

# THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA AND GRAVE BREACHES OF THE GENEVA CONVENTIONS OF 1949

## INTRODUCTION

In 2004, more than twenty-five years after the brutal Democratic Kampuchea (“DK”) regime was driven from power, the Royal Government of Cambodia and the United Nations signed the Law on the Establishment of the Extraordinary Chambers (“ECCC Law”) and thus established the foundation for the belated criminal prosecutions process in the conflict scarred nation.<sup>1</sup> The ECCC Law conferred the ECCC (or “tribunal”) with jurisdiction to prosecute “senior leaders” and “those most responsible” for the crimes committed in Democratic Kampuchea between April 17, 1975 and January 6, 1979.<sup>2</sup>

The substantive crimes within the tribunal’s subject matter jurisdiction include the international crimes of genocide, crimes against humanity, and grave breaches of the Geneva Conventions of 12 August 1949 (the “Geneva Conventions”).<sup>3</sup> Under Article 6 of the ECCC Law, the tribunal has “the power to bring to trial all Suspects who committed or ordered the commission of grave breaches of the Geneva Conventions of 12

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<sup>1</sup> Law on the Establishment of the Extraordinary Chambers, with inclusion of amendments (NS/RKM/1004/006), (27 October 2004) [hereinafter ECCC Law]. As many as two million people – approximately one third of the Cambodian population – are thought to have died from disease, starvation, execution, or exhaustion from overwork during the three years, eight months, and twenty days that the regime held power. *See* KHAMBOLY DY, A HISTORY OF DEMOCRATIC KAMPUCHEA (1975-1979) 3 (Documentation Center of Cambodia 2007); STEPHEN HEDER & BRIAN D. TITTEMORE, SEVEN CANDIDATES FOR PROSECUTION: ACCOUNTABILITY FOR THE CRIMES OF THE KHMER ROUGE 3 (2004) [hereinafter HEDER & TITTEMORE]; BEN KIERNAN, THE POL POT REGIME: RACE, POWER, AND GENOCIDE IN CAMBODIA UNDER THE KHMER ROUGE, 1975-1979 (1996).

<sup>2</sup> ECCC Law, *supra* note 1, art. 2.

<sup>3</sup> The tribunal also has jurisdiction to try suspects for the crimes of homicide, torture, and religious persecution in violation of the 1956 Penal Code (ECCC Law, art. 3), the destruction of cultural property during armed conflict in violation of the 1954 Hague Convention for the Protection of Cultural Property (ECCC Law, art. 7), and for crimes against internationally protected persons in violation of the Vienna Convention of 1961 on Diplomatic Relations (ECCC Law, art. 8). ECCC Law, *supra* note 1.

August 1949.”<sup>4</sup> The provision expressly includes the following acts against persons or property protected under provisions of the Geneva Conventions:

- wilful killing;
- torture or inhumane treatment;
- willfully causing great suffering or serious injury to body or health;
- destruction and serious damage to property, not justified by military necessity and carried out unlawfully and wantonly;
- compelling a prisoner of war or a civilian to serve in the forces of a hostile power;
- willfully depriving a prisoner of war or civilian the rights of fair and regular trial;
- unlawful deportation or transfer or unlawful confinement of a civilian;
- taking civilians as hostages.<sup>5</sup>

This list of eight types of violations represents a composite list of those “grave breaches” articulated in common Articles 50/51/130/147 of the Geneva Conventions.<sup>6</sup> The Geneva Conventions were drafted in the immediate aftermath of the “indescribable atrocities” committed during World War II and the Holocaust. In discussing the grave breach system, the International Committee of the Red Cross Commentary to all four Conventions explain that “[i]f repression of grave breaches was to be universal, it was necessary to determine what constituted them.”<sup>7</sup> The drafters thus sought to distinguish the legal and moral culpability of such acts from infractions of other provisions of the Geneva Conventions “which would constitute minor offences or mere disciplinary faults

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<sup>4</sup> *Id.*, art. 2. The 1949 Geneva Conventions are comprised of: Convention for the Amelioration of the Condition of Wounded and Sick in Armed Forces in the Field, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter GC I]; Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 6 U.S.T. 3316, 75 U.N.T.S. 85 [hereinafter GC II]; Convention Relative to the Treatment of Prisoners of War, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GC III]; Convention Relative to the Protection of Civilian Persons in Time of War, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GC IV] [collectively the Geneva Conventions].

<sup>5</sup> ECCC Law, *supra* note 1, art. 6.

<sup>6</sup> GC I, *supra* note 4, art. 50; GC II, *supra* note 4, art. 51; GC III, *supra* note 4, art. 130; GC IV, *supra* note 4, art. 147. *See also* Oren Gross, *The Grave Breaches System and the Armed Conflict in the Former Yugoslavