, treats, orders and abuses of position or giving instructions for its commission.[160]

French law does not recognise secondary criminal responsibility under the doctrines of either command or superior responsibility.

Criminal offences are prescriptible in France,[161] with the sole exceptions of genocide and crimes against humanity.[162] No exception is made for war crimes.[163]

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154 Nor, for that matter, the Code of Military Justice, Third Book, Second Title.

155 See Penal Code, arts 221–1 to 221–4.

156 For example, homicide is punishable by imprisonment for, alternatively, thirty years or life: see Penal Code, arts 221–1 to 221–4.

157 Penal Code, art 121–4 subpara 1º.

158 Penal Code, art 121–4 subpara 2º. Attempt is defined in art 121–5.

159 Penal Code, art 121–6.

160 Penal Code, art 121–7.

161 Code of Criminal Procedure, art 7.

162 Penal Code, art 213–5.

163 *Barbie*, JCP, 1986, II, 20655 (Cour de cassation (Chambre criminelle), 20 Dec 1985).

2.4 Jurisdiction

The ordinary criminal law of France is applicable, first of all, on a territorial basis.[164] It applies also, in relation to extraterritorial conduct, on the basis of nationality.[165] Grave breaches *quâ* common crimes would be triable in France on these two bases.

The possibility of the ordinary[166] criminal courts' exercising universal jurisdiction over extraterritorial conduct, *ie* jurisdiction over acts committed abroad by non-nationals, exists, pursuant to the second limb of article 689 and to article 689–1 and following of the Code of Criminal Procedure. Article 689, flowing from article 55 of the Constitution, provides for universal jurisdiction in cases where an international convention grants the French criminal courts such jurisdiction. But article 689, like article 55 of the Constitution, applies only to self-executing conventional provisions.[167] Article 689–1 makes alternative provision for universal jurisdiction.[168] Article 689–1, however, applies in respect only of those offences embodied in the specific international conventions enumerated in articles 689–2 to 689–9.

It is clear that universal jurisdiction does not attach to common crimes amounting to grave breaches. The French Court of Cassation (Criminal Chamber) has held that the grave breaches provisions of the 1949 Geneva Conventions are not self-executing;[169] as such, article 689 of the Code of Criminal Procedure does not apply. Nor is article 689–1 applicable: neither the 1949 Geneva Conventions nor Additional Protocol I are numbered among the international conventions enumerated in articles 689–2 to 689–9.

3. THE SECOND HAGUE PROTOCOL

3.1 Criminalisation

If France were to become a party to the Second Hague Protocol, the serious violations defined in article 15 (1) would not be punishable as such in France unless enacted; *a fortiori*, the violations defined in article 21 of the Protocol. Some of the serious violations of the Protocol would fall within the definition of the common crime of destruction or damage to another's property found in the Penal Code.[170] Some would perhaps amount also to the offence of destroying, defacing or damaging a listed site,[171] depending on

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164 Penal Code, art 113–2.

165 Penal Code, art 113–6. This is the case even where the alleged offender becomes a French national after committing the offence: *ibid*. In the case of '*délits*', extraterritorial jurisdiction on the basis of nationality is possible only when the conduct is also punishable under the law of the state where it was committed.

The exercise by the courts of extraterritorial jurisdiction on the basis of nationality is facilitated by the first limb of article 689 of the Code of Criminal Procedure.

166 Note that French military tribunals have, in their particular sphere of competence, extraterritorial jurisdiction to try non-nationals for offences embodied in the Penal Code (as well as those specifically military offences found in the Code of Military Justice, Third Book, Second Title). The relevant provision, art 65 of the Code of Military Justice speaks broadly of crimes punishable by 'French criminal law'. But, as this provision makes clear, this is only the case in respect of crimes against the French armed forces and their property.

167 See Stern (1999) 93 *AJIL* 525 at 528.

168 But only when the offender is subsequently found in France.

169 *Javor*, 1996 *Bull crim* Nº 132, affirming Court of Appeal of Paris, 24 Nov 1994.

170 Penal Code, art 322–1.

171 Environment Code, art L.341–20.

whether this is limited to sites listed in accordance with the law of France.[172] But the crimes currently embodied in French law do not encompass every act defined as a serious violation of the Protocol. The obligation imposed by the first limb of article 15 (2) of the Protocol to establish as crimes under domestic law the serious violations set forth in article 15 (1) would thus necessitate specific legislation on the part of France.

The applies also to the recognition in French criminal law of the other violations set forth in article 21.

3.2 Penalties

Serious violations of the Protocol would not be punishable in France by appropriate penalties if tried as common crimes under the Penal Code. The Code fixes the penalty for the crime of destroying or damaging another's property in relevant cases, and for the crime of destroying, defacing or damaging a listed site, at three years' imprisonment and a fine of 300,000 francs.[173] This would not reflect the gravity of a serious violation of the Protocol. In short, the obligation imposed by the first limb article 15 (2) of the Protocol to punish by appropriate penalties serious violations of the instrument would only be acquitted by specific legislative enactment on the part of France.

3.3 Material scope and prescriptibility

The scope of criminal responsibility under French law for serious violations of the Protocol, whether *quâ* violations of the Protocol or analogous common crimes, would not adequately reflect the scope of such responsibility under international law unless legislative provision were made by France for secondary criminal responsibility on the bases of command and superior responsibility. That is, the requirement stipulated in the second limb of article 15 (2) of the Protocol—*viz* to comply with general principles of law and international law, including the rules extending individual criminal responsibility to persons other than those who directly commit the act, when enacting as domestic crimes the serious violations of the Protocol—would only be met through legislative enactment by France of criminal responsibility in accordance with these doctrines.

In addition, in the absence of provision to the contrary, serious violations of the Protocol would remain prescriptible as a matter of French law.

3.4 Jurisdiction

Serious violations of the Protocol, whether as such or under the rubric of common crimes, would be punishable under French law if committed in French territory or abroad by a French national.[174]

But in the absence of statutory provision, universal jurisdiction would not attach to those serious violations of the Protocol defined in article 15 (1) subparagraphs (a) to (c), as would be required of France by article 16 (1)(c) of the instrument. The formulation 'each Party shall take the necessary legislative measures to ...' found in article 16 (1) of the Protocol is, as a matter of French jurisprudence, classic non-self-executing language;[175] indeed, it is analogous to that of the grave breaches provisions of the 1949 Geneva Conventions and the latter have been held not to be self-executing in France.[176] More generally, the as

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[172] In addition, pillage of cultural property, within the meaning of art 15 (1)(e) of the Protocol, would constitute pillage as prohibited by the Code of Military Justice, art 427.

[173] Penal Code, art 322–2.

[174] The latter presumes that any legislation to insert into the Penal Code the serious violations of the Protocol would charaterise them as '*crimes*' and not as '*délits*'.

[175] See *eg* Nguyen Quoc Dinh, *Droit International Public* (6th ed; Daillier & Pellet eds) (Paris: LGDJ, 1999), §149; Huet & Koering-Joulin, *Droit pénal international* (2nd rev ed) (Paris: PUF, 2001), §13 (d).

[176] See *Javor*, *supra*.

such, article 689 of the Code of Criminal Procedure would be inapplicable. Nor would article 689–1 apply unless the Protocol was included among the specific international conventions enumerated in the provisions following that article. Universal jurisdiction over such violations would be effected in France only by inserting an article referring to the Protocol among the provisions immediately following article 689–1 of the Code of Criminal Procedure.[177]

4. RECOMMENDATIONS

1. *It is recommended that France become a party to the Second Hague Protocol.*

2. *It is recommended that France legislate to define as crimes under its Penal Code the serious violations of the Protocol.*

3. *It is recommended that France legislate to make such crimes punishable by imprisonment for an appropriate period.*

4. *It is recommended that France legislate to impose secondary criminal responsibility for such crimes on the bases of command and superior responsibility.*

5. *It is recommended that France legislate to render such crimes imprescriptible.*

6. *It is recommended that France legislate to insert an article referring to the Protocol among the provisions immediately following article 689–1 of the Code of Criminal Procedure.*

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[177] At present, such reference would constitute art 689–10 of the Code of Criminal Procedure.

Chapter 11

JAPAN

1. GENERAL

1.1 Preface

Japan is not yet a party to either the 1954 Hague Convention or to the Second Hague Protocol. It is a party to the 1949 Geneva Conventions but to neither of the Additional Protocols.

1.2 Constitutional determinants of national implementation

The prevailing view is that treaties concluded by Japan have, on publication, the force of law in the Japanese legal order.[178]

But having the force of law does not necessarily equate with direct applicability by the Japanese courts. Given treaty provisions will only be applicable without need for legislative intervention if they are self-executing. Whether or not a treaty is self-executing in the Japanese legal order is a question for the Japanese courts.

In addition, the applicability in Japan of treaty provisions of a penal nature, such as the serious violations of the Second Hague Protocol and the grave breaches of the 1949 Geneva Conventions, is complicated by considerations peculiar to the criminal law. Specifically, it is a fundamental principle of Japanese criminal law that no person may be punished for a crime unless it is established and defined by statute and no punishment may be imposed unless by statute. [179] In short, unless a crime and its penalty are found in the Penal Code or in penal provisions of a separate statute,[180] it does not form part of the criminal law of Japan.

Japan has not enacted legislation to reflect in domestic law the grave breaches provisions of the 1949 Geneva Conventions. That is, it has amended neither the Penal Code nor the Code of Penal Procedure to include grave breaches.

2. THE 1949 GENEVA CONVENTIONS

2.1 Criminalisation

Since they are not found in the Japanese Penal Code, the grave breaches provisions of the 1949 Geneva Conventions are not punishable *eo nomine* in Japan.

But certain acts amounting to grave breaches constitute common crimes found in the Penal Code, *eg* homicide.[181] As such, most if not all grave breaches should, at least in principle, be triable by the Japanese criminal courts.

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178 See *eg X* et al *v State of Japan*, Tokyo District Court, 30 Nov 1998, reproduced and translated in (1999) 42 *Japanese Ann Int'l L* 143, at 145; see also Iwasawa, *International Law, Human Rights and Japanese Law. The Impact of International Law on Japanese Law* (Oxford: OUP, 1998), pp.28-30.

179 See Dando, *The Criminal Law of Japan: The General Part* (Littleton, CO: Rothman, 1997) (trans George), pp.19-23.

180 Note that, in accordance with Law No 45 of 1907 (as amended), the general part of the Penal Code is applicable also to crimes and punishments found in other statutes: see Dando, *supra*, p.33.

181 See Penal Code, art 199.

2.2 Penalties

The common crimes in the guise of which grave breaches would be triable are punishable by imprisonment for varying periods.[182]

2.3 Material scope and prescriptibility

In addition to responsibility for the actual commission of an offence, whether individually or jointly,[183] Japanese law criminal recognises responsibility for attempt[184] but only where it is expressly provided for in the specific article defining the crime in question.[185] Criminal responsibility is also imposed for instigating and soliciting the instigation of a crime committed by another,[186] as well as for aiding, and instigating the aiding, of another's commission of a crime.[187]

Japanese law does not recognise secondary criminal responsibility under the doctrines of either command or superior responsibility.

Criminal offences are prescriptible under Japanese law.[188] No exception is made for war crimes.

2.4 Jurisdiction

The criminal law of Japan applies, first, to offences committed in Japan.[189] Most, if not all grave breaches would be triable as common crimes under Japanese law if committed on Japanese territory.

Japanese criminal law also applies extraterritorially to Japanese nationals but only in relation to certain specified offences.[190] Grave breaches amounting to homicide or attempted homicide would be triable under Japanese law if committed extraterritorially by a Japanese national.[191] The same goes for grave breaches comprising the crimes, as defined in the Penal Code, of bodily injury and death resulting from bodily injury,[192] and of unlawful arrest or imprisonment and death or injury resulting therefrom.[193]

In addition, under article 4–2 of the Penal Code, universal jurisdiction attaches to offences committed abroad by non-nationals in cases where the offender is required to be punished by virtue of an international

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182 For example, homicide is punishable by a maximum sentence of life imprisonment: see Penal Code, art 199.

183 Penal Code, art 60.

184 This is taken as understood in Penal Code, art 43. But punishment may be reduced in such cases: *ibid*.

185 Penal Code, art 44.

186 Penal Code, art 61.

187 Penal Code, art 62. But the penalty in such cases is reduced: Penal Code, art 63.

188 Code of Penal Procedure, art 250.

189 Penal Code, art 1 (1).

190 See Penal Code, art 3.

191 Penal Code, art 3 (vi).

192 Penal Code, art 3 (vii).

193 Penal Code, art 3 (x).

agreement.[194] While the point is undecided, it is unlikely that this provision has, of itself, the effect of rendering directly applicable the jurisdictional aspects of penal provisions embodied in treaties to which Japan becomes a party, in the event that those treaties require States Parties to punish the offences in question. This seems implied by the need felt by the Japanese Diet to include explicit universal jurisdictional provisions in the Law Concerning the Punishment of Hostages, enacted to give effect to the International Convention against the Taking of Hostages 1979 and in the amendment made to the Law Concerning the Punishment of Violent Acts, passed in order to give effect to the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents 1973.[195] The likely conclusion to be drawn is that article 4–2 of the Penal Code provides for universal jurisdiction only where the treaty in question is self-executing in the Japanese legal order or where, pursuant to a treaty obligation to punish those responsible for certain crimes, statute provides for universal jurisdiction over an offence.

There is no judicial authority indicating whether the jurisdictional provisions of the grave breaches regime are self-executing in the Japanese legal order. But the fact that the Japanese Diet felt the need to legislate explicitly for universal jurisdiction so as to give effect to its analogous jurisdictional obligations under both the International Convention against the Taking of Hostages and the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents points towards their non-self-executing character.

3. THE SECOND HAGUE PROTOCOL

3.1 Criminalisation

If Japan were to become a party to the Second Hague Protocol, the serious violations defined in article 15 (1) would not be punishable as such in Japan unless enacted; *a fortiori*, the violations defined in article 21 of the Protocol. Some of the serious violations of the Protocol would fall within the definition of the common crime found in the Penal Code of destroying or damaging a building belonging to another.[196] Others would constitute the common crime of damaging, destroying or otherwise making useless other relevant objects.[197] But the crimes currently embodied in Japanese law do not encompass every act amounting to a serious violation of the Protocol. The obligation imposed by the first limb of article 15 (2) of the Protocol to establish as crimes under domestic law the serious violations set forth in article 15 (1) would therefore necessitate specific legislation on the part of Japan.

The same applies in relation to the recognition in Japanese criminal law of the other violations set forth in article 21.

3.2 Penalties

In the absence of specific statutory enactment, serious violations of the Protocol would not be punishable by appropriate penalties if tried as common crimes. The Penal Code fixes the maximum penalty for the

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194 See Dando, *supra*, pp.52-54.

195 See *ibid*, pp.52-53. (The two conventions are found at 1316 UNTS 205 and 1035 UNTS 167 respectively.) In this light, Amnesty International's assessment that '[the] provision would appear to be self-executing, so that a court could exercise universal jurisdiction over any conduct that amounts to an ordinary crime and that is also conduct over which a treaty provides for universal jurisdiction' seems over-optimistic: see Amnesty International, *supra*, Chapter Four, Part B, p.15. Indeed, Amnesty later concedes that '[the] matter is not entirely free from doubt': *idem*, p.16 note 68. (Note that it is also confusing to describe the constitutional provision itself, rather than the provisions of the treaty in question, as 'self-executing'.)

196 Penal Code, art 260.

197 Penal Code, art 261.

crime of destroying or damaging a building belonging to another at five years' imprisonment;[198] and for the crime of damaging, destroying or rendering useless any other object at three years' imprisonment and a fine.[199] Neither would not reflect the gravity of a serious violation of the Protocol. In short, the obligation imposed by the first limb article 15 (2) of the Protocol to punish by appropriate penalties serious violations of the instrument would only be acquitted by specific legislative enactment on the part of Japan.

3.3 Material scope and prescriptibility

The scope of criminal responsibility under Japanese law for serious violations of the Protocol, whether as violations of the Protocol or as analogous common crimes, would not adequately reflect the scope of such responsibility under international law unless legislative provision were made by Japan for secondary criminal responsibility on the bases of command and superior responsibility. That is, the requirement stipulated in the second limb of article 15 (2) of the Protocol—*viz* to comply with general principles of law and international law, including the rules extending individual criminal responsibility to persons other than those who directly commit the act, when enacting as domestic crimes the serious violations of the Protocol—would be met only through legislative enactment by Japan of criminal responsibility in accordance with these doctrines.

In addition, in the absence of provision to the contrary, serious violations of the Protocol would be prescriptible under Japanese law.

3.4 Jurisdiction

Serious violations of the Protocol would be triable in Japan, whether as such or as common crimes under Japanese law, if committed on Japanese territory.

But none of the violations of the Protocol would be triable in Japan if committed abroad by a Japanese national. It would require specific statutory enactment for Japan to satisfy the obligation imposed by article 16 (1)(b) of the Protocol to establish its jurisdiction over serious violations when the alleged offender is a Japanese national.

Furthermore, it is unclear whether universal jurisdiction would attach under article 4–2 of the Penal Code to serious violations of the Protocol since, in the absence of judicial indication, it is uncertain whether the jurisdictional provisions of the Protocol would be self-executing in the Japanese legal order. For the reasons cited above in relation to the grave breaches provisions of the 1949 Geneva Conventions, this is less likely than more. Specific legislative provision would be advisable in this regard, in order for Japan unambiguously to establish jurisdiction over serious violations of the Protocol on the basis of universality, as required by article 16 (1)(c).

4. RECOMMENDATIONS

1. *It is recommended that Japan become a party to the 1954 Hague Convention and to the Second Hague Protocol.*

2. *It is recommended that Japan legislate to define as crimes under its Penal Code the serious violations of the Protocol.*

3. *It is recommended that Japan legislate to make such crimes punishable by imprisonment for an appropriate period.*

4. *It is recommended that Japan legislate to impose secondary criminal responsibility for such crimes on the bases of command and superior responsibility.*

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198 Penal Code, art 260.

199 Penal Code, art 261.

5. *It is recommended that Japan legislate to render such crimes imprescriptible.*

6. *It is recommended that Japan legislate to establish its jurisdiction over such crimes when committed abroad by Japanese nationals.*

7. *It is recommended that Japan legislate to establish its jurisdiction over those crimes corresponding to the serious violations set forth in article 15 (1) subparagraphs (a) to (c) of the Protocol when such crimes are committed abroad by non-nationals and when the alleged offender is subsequently present in Japanese territory.*

Chapter 12

THE NETHERLANDS

1. GENERAL

1.1 Preface

The Netherlands is a party to the 1954 Hague Convention. It has signed but not yet ratified the Second Hague Protocol. It is a party to the 1949 Geneva Conventions and to both of their Additional Protocols.

The criminal law of the Netherlands encompasses the ordinary criminal law and military criminal law.[200] But the latter is not considered with below in any detail. The armed forces of the Netherlands remain subject to the ordinary criminal law in respect of offences not covered by the Military Penal Code and it is under the ordinary criminal law that violations of the 1949 Geneva Conventions and their Additional Protocols are punishable. Violations of the Second Hague Protocol would be punishable the same way.

1.2 Constitutional determinants of national implementation

Article 93 of the Constitution of the Kingdom of the Netherlands provides that those provisions of treaties approved by the States General that are capable of binding all persons by virtue of their contents become so binding on publication. In short, international conventions to which the Netherlands is a party form part of the domestic legal order without need for further legislative action.

But the domestic applicability in the Netherlands of conventional provisions of a specifically penal nature, such as the serious violations of the Second Hague Protocol and the grave breaches of the 1949 Geneva Conventions and Additional Protocol I, is made more complex by the special nature of the criminal law. Specifically, it is a fundamental principle of Dutch criminal law that no act or omission is punishable unless it constituted a criminal offence under the law of the Netherlands at the time it was committed.[201] In other words, unless a crime is found in the Penal Code, in another Code or in a separate statute, it is not punishable in the Netherlands.

As it is, the Netherlands has enacted legislation in order to give effect to its obligations under the grave breaches regime of the 1949 Geneva Conventions and Additional Protocol I. The relevant legislation is the Criminal Law in Wartime Act 1952 (as amended).

2. THE 1949 GENEVA CONVENTIONS AND ADDITIONAL PROTOCOL I

2.1 Criminalisation

Article 8 (1) of the Criminal Law in Wartime Act provides in relevant part:

> Any person who commits a breach of the laws and customs of war shall be liable to a penalty ...[202]

Article 8 paragraphs (2) and (3) enumerate aggravated forms of the basic offence provided for in article 8 (1). As emphasised in article 11, the effect of article 8 is to make breaches of the laws and customs of war crimes under Dutch law.[203]

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200 Since 1990, members of the armed forces have been triable at first instance by a special Military Chamber of the Arnhem District Court and on appeal to the Military Division of the Court of Appeal.

201 Penal Code, art 1 (1).

202 Translated in *Dutch legal code – Suppl 226 (February 1991)*, provided by the Library and Research Service, ICRC, Geneva.

The term 'the laws and customs of war' is not restricted to the customary international law of war but extends to the laws of war provided for in treaties to which the Netherlands is a party.[204] Indeed, article 8 was incorporated in the Act (along with article 9) precisely in order to fulfil conventional obligations incumbent on the Netherlands, specifically those imposed by the 1949 Geneva Conventions.[205] The term 'war' is not limited to war in the formal sense of the term but applies to all armed conflicts,[206] including those of a non-international character.[207] Furthermore, it has been held by the Supreme Court of the Netherlands that article 8 applies regardless of whether the Netherlands is a party to the conflict in question.[208]

Grave breaches of the 1949 Geneva Conventions and Additional Protocol I are therefore punishable under Dutch law in accordance with article 8 (1) of the Criminal Law in Wartime Act. In fact, article 8 (1) appears to go beyond grave breaches to render punishable all violations of the 1949 Geneva Conventions and Additional Protocol I, to the extent that they give rise to individual criminal responsibility, including violations of common article 3.[209] On this logic, article 8 (1) would also embrace violations of Additional Protocol II, again to the extent that they give rise to individual criminal responsibility.

2.2 Penalties

All violations of the laws and customs of war within the meaning of article 8 are punishable by imprisonment or a fine. In cases of imprisonment, the maximum sentence available varies depending on the nature and consequences of the offence in question, a gradation reflected in article 8 paragraphs (1), (2) and (3) respectively. Offences under article 8 (1), comprising breaches *simpliciter* of the laws and customs of war, are punishable by ten years' imprisonment.[210] Offences under article 8 (2), involving *eg* the likelihood of death or grievous bodily harm to another[211] or inhuman treatment,[212] are punishable by fifteen

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203 Article 11 (as translated *ibid*) states: 'The offences set out under Articles 4-9 shall be classed as criminal offences.'

204 See *eg Knesević*, Supreme Court of the Netherlands (Criminal Division), 11 Nov 1997, translated in (1998) 1 *YIHL* 600, relating to violations of 1949 Geneva Convention IV.

205 See *Knesević*, *supra*, paras 4.6 (citing para 4.4 of the judgment of the Court of Appeal), 5.1 & 5.2.

206 See art 1 (2) of the Act: 'In the event of an armed conflict which cannot be regarded as war ..., Articles 4-9 shall apply ...'. Note that the ruling in *Knesević*, discussed *infra*, was as to 'the *limitations* contained in paragraphs 1, 2 and 3 of [article] 1' [emphasis added], specifically the limitation embodied in art 1 (2) as regards the Netherlands' participation in the conflict. This would appear to leave intact art 1 (2)'s *extension* of the application of arts 8 and 9 to armed conflict which cannot be regarded as war. Indeed, the Supreme Court used the term 'armed conflict' in *Knesević* itself: see *eg* para 4.2.2.

207 See art 1 (3): 'The term "war" shall include civil war.'. Again, art 1 (3) would appear to be unaffected by the ruling in *Knesević*, discussed *infra*, as to the limitations contained in art 1. Indeed, *Knesević* itself was a case arising out of a non-international armed conflict.

208 Article 1 (2) of the Act appears, on its face, to limit the application of arts 8 and 9 to 'armed conflict ... in which the Netherlands are involved'. But in *Knesević*, *supra*, para 5.3, the Supreme Court held that 'the limitations contained in paragraphs 1, 2 and 3 of [article] 1 of the Wartime Criminal Law Act do not relate to sections 8 and 9 referred to therein ...'.

209 *Knesević* itself involved violations of common article 3: see *eg* para 4.2.4.

210 Criminal Law in Wartime Act, art 8 (1).

211 Criminal Law in Wartime Act, art 8 (2) para 1º.

212 Criminal Law in Wartime Act, art 8 (2) para 2º.

years' imprisonment.[213] Finally, offences under article 8 (3), involving *eg* actual death or grievous bodily harm to another[214] and joint commission,[215] are punishable by imprisonment for life or for a term of twenty years.[216]

2.3 Material scope and prescriptibility

In addition to criminal responsibility for the actual commission of an offence, personally or jointly with another or others,[217] Dutch law imposes responsibility for attempt;[218] for intentionally soliciting (and attempting to solicit[219]) the commission of an offence by means of gifts, promises, abuse of authority, use of violence, threat or deception or by providing the opportunity, means or information with which to do so;[220] and, in relation to serious offences, for complicity as an accessory, by which is meant intentionally assisting during the commission of a serious offence or intentionally providing the opportunity, means or information necessary to do so.[221]

Article 9 of the Criminal Law in Wartime Act provides for secondary criminal responsibility in respect of the acts of subordinates:

> Any person who deliberately allows a subordinate to commit ... an offence [under article 8] shall be subject to the same penalties as specified for the offence set out in the previous Article ...[222]

This would seem to apply to both military commanders and civilian superiors.[223]

Criminal offences are generally prescriptible in the Netherlands.[224] Article 10 (2), however, of the Criminal Law in Wartime Act creates an exception for the aggravated violations of the laws and customs of war

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213 Criminal Law in Wartime Act, art 8 (2), *chapeau*.

214 Criminal Law in Wartime Act, art 8 (3) para 1º.

215 Criminal Law in Wartime Act, art 8 (3) paras 2º, 3º & 4º.

216 Criminal Law in Wartime Act, art 8 (3), *chapeau*.

217 Penal Code, art 47 (1). Recall that the joint commission of an offence under art 8 of the Criminal Law in Wartime Act is punishable more severely: see art 8 (3), subparas 2º, 3º & 4º.

218 Penal Code, art 45 (1); see also the clarification in art 46b.

219 Penal Code, art 46a.

220 Penal Code, art 47 (2).

221 Penal Code, art 48.

222 Translated in *Dutch legal code – Suppl 226 (February 1991), supra*.

223 There is a discrepancy, however, between article 9 and command responsibility as recognised by international law, although the provision is consonant with the doctrine of superior responsibility.

As specifically regards the secondary criminal responsibility of military commanders, at least as formulated in art 28 (a)(i) of the Rome Statute of the International Criminal Court, the alternative requisite standard of knowledge of the offences committed by subordinates ('or, owing to the circumstances at the time, should have known') does not limit the mental element of the doctrine to intent, as does article 9 of the Act, but would seem to allow for responsibility on the basis of criminal negligence.

On the other hand, as regards the secondary criminal responsibility of other superiors, the standard of knowledge alternatively required by art 28 (b)(i) of the Rome Statute ('or consciously disregarded information which clearly indicated') amounts to wilful blindness – a form of actual, if imputed knowledge, and hence a form of intent, as required by article 9 of the Act.

punishable under article 8 paragraphs (2) and (3) respectively of the Act, including when they are punishable in accordance with the form of secondary criminal responsibility recognised in article 9. But breaches *simpliciter* of the laws and customs of war punishable under article 8 (1) remain prescriptible.

2.4 Jurisdiction

Article 3 paragraph 1º of the Criminal Law in Wartime Act establishes Dutch jurisdiction over 'any person who commits an offence described in Articles 8 and 9 outside the Kingdom but within Europe'.[225] This encompasses both Dutch nationals and foreigners. In the latter regard, article 3 paragraph 1º embodies, to a limited geographical extent, universal jurisdiction.[226]

The *chapeau* to article 3 states that the provision is without prejudice to the relevant articles of the Penal Code. In turn, the Penal Code provides that the ordinary criminal law of the Netherlands applies to offences committed within the Netherlands.[227]

3. THE SECOND HAGUE PROTOCOL

3.1 Criminalisation

If the Netherlands were to become a party to the Second Hague Protocol, the serious violations of the Protocol set forth in article 15 (1) would automatically form part of Dutch law by virtue of article 8 of the Criminal Law in Wartime Act. Serious violations of the Protocol would constitute 'breaches of the laws and customs of war', within the meaning of article 8, since the phrase extends to violations of conventions on the law of armed conflict to which the Netherlands is a party. In this way, the Netherlands would acquit the obligation laid down in the first limb of article 15 (2) of the Protocol to establish as crimes under its domestic law the serious violations of the Protocol.

In addition, while the point is unclear, the fact that violations of common article 3 of the 1949 Geneva Conventions are punishable in the Netherlands pursuant to article 8 of the Act suggests that the other violations set forth in article 21 of the Protocol would also constitute crimes under Dutch law by virtue of this provision.

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224 Penal Code, art 70.

225 Translated in *Dutch legal code – Suppl 226 (February 1991)*, *supra*. Note that, further to its ruling discussed *supra*, the Supreme Court of the Netherlands held in *Knesević*, *supra*, para 5.3, that the limitations contained in art 1 of the Act do not apply to art 3.

The *chapeau* to art 3 makes it clear that the provision is without prejudice to the relevant articles of the Penal Code. For its part, the Penal Code makes Dutch criminal law applicable to some offences committed abroad by Dutch nationals: see, generally, Penal Code, art 5 (1). (Pursuant to art 5 (2), this is the case even when the accused acquired Dutch nationality after the commission of the offence.) Certain specified offences of a serious nature are always triable on the basis of nationality when committed extraterritorially: see Penal Code, art 5 (1)(1). And all serious offences under Dutch law committed extraterritorially are triable if the serious offence in question is a criminal offence against the law of the state where it was committed: see Penal Code, art 5 (1)(2).

Many of the breaches, grave and otherwise, of the 1949 Geneva Conventions and Protocols would also constitute common crimes under the Penal Code punishable on the basis of nationality. The result is that, if committed by Dutch nationals, such breaches would be punishable even if committed outside Europe.

226 See *Knesević*, *supra*, para 5.2.

227 Penal Code, art 2.

3.2 Penalties

In accordance with article 8 paragraphs 1, 2 and 3 respectively of the Act, the penalty to be imposed for serious violations of the Protocol would be imprisonment or a fine. The latter would not be an appropriate penalty, within the meaning of the first limb of article 15 (2) of the Protocol; but there is reason to presume that only imprisonment would in fact be imposed.

The maximum sentences available would vary depending on which serious violation was committed and the circumstances of its commission. If the violation 'involves acting jointly with another person or persons to destroy, damage, render unusable or remove any property wholly or partially belonging to another',[228] it would be punishable by a maximum term of life or twenty years' imprisonment, in accordance with article 8 (3) of the Act. An offence involving plunder would be subject to a maximum sentence of fifteen years' imprisonment, pursuant to article 8 (2). All other grave breaches would be punishable by ten years' imprisonment under article 8 (1). Each of these sentences would reflect the gravity of a serious violation of the Protocol. As such, the Netherlands would satisfy the obligation imposed by the first limb of article 15 (2) of the Protocol to make serious violations punishable by appropriate penalties.

3.3 Material scope

The material scope of serious violations of the Protocol as offences under article 8 of the Criminal Law in Wartime Act would accord to a satisfactory extent with general principles of international law 'including the rules extending individual criminal responsibility to persons other than those who directly commit the act',[229] as required by the second limb of article 15 (2) of the Protocol.

Those serious violations falling within article 8 (2) and (3) of the Act would be imprescriptible as a matter of Dutch law. But all other serious violations would remain prescriptible.

3.4 Jurisdiction

Serious violations of the Protocol as crimes within the meaning of article 8 of the Act would, in accordance with the Penal Code, be punishable in the Netherlands if committed in Dutch territory. In this way, the Netherlands would fulfil the obligation laid down by article 16 (1)(a) of the Protocol.

Pursuant to article 3 paragraph 1º of the Criminal Law in Wartime Act, the Netherlands would also enjoy jurisdiction over serious violations of the Protocol committed extraterritorially on the twin bases of nationality and universality.[230] But, in further accordance with article 3 paragraph 1º of the Act, Dutch

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228 Translated in *Dutch legal code – Suppl 226 (February 1991), supra*.

229 Recall that the requirement in art 9 that a person *deliberately* allow a subordinate to commit a relevant offence represents a restriction on the doctrine of command responsibility as recognised by international law, at least as it is formulated in art 28 (a)(i) of the Rome Statute of the International Criminal Court; but that, at the same time, it squares with the secondary responsibility of civilian superiors, as phrased in art 28 (b)(i) of the Rome Statute.

Deletion of the word 'deliberately' from art 9 would bring its version of command responsibility into line with international law. But it would, in the process, widen the scope of its form of superior responsibility beyond that recognised by international law. In this light, the better alternative seems to be to leave art 9 as it is.

230 Indeed, the Netherlands would establish universal jurisdiction not only over the serious violations of the Protocol set forth in art 15 (1) subparagraphs (a) to (c), as required by art 16 (1)(c), but also over those serious violations of the Protocol set forth in art 15 (1) subparagraphs (d) to (e) which are subject to an obligation to establish jurisdiction only on the bases of territoriality and nationality, as laid down in art 16 (1)(a) and (b) respectively.

The only alternative to the Netherland's blanket establishment of universal jurisdiction, via art 3 para 1º of the Act, over all serious violations of the Protocol would be the enactment of a separate jurisdictional provision specifically in respect of those serious violations of the Protocol set forth in art 16 (d) and (e). Such legislation seems, from a Dutch standpoint, inconvenient.

Moreover, it appears to be the Netherland's established policy, as presently reflected in art 3 para 1º itself and in the relevant case-law (*ie Knesević*) on violations of common art 3 of the 1949 Geneva Conventions, to establish

jurisdiction would only extend in this regard to serious violations committed within Europe. Legislation to amend article 3 paragraph 1º to delete its geographical restriction to Europe would be needed for the Netherlands to satisfy fully the obligations laid down in article 16 (1) paragraphs (b) and (c) of the Protocol to establish its jurisdiction over serious violations, wherever committed, on the bases of nationality and universality respectively.

4. RECOMMENDATIONS

1. *It is recommended that the Netherlands ratify the Second Hague Protocol.*

2. *It is recommended that the Netherlands legislate to amend the Criminal Law in Wartime Act to render all breaches of the laws and customs of war imprescriptible.*

3. *It is recommended that the Netherlands legislate to amend the Criminal Law in Wartime Act to delete the phrase 'but within Europe' from article 3 paragraph 1º .*

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universal jurisdiction over all breaches of the laws and customs of war, within the meaning of art 8 of the Act, whether or not it is legally obliged to do so.

In this light, the establishment by the Netherlands, through the mere act of ratification of the Protocol, of universal jurisdiction over all violations of the Protocol appears the pragmatic alternative.

Chapter 13

THE RUSSIAN FEDERATION

1. GENERAL

1.1 Preface

The Russian Federation is a party to the 1954 Hague Convention but is not yet a party to the Second Hague Protocol. It is a party to the 1949 Geneva Conventions and to both of their Additional Protocols.

1.2 Constitutional determinants of national implementation

Article 15 (4) of the Constitution of the Russian Federation states that treaties to which Russia[231] is a party form 'an integral part of its legal system'.[232] Pursuant to this, article 5 (3) of the Federal Law on International Treaties of the Russian Federation states:

> The provisions of officially published international treaties of the Russian Federation which do not require the publication of intra-State acts for application shall operate in the Russian Federation directly.[233]

Indeed, the provisions of such treaties prevail over inconsistent statute.[234] But, as article 5 (3) itself makes clear, the provisions of treaties to which Russia is a party are directly applicable only where these provisions are self-executing. Non-self-executing provisions require legislative interposition.[235]

Moreover, the domestic applicability of treaty provisions of a specifically penal nature, such as the serious violations of the Second Hague Protocol and the grave breaches of the 1949 Geneva Conventions and Additional Protocol I, is complicated by principles peculiar to the criminal law. Specifically, under Russian law, no person may be punished for a crime that is not recognised as such at the time of its commission.[236] The criminality of an act and the penalty to attach are determined exclusively by reference to the Criminal Code.[237] In short, unless a crime and its penalty are found in the Criminal Code, it cannot be tried by the Russian criminal courts.

In the case of grave breaches, legislation giving effect in Russian law to the country's obligations under the 1949 Geneva Conventions and Additional Protocol I is in fact in place. The relevant legislation is the Russian Criminal Code.

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231 Note, in accordance with art 2 of the Constitution, that the names 'Russian Federation' and 'Russia' are deemed equivalent.

232 Translated in Butler & Henderson (eds), *Russian Legal Texts. The Foundations of a Rule-of-Law State and a Market Economy* (London: Simmons & Hill, 1998), pp.1 *et seq*, at p.7; see also the Federal Law of the Russian Federation on International Treaties of the Russian Federation, 16 June 1995, art 5 (1).

233 Translated in Butler & Henderson, *idem*, pp.767 *et seq*, at p.771.

234 Constitution, art 15 (4); Federal Law of the Russian Federation on International Treaties of the Russian Federation, art 5 (2).

235 Article 5 (3) of the Law continues: 'Respective legal acts shall be adopted in order to effectuate other provisions of international treaties of the Russian Federation' (translated *ibid*.).

236 Constitution, art 54 (2).

237 Criminal Code of the Russian Federation, art 3 (1); see also art 1 (1).

2. THE 1949 GENEVA CONVENTIONS AND ADDITIONAL PROTOCOLS

1.1 Criminalisation

Article 356 (1) of the Russian Criminal Code provides:

> use in an armed conflict of means and methods prohibited by an international treaty of the Russian Federation ... shall be punished by imprisonment for up to twenty years.[238]

This has the effect, first of all, of making the use of any means or methods of warfare prohibited by the conventional law of armed conflict a crime under Russian law, in cases where Russia is a party to the convention in question.

As a result, the grave breaches of the 1949 Geneva Conventions and Additional Protocol I constitute crimes under Russian law, pursuant to article 356 (1). In fact, it may be the case that, to the extent that they prohibit means and methods of warfare and give rise to individual criminal responsibility, other breaches of the Conventions—including of common article 3—and of Additional Protocol I, as well as violations of Additional Protocol II, constitute crimes against Russian law.

1.2 Penalties

As seen above, article 356 (1) of the Criminal Code also fixes the penalty to attach under Russian law to means and methods of warfare prohibited by treaty, providing for imprisonment for a maximum term of twenty years.

1.3.2 Material scope and prescriptibility

As well as responsibility for the actual commission of a crime, the Russian Criminal Code imposes responsibility for attempt to commit[239] and for preparation of a crime.[240] The latter covers 'the finding, manufacture, or outfitting of a person with the means or implements for commission of a crime, the finding of conspirators [to] a crime, collusion in the commission of a crime, or any other intentional creation of conditions for the commission of a crime', in circumstances where the crime was not completed owing to circumstances beyond the accused's control.[241]

In addition, the Code imposes criminal responsibility for conspiracy to commit a crime,[242] defined as joint participation in a crime;[243] in turn, conspiracy encompasses organising, instigating and being the accessory to a crime respectively.[244] Harsher penalties are imposed in respect of crimes jointly committed by a group of persons, by a group of persons by prior collusion, by an organised group, or by a criminal society or organisation.[245]

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238 Translation available on ICRC National Implementation database, *supra*.

239 Criminal Code, art 29 (2) & (3) and art 30 (3).

240 Criminal Code, art 29 (2) & (3) and art 30 (1); but see the limitation contained in art 30 (2).

241 See Criminal Code, art 30 (1), as translated in *Criminal Code of the Russian Federation* (3rd ed, trans Butler) (London: Simmons & Hill, 1999), p.13.

242 See Criminal Code, arts 32 to 36.

243 Criminal Code, art 32.

244 Criminal Code, art 33 (1); the terms are defined in art 33 paragraphs (3), (4) & (5) respectively.

245 See Criminal Code, art 35, especially paragraph (7).

Russian criminal law does not recognise secondary criminal responsibility under the doctrines of either command or superior responsibility.[246]

Finally, while criminal offences are generally prescriptible in Russia,[247] exception is made for certain crimes, among them war crimes.[248]

1.3.3 *Jurisdiction*

The criminal law of Russia applies, first, to crimes committed on the territory of the Russian Federation.[249] It applies also to crimes committed abroad by Russian nationals (as well as stateless persons) when the act committed is deemed a crime by the state where it was committed and the persons in question have not been convicted in that state.[250]

As a result, grave breaches of the 1949 Geneva Conventions and Additional Protocol I are triable in Russia on the bases of territoriality and nationality.

Universal jurisdiction over certain offences under the Criminal Code law is provided for in article 12 (3):

> Foreigners and stateless persons who are not permanent residents of the Russian Federation who have committed a crime outside the borders of the Russian Federation shall incur criminal responsibility under the present Code in cases when the crime was directed against the interests of the Russian Federation and in cases provided for by an international treaty of the Russian Federation if they have not been convicted in a foreign state and if criminal proceedings against them are instituted within the territory of the Russian Federation.[251]

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246 Note, however, that failure to act can be punishable under the Code (see *eg* Criminal Code, arts 5 (1), 9 (2) and 14 (2)) and that the Code imposes criminal responsibility for negligence in certain cases (*ibid*., art 24 (1)). But, in accordance with art 24 (2), negligence alone is grounds for responsibility solely when this is expressly provided for in the specific provision creating the crime in question. The article that renders war crimes punishable (art 356) makes no provision for criminal negligence.

247 Criminal Code, art 78.

248 Criminal Code, art 78 (5), in combination with art 356.

249 Criminal Code, art 11 (1).

250 Criminal Code, art 12 (1).

251 Criminal Code, art 12 (3), as translated on the ICRC National Implementation of Humanitarian Law database, www.icrc.org/ihl-nat. There is a small but significant discrepancy between the ICRC translation and that of Butler found in *Criminal Code of the Russian Federation*, *supra*, p.5. The latter reads, in relevant part, 'if the crime is directed against the interests of the Russian Federation and, in instances provided for by an international treaty of the Russian Federation, if they were not convicted in the foreign State and are brought to criminal responsibility on the territory of the Russian Federation'. Note the insertion of the commas, suggesting that 'instances provided for by an international treaty of the Russian Federation' represent a subset of 'crime[s] ... directed against the interests of the Russian Federation' – in other words, that crimes provided for by international treaty give rise to universal jurisdiction only in cases where they are directed against the interests of the Russian Federation.

Butler elsewhere explains article 12 (3) as follows: 'Foreign citizens and stateless persons who are not permanently resident in Russia and who have committed a crime beyond the limits of Russia which is directed against the interests of the Russian Federation may be prosecuted under the Russian Criminal Code. Where an international treaty so provides, such persons may also bear criminal responsibility in Russia if they were not convicted in the foreign state.': Butler, *Russian Law* (Oxford: OUP, 1999), p.552. While not on all fours with the ICRC translation, this at least seems to suggest, in keeping with the ICRC reading, that 'instances provided for by an international treaty of the Russian Federation' comprise a separate category of crimes from those directed against the interests of the Russian Federation, and hence are subject to universal jurisdiction in their own right.

The better reading is that the two categories are indeed distinct, the first recognising extraterritorial jurisdiction under the protective principle, the second on the basis of universal jurisdiction (and any other form of extraterritorial jurisdiction over non-nationals) pursuant to treaty.

In other words, article 12 (3) provides, in relevant part, for universal jurisdiction where a treaty to which Russia is a party itself provides for universal jurisdiction. In the absence of judicial authority on point, it is uncertain whether article 12 (3) applies only to self-executing treaty provisions. This said, it is more likely that article 12 (3) is not limited in this way, if only for the evidentiary reason that Russia has made no specific legislative provision for universal jurisdiction in respect of any of the cases provided for by treaties to which it is a party.[252]

In this light, it is probable that grave breaches of the 1949 Geneva Conventions and Additional Protocol I are triable in Russia on the basis of universality.

3. THE SECOND HAGUE PROTOCOL

3.1 Criminalisation

Were Russia to become a party to the Second Hague Protocol, the serious violations defined in article 15 (1) would be punishable automatically as crimes under Russian law by virtue of article 356 (1) of the Criminal Code. Acts amounting to serious violations of the Protocol would constitute the use in an armed conflict of means and methods prohibited by an international treaty of the Russian Federation, within the meaning of the provision.

In this way, simply by becoming party to the Protocol, Russia would fulfil the obligation imposed by the first limb of article 15 (2) of the Protocol to adopt such measures as may be necessary to establish as criminal offences under its domestic law the offences set forth in article 15 (1).

Moreover, it may be the case that the 'other' violation of the Protocol set forth in article 21 (a)—'any use of cultural property in violation of the Convention or [the] Protocol'—would also be punishable under article 356 (1) of the Criminal Penal Code. It too represents the use in an armed conflict of means and methods prohibited by an international treaty of the Russian Federation capable of giving rise to individual criminal responsibility.

3.2 Penalties

In further accordance with article 356 (1) of the Criminal Code, serious violations of the Protocol would be punishable by imprisonment for a maximum term of twenty years.

In this way, Russia would comply with the obligation laid down in the first limb of article 15 (2) to make serious violations of the Protocol punishable by appropriate penalties.

3.3 Material scope and prescriptibility

The material scope of serious violations of the Second Hague Protocol as crimes punishable under the Criminal Code would, for the most part, be consonant with the material scope of such offences under international law.

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[252] In addition to the grave breaches encompassed by art 356, in respect of which the 1949 Geneva Conventions and Additional Protocol I mandate universal jurisdiction, art 360 embodies the crime of attacking a representative of a foreign state, in respect of which universal jurisdiction is required by the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents.

Amnesty International assumes that art 12 (3) of the Russian Constitution applies regardless of whether the treaty provisions in question are self-executing or not, although its assumption is perhaps uncritical: see Amnesty International, *supra*, Chapter Four, Part B, p.63.

If art 12 (3) were, in fact, limited to self-executing provisions, it is unclear—again in the absence of relevant judicial pronouncement—whether the grave breaches provisions of the 1949 Geneva Conventions and Additional Protocol I are self-executing in the Russian legal order.

To this extent, Russia would, in its domestic criminalisation of the serious violations of the Protocol, be in compliance with general principles of international law, as demanded by the second limb of article 15 (2).

The one aspect in which Russian criminal law does not accord with the scope of criminal responsibility under international law is in its non-recognition of secondary responsibility under the doctrines of command and superior responsibility.

The obligation to comply with general principles of international law, 'including the rules extending individual criminal responsibility to persons other than those who directly commit the act', would require Russia to amend its Criminal Code so as to impose secondary criminal responsibility on the twin bases of command and superior responsibility.

Serious violations of the Protocol would not be prescriptible under Russian law.

3.4 Jurisdiction

Russian jurisdiction would extend over all serious violations of the Protocol on the basis of territoriality. As such, Russia would acquit the obligation imposed by article 16 (1)(a) of the instrument.

Russian jurisdiction would also extend over serious violations of the Protocol on the basis of nationality in cases where the offence in question also constitutes an offence, though presumably not necessarily the same offence, under the law of the state where it was committed. Not all serious violations of the Protocol are likely to fall into this category.

As such, remedial legislation would be need for Russia to comply fully with the obligation laid down by article 16 (1)(b) of the Protocol to extend its jurisdiction over all serious violations of the Protocol when committed by a Russian national.

It is unclear whether universal jurisdiction would attach to the serious violations set forth in article 15 (1) subparagraphs (a) to (c), as required by article 16 (1)(c). The serious violations defined in article 15 (1)(a) to (c) would, on the one hand, represent 'cases provided for by an international treaty of the Russian Federation', within the meaning of article 12 (3) of the Criminal Code. As such, foreigners and stateless persons could, in principle, be tried by the Russian courts for such offences committed outside the territory of the Russian Federation. But it is uncertain whether article 12 (3) applies only to self-executing treaty provisions; and, if so, it is not known whether the jurisdictional provisions of the Protocol would be self-executing as a matter of Russian law.

In this light, it would be advisable for Russia to enact legislation expressly to provide for universal jurisdiction over those serious violations of the Protocol set forth in article 15 (1)(a) to (c), in accordance with the obligation laid down in article 16 (1)(c).

4. RECOMMENDATIONS

1. *It is recommended that the Russian Federation become a party to the Second Hague Protocol.*

2. *It is recommended that the Russian Federation legislate to amend its Criminal Code to recognise secondary criminal responsibility under the doctrines of command and superior responsibility.*

3. *It is recommended that the Russian Federation legislate to amend its Criminal Code to provide for jurisdiction over serious violations of the Protocol when committed abroad by a Russian national.*

4. *It is recommended that the Russian Federation legislate to amend its Criminal Code to provide for jurisdiction the serious violations set forth in article 15 (1) subparagraphs (a) to (c) of the Protocol when such crimes are committed abroad by non-nationals and when the alleged offender is subsequently present in Russian territory.*

Chapter 14

SWITZERLAND

1. GENERAL

1.1 Preface

Switzerland is a party to the 1954 Hague Convention. It has signed but not yet ratified the Second Hague Protocol. It is a party to the 1949 Geneva Conventions and to both of their Additional Protocols.

1.2 Constitutional determinants of national implementation

The criminal law of Switzerland is split between the ordinary criminal law and courts, on the one hand, and military law and tribunals, on the other.

As reflected in both the ordinary Penal Code[253] and the Military Penal Code,[254] it is a basic principle of Swiss criminal law that no person may be punished for an act unless it is prohibited by legislation.

In the case of grave breaches, legislation giving effect in Swiss law to the country's obligations under the 1949 Geneva Conventions and Additional Protocol I, and to suppress violations of Additional Protocol II, is indeed in place. The relevant legislation is the Military Penal Code.[255]

2. THE 1949 GENEVA CONVENTIONS AND ADDITIONAL PROTOCOLS

2.1 Criminalisation

Article 109 of Switzerland's Military Penal Code provides in relevant part:

> Anyone who violates the requirements of international conventions on the conduct of war and on the protection of persons and property ... is, unless more serious measures apply, punishable with imprisonment. ...[256]

In short, through article 109, Switzerland recognises as crimes under Swiss law the prohibitions embodied in any international humanitarian convention to which it is a party or to which it becomes a party in the future.

The provision is not limited in its application to war, in the formal legal sense of the term, but applies to all armed conflicts.[257] Nor is it restricted to armed conflicts to which Switzerland is a party.[258] The violations

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253 Penal Code, art 1.

254 Military Penal Code, art 1.

255 Persons subject to Swiss military law are triable by the Swiss military tribunals, in accordance with Military Penal Code, art 218 (1). This applies equally in respect of offences committed extraterritorially: Military Penal Code, art 218 (2).

The provisions of the Military Penal Code relating to war crimes are applicable in the event of declared wars or other armed conflicts between two or more states or, in the case of violations of international conventions, to any greater extent provided for in the convention in question: Military Penal Code, art 108.

256 Author's translation.

257 See Roth & Henzelin, 'The repression of violations of international humanitarian law in Switzerland', in Pellandrini (ed), *National Measures to Repress Violations of International Humanitarian Law (Civil Law Systems). Report on the Meeting of Experts, Geneva, 23-25 September 1997* (Geneva: ICRC, 2000), pp.197 *et seq*, at p.200 note

punishable under this provision are punishable, at least in principle, regardless of the parties to the conflict in which they occurred.[259] Finally, article 109 is not limited to armed conflict of an international character.[260] On the contrary, as long as the relevant provisions of an international convention on the conduct of armed conflict and/or on the protection of persons or property to which Switzerland is a party are applicable to non-international armed conflict, any prohibitions contained therein are punishable by Switzerland under article 109 of the Military Penal Code.[261]

Grave breaches of the 1949 Geneva Conventions and Additional Protocol I, being provisions of international conventions on the conduct of war, as well as on the protection of persons and property, are therefore punishable under Swiss military law.

In fact, the term 'requirements of international conventions' within the meaning of article 109 of the Military Penal Code is not limited, in the context of the 1949 Geneva Conventions and Additional Protocols, to grave breaches.[262] On the contrary, it would seem, on the face of the article, that all violations by individuals of the 1949 Geneva Conventions and of Additional Protocol I are punishable under this provision, to the extent that they give rise to individual criminal responsibility.[263] This has been held to be the case in relation to violations of article 3 common to the four Conventions, applicable to non-international armed conflict.[264] Moreover, violations of Additional Protocol II, also applicable to non-international armed conflict, have been held to be punishable in accordance with article 109.[265]

2.2 Penalties

The punishment fixed by the Military Penal Code for violations of relevant conventions is imprisonment, although purely disciplinary sanctions are available is less serious cases.[266] Swiss judicial authority

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18 and p.202; van Wijnkoop, 'The prosecution of presumed war criminals in Switzerland', in Pellandrini (ed), *idem*, pp.216 *et seq*, at p.217.

258 Roth & Henzelin, *idem*, p.199 note 14; van Wijnkoop, *idem*, p.217.

259 In practice, this is probably limited in the context of armed conflicts to which Switzerland is not a party by the Military Penal Code's restricted scope of application *ratione personae* in respect of foreign military personnel: see *infra*.

260 Roth & Henzelin, *idem*, p.200 note 18 and p.202, especially note 29; van Wijnkoop, *idem*, p.217.

261 All three points are evident from *N*, Military Court of Appeal, 26 May 2000, affirmed by Military Court of Cassation, 27 Apr 2001, pertaining to war crimes committed in the civil upheaval in Rwanda. (For the texts of both cases, see ICRC National Implementation of Humanitarian Law database, www.icrc.org/ihl-nat).

262 Roth & Henzelin, *supra*, p.207; Sträuli, 'The repression of violations of international humanitarian law in Switzerland. Aspects of criminal procedure', in Pellandrini (ed), *supra*, pp.231 *et seq*, at p.231.

263 In addition, in accordance with art 110 of the Military Penal Code, abuse of the emblem or protection of the Red Cross, Red Crescent or Red Lion and Sun is also a crime under the Code, punishable by imprisonment.

Specific provision is also made in art 111 of the Code for the crimes of engaging in acts of hostility against persons placed under the protection of the Red Cross, Red Crescent or Red Lion and Sun, or preventing the exercise of their functions; and of destroying or damaging material placed under the protection of the Red Cross, Red Crescent or Red Lion and Sun.

Both are punishable by imprisonment, the latter also by disciplinary sanctions in less serious cases.

264 See *N*, Military Court of Appeal, 26 May 2000, *supra*, affirmed by Military Court of Cassation, 27 Apr 2001, *supra*.

265 See *N*, Military Court of Appeal, 26 May 2000, *supra*, affirmed by *N*, Military Court of Cassation, 27 April 2001, *supra*.

266 Military Penal Code, art 109.

suggests that such violations are *ipso facto* serious, implying that imprisonment is the only appropriate penalty.[267]

No maximum or minimum sentences are fixed.

2.3 Material scope and prescriptibility

In addition to criminal responsibility for the actual commission of an offence, the military criminal law of Switzerland recognises responsibility for attempt,[268] instigation[269] and complicity.[270] This is the case in relation to all offences under the Military Penal Code, including violations of international agreements on the conduct of war and on the protection and persons and property, such as the 1949 Geneva Conventions and Additional Protocols.

The Military Penal Code imposes criminal responsibility on commanders and superiors who order the commission of any act punishable by the Code.[271]

But the Code does not recognise secondary criminal responsibility under the doctrines of command or superior responsibility.

Violations of conventions on the conduct of war and on the protection of persons and property to which Switzerland is a party—including, explicitly, grave breaches—are imprescriptible only when the violation in question is aggravated by the circumstances of its commission.[272]

2.4 Jurisdiction

The Military Penal Code is applicable to offences committed both in Switzerland and abroad.[273] Furthermore, the Code makes no reference to the nationality of the offender.[274]

In terms of its scope of application *ratione personae*, the Military Penal Code applies, first of all, to members of the Swiss armed forces and to a range of associated persons.[275] It is also applicable to civilians who, during armed conflict, are guilty of the violations of international law embodied in articles 108 to 114

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267 'Characterised as war crimes, these offences are inherently very serious.': *N*, Military Court of Appeal, 26 May 2000, *supra* [author's translation].

268 This is taken as understood in Military Penal Code, art 19. Article 19 (1) stipulates, however, that the penalty may be reduced in such cases.

269 A person who has instigated the commission of an offence by another is punishable as if for the offence: Military Penal Code, art 22 (1). But the attempt to instigate such commission is punishable as if for the attempt to commit the offence: Military Penal Code, art 22 (2).

270 This is taken as understood in Military Penal Code, art 23. The provision stipulates, however, that the penalty may be reduced in such cases. Complicity is defined as intentionally assisting in the commission of an offence.

271 Military Penal Code, art 18 (1).

272 Military Penal Code, art 56bis (2). See, in this regard, Sträuli, *supra*, p.241.

273 Military Penal Code, art 9 (1).

274 See Roth & Henzelin, *supra*, pp.200-201.

275 See, generally, Military Penal Code, art 2.

of the Code.[276] The Code is further applicable in time of war[277]—by which is meant an armed conflict to which Switzerland is a party[278]—to prisoners of war, in respect of offences committed against the Swiss State, the Swiss armed forces or persons belonging to the Swiss armed forces.[279] Finally, those persons not otherwise subject to military criminal law who participate in a violation of the international law of armed conflict with persons who are subject to military criminal law are punishable in accordance with the Code.[280]

In sum, in respect of breaches (grave and otherwise) of the 1949 Geneva Conventions and Additional Protocol I, and of violations of Additional Protocol II, Swiss military law applies on the three bases of territoriality, nationality and universality – with one probable exception. In the case of foreigners who are military personnel at the time of commission of the relevant offence, the Military Penal Code appears applicable only in the context of armed conflicts to which Switzerland is a party, although the point is undecided.[281] Nor does it seem that the ordinary Penal Code is capable of filling the gap, although again the point is unclear.[282]

3. THE SECOND HAGUE PROTOCOL

3.1 Criminalisation

Were Switzerland to ratify the Second Hague Protocol, the serious violations defined in article 15 (1) would be punishable automatically as crimes under Swiss military law by virtue of article 109 of the Military Penal Code. Serious violations of the Protocol constitute violations of the prescriptions of an international convention on the conduct of war, as well as on the protection of property, within the meaning of the provision. In this way, Switzerland would fulfil the obligation imposed by the first limb of article 15 (2) of the Protocol to adopt such measures as may be necessary to establish as criminal offences under its domestic law the offences set forth in article 15 (1).

Moreover, it seems that the other violations of the Protocol set forth in article 21 would also be punishable under article 109 of the Military Penal Code. Like violations of common article 3 of the 1949 Geneva Conventions and of the provisions of Additional Protocol II, both held by Swiss military tribunals to be punishable in accordance with article 109, the violations defined in article 21 of the Protocol are violations of the prescriptions of an international agreement on the conduct of war and on the protection of property, within the meaning of the article.

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276 Military Penal Code, art 2 (9).

277 Note that the Military Penal Code has a special scope of application *ratione personae* in time of 'active service', a state of military preparedness short of war instituted by decision of the Federal Council: see Military Penal Code, art 3 (4).

278 Roth & Henzelin, *supra*, p.200 note 18.

279 Military Penal Code, art 4 (3).

280 Military Penal Code, art 6 (1).

281 See Roth & Henzelin, *supra*, pp.209-212. But *cf* van Wijnkoop, *supra*, p.217, especially note 11.

282 See Roth & Henzelin, *supra*, pp.212-214. But *cf* Sträuli, *supra*, pp.232-233. Note that, even if triable under the ordinary Penal Code, grave breaches would have to be tried as common crimes, as they are not embodied in the Code as such: *idem*, pp.212-213. In this light, in the specific context of serious violations of the Second Hague Protocol, the triability or otherwise of foreign military personnel under the ordinary criminal law is largely moot, since not all serious violations would equally constitute a common crime embodied in the Penal Code.

Note that abuse of the distinctive emblem of the 1954 Hague Convention is already a crime under the Military Penal Code.[283] In addition, specific provision is made in the Code for the crimes of engaging in acts of hostility against persons placed under the protection of the distinctive emblem of the Convention, or preventing the exercise of their functions; and of unlawfully destroying or damaging cultural property or material placed under the protection of the distinctive emblem of the Convention.[284]

3.2 Penalties

Serious (and other) violations of the Protocol would be punishable under the Military Penal Code by imprisonment. Judicial authority suggests that, since such violations of the Protocol constitute war crimes, mere disciplinary sanctions would not be available.[285] While there is no indication of the sentences likely to be imposed, there is every reason to think that Switzerland would be in compliance with the obligation laid down in the first limb of article 15 (2) to make serious violations of the Protocol punishable by appropriate penalties.

Note that abuse of the distinctive emblem of the 1954 Hague Convention is punishable by imprisonment.[286] The same is true of engaging in acts of hostility against persons placed under the protection of the distinctive emblem of the Convention, or preventing the exercise of their functions; and unlawfully destroying or damaging cultural property or material placed under the protection of the distinctive emblem of the Convention.[287] Disciplinary sanctions are additionally available in less serious cases of the latter.[288]

3.3 Material scope and prescriptibility

The material scope of serious (and other) violations of the Second Hague Protocol as crimes punishable under the Military Penal Code would, for the most part, be consonant with the material scope of such offences under international law. To this extent, Switzerland would, in its domestic criminalisation of the serious violations of the Protocol, be in compliance with general principles of international law, as demanded by the second limb of article 15 (2).

The one aspect in which Swiss military penal law does not accord with the scope of criminal responsibility under international law is in its non-recognition of secondary responsibility under the doctrines of command and superior responsibility. The obligation to comply with general principles of international law 'including the rules extending individual criminal responsibility to persons other than those who directly commit the act' would require Switzerland to amend its Military Penal Code so as to impose secondary criminal responsibility on the twin bases of command and superior responsibility.

Serious violations of the Protocol would be imprescriptible only when aggravated by the circumstances of their commission.

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283 Military Penal Code, art 110.

284 Military Penal Code, art 111.

285 See *N*, Military Court of Appeal, 26 May 2000, *supra*.

286 Military Penal Code, art 110.

287 Military Penal Code, art 111 (1).

288 Military Penal Code, art 111 (2).

3.4 Jurisdiction

Swiss jurisdiction over serious (and other) violations of the Protocol would, as with all crimes punishable under the Military Penal Code, apply on the combined bases of territoriality, nationality and universality,[289] with the single likely exception of those foreigners who are military personnel at the time of commission of the offence involved in an armed conflict to which Switzerland is not a party.[290] In order for Switzerland unambiguously to acquit the obligation laid down by article 16 (1)(c) of the Protocol to establish universal jurisdiction over those serious violations set forth in article 15 (1) subparagraphs (a) to (c), it would need to amend the Military Penal Code to provide for its application in all armed conflicts to foreign military personnel.[291]

4. RECOMMENDATIONS

1. *It is recommended that Switzerland ratify the Second Hague Protocol.*

2. *It is recommended that Switzerland legislate to amend its Military Penal Code to recognise secondary criminal responsibility under the doctrines of command and superior responsibility.*

3. *It is recommended that Switzerland legislate to amend its Military Penal Code to make all offences punishable under article 109 imprescriptible.*

4. *It is recommended that Switzerland legislate to amend its Military Penal Code to make it applicable in all armed conflicts to foreign military personnel.*

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289 In the process, it would collaterally establish universal jurisdiction over those serious violations of the Protocol set forth in article 15 (1) subparagraphs (d) to (e)—which are subject to an obligation to establish jurisdiction only on the bases of territoriality and nationality, not universality—and over the other violations of the Protocol set forth in article 21.

The only alternative to Switzerland's blanket establishment of universal jurisdiction via the Military Penal Code over all violations, serious and other, of the Protocol would be the enactment under its military criminal law of discrete legislation, separate from the Military Penal Code, specifically in respect of the Second Hague Protocol. Such legislation would be unique and seems, from a Swiss point of view, both unfeasible and undesirable on grounds of practicality and principle.

Moreover, it appears to be Switzerland's established policy, as reflected in the Military Penal Code and relevant case-law dealing with violations of common article 3 of the 1949 Geneva Conventions and violations of Additional Protocol II, to establish universal jurisdiction over all prescriptions of international conventions on the conduct of war and the protection of persons and property, whether or not it is legally obliged to do so.

In this light, the establishment by Switzerland, through the mere act of ratification of the Protocol, of universal jurisdiction via its Military Penal Code over all violations of the Protocol appears the pragmatic alternative.

290 Note that, even if the ordinary Penal Code were in fact applicable in such cases, not every serious violation of the Protocol would be triable as a common crime.

291 See Roth & Henzelin, *supra*, pp.214 & 215; Sträuli, *supra*, p.232 note 9.

PART III

SUMMARY OF RECOMMENDATIONS

ARGENTINA

1. *It is recommended that Argentina legislate to define as crimes under its Penal Code the serious violations of the Protocol.*

2. *It is recommended that Argentina legislate to make such crimes punishable by imprisonment for an appropriate period.*

3. *It is recommended that Argentina legislate to impose secondary criminal responsibility for such crimes on the bases of command and superior responsibility.*

4. *It is recommended that Argentina legislate to render such crimes imprescriptible.*

5. *It is recommended that Argentina legislate to establish its jurisdiction over such crimes when committed abroad by Argentine nationals.*

6. *It is recommended that Argentina legislate to establish its jurisdiction over those crimes corresponding to the serious violations set forth in article 15 (1) subparagraphs (a) to (c) of the Protocol when such crimes are committed abroad by non-nationals and when the alleged offender is subsequently present in Argentine territory.*

AUSTRALIA

1. *It is recommended that Australia become a party to the Second Hague Protocol.*

2. *It is recommended that Australia legislate along the lines of its Geneva Conventions Act to enact as crimes under Australian law the serious violations of the Protocol.*

3. *It is recommended that Australia legislate along the lines of its Geneva Conventions Act to make such crimes punishable by imprisonment for an appropriate period.*

4. *It is recommended that Australia legislate to impose criminal responsibility for attempting to commit such crimes; for ordering, soliciting or inducing the commission of such crimes; for aiding, abetting or otherwise assisting in the commission or attempted commission of such crimes; and for intentionally contributing in any other way to the commission or attempted commission of such crimes by a group of persons acting with a common purpose.*

5. *It is recommended that Australia legislate to impose secondary criminal responsibility for such crimes on the bases of command and superior responsibility.*

6. *It is recommended that Australia legislate to establish its jurisdiction over such crimes when they are committed abroad by Australian nationals.*

7. *It is recommended that Australia legislate along the lines of its Geneva Conventions Act to establish its jurisdiction over those crimes corresponding to the serious violations set forth in article 15 (1) subparagraphs (a) to (c) of the Protocol when they are committed abroad by non-nationals and when the alleged offender is subsequently present in Australian territory.*

CANADA

1. *It is recommended that Canada become a party to the Second Hague Protocol.*

FRANCE

1. *It is recommended that France become a party to the Second Hague Protocol.*

2. *It is recommended that France legislate to define as crimes under its Penal Code the serious violations of the Protocol.*

3. *It is recommended that France legislate to make such crimes punishable by imprisonment for an appropriate period.*

4. *It is recommended that France legislate to impose secondary criminal responsibility for such crimes on the bases of command and superior responsibility.*

5. *It is recommended that France legislate to render such crimes imprescriptible.*

6. *It is recommended that France legislate to insert an article referring to the Protocol among the provisions immediately following article 689–1 of the Code of Criminal Procedure.*

INDIA

1. *It is recommended that India become a party to the Second Hague Protocol.*

2. *It is recommended that India legislate along the lines of its Geneva Conventions Act to enact as crimes under Indian law the serious violations of the Protocol.*

3. *It is recommended that India legislate along the lines of its Geneva Conventions Act to make such crimes punishable by imprisonment for an appropriate period.*

4. *It is recommended that India legislate to impose criminal responsibility for attempting to commit such crimes; for ordering, soliciting or inducing the commission of such crimes; for aiding, abetting or otherwise assisting in the commission or attempted commission of such crimes; and for intentionally contributing in any other way to the commission or attempted commission of such crimes by a group of persons acting with a common purpose.*

5. *It is recommended that India legislate to impose secondary criminal responsibility for such crimes on the bases of command and superior responsibility.*

6. *It is recommended that India legislate to establish its jurisdiction over such crimes when they are committed abroad by Indian nationals.*

7. *It is recommended that India legislate along the lines of its Geneva Conventions Act to establish its jurisdiction over those crimes corresponding to the serious violations set forth in article 15 (1) subparagraphs (a) to (c) of the Protocol when they are committed abroad by non-nationals and when the alleged offender is subsequently present in Indian territory.*

JAPAN

1. *It is recommended that Japan become a party to the 1954 Hague Convention and to the Second Hague Protocol.*

2. *It is recommended that Japan legislate to define as crimes under its Penal Code the serious violations of the Protocol.*

3. *It is recommended that Japan legislate to make such crimes punishable by imprisonment for an appropriate period.*

4. *It is recommended that Japan legislate to impose secondary criminal responsibility for such crimes on the bases of command and superior responsibility.*

5. *It is recommended that Japan legislate to render such crimes imprescriptible.*

6. *It is recommended that Japan legislate to establish its jurisdiction over such crimes when committed abroad by Japanese nationals.*

7. *It is recommended that Japan legislate to establish its jurisdiction over those crimes corresponding to the serious violations set forth in article 15 (1) subparagraphs (a) to (c) of the Protocol when such crimes are committed abroad by non-nationals and when the alleged offender is subsequently present in Japanese territory.*

THE NETHERLANDS

1. *It is recommended that the Netherlands ratify the Second Hague Protocol.*

2. *It is recommended that the Netherlands legislate to amend the Criminal Law in Wartime Act to render all breaches of the laws and customs of war imprescriptible.*

3. *It is recommended that the Netherlands legislate to amend the Criminal Law in Wartime Act to delete the phrase 'but within Europe' from article 3 paragraph 1º .*

NIGERIA

1. *It is recommended that Nigeria ratify the Second Hague Protocol.*

2. *It is recommended that Nigeria legislate along the lines of its Geneva Conventions Act to enact as crimes under Nigerian law the serious violations of the Protocol.*

3. *It is recommended that Nigeria legislate along the lines of its Geneva Conventions Act to make such crimes punishable by imprisonment for an appropriate period.*

4. *It is recommended that Nigeria legislate to impose criminal responsibility for attempting to commit such crimes; for ordering, soliciting or inducing the commission of such crimes; for aiding, abetting or otherwise assisting in the commission or attempted commission of such crimes; and for intentionally contributing in any other way to the commission or attempted commission of such crimes by a group of persons acting with a common purpose.*

5. *It is recommended that Nigeria legislate to impose secondary criminal responsibility for such crimes on the bases of command and superior responsibility.*

6. *It is recommended that Nigeria legislate to establish its jurisdiction over such crimes when they are committed abroad by Nigerian nationals.*

7. *It is recommended that Nigeria legislate along the lines of its Geneva Conventions Act to establish its jurisdiction over those crimes corresponding to the serious violations set forth in article 15 (1) subparagraphs (a) to (c) of the Protocol when they are committed abroad by non-nationals and when the alleged offender is subsequently present in Nigerian territory.*

THE RUSSIAN FEDERATION

1. *It is recommended that the Russian Federation become a party to the Second Hague Protocol.*

2. *It is recommended that the Russian Federation legislate to amend its Criminal Code to recognise secondary criminal responsibility under the doctrines of command and superior responsibility.*

3. *It is recommended that the Russian Federation legislate to amend its Criminal Code to provide for jurisdiction over serious violations of the Protocol when committed abroad by a Russian national.*

4. *It is recommended that the Russian Federation legislate to amend its Criminal Code to provide for jurisdiction the serious violations set forth in article 15 (1) subparagraphs (a) to (c) of the Protocol when such crimes are committed abroad by non-nationals and when the alleged offender is subsequently present in Russian territory.*

SWITZERLAND

1. *It is recommended that Switzerland ratify the Second Hague Protocol.*

2. *It is recommended that Switzerland legislate to amend its Military Penal Code to recognise secondary criminal responsibility under the doctrines of command and superior responsibility.*

3. *It is recommended that Switzerland legislate to amend its Military Penal Code to make all offences punishable under article 109 imprescriptible.*

4. *It is recommended that Switzerland legislate to amend its Military Penal Code to make it applicable in all armed conflicts to foreign military personnel.*

THE UNITED KINGDOM

1. *It is recommended that the UK become a party to the 1954 Hague Convention and to the Second Hague Protocol.*

2. *It is recommended that the UK legislate along the lines of its International Criminal Court Act and International Criminal Court (Scotland) Act to enact as crimes under UK law the serious violations of the Protocol.*

3. *It is recommended that the UK legislate along the lines of its International Criminal Court Act and International Criminal Court (Scotland) Act to make such crimes punishable by imprisonment for an appropriate period.*

4. *It is recommended that the UK legislate along the lines of its International Criminal Court Act and International Criminal Court (Scotland) Act to recognise criminal responsibility for aiding, abetting, counselling or procuring the commission of such crimes; for inciting a person to commit such crimes; for attempting or conspiring to commit such crimes; and for assisting an offender or concealing the commission of such crimes.*

5. *It is recommended that the UK legislate along the lines of its International Criminal Court Act and International Criminal Court (Scotland) Act to impose secondary criminal responsibility for such crimes on the bases of command and superior responsibility.*

6. *It is recommended that the UK legislate along the lines of its International Criminal Court Act and International Criminal Court (Scotland) Act to establish its jurisdiction over such crimes when they are committed abroad by UK nationals.*

7. *It is recommended that the UK legislate along the lines of its Geneva Conventions Act to establish its jurisdiction over those crimes corresponding to the serious violations set forth in article 15 (1)*

subparagraphs (a) to (c) of the Protocol when they are committed abroad by non-nationals and when the alleged offender is subsequently present in UK territory.

THE UNITED STATES OF AMERICA

1. *It is recommended that the US become a party to the 1954 Hague Convention and to the Second Hague Protocol.*

2. *It is recommended that the US legislate to insert into 18 USC §2441 (c) a paragraph referring to serious violations of the Protocol.*

3. *It is recommended that the US legislate to amend 18 USC §2441 to impose criminal responsibility for attempts to commit serious violations of the Protocol.*

4. *It is recommended that the US legislate to amend 18 USC §2441 to impose criminal responsibility for serious violations of the Protocol on the bases of command and superior responsibility*.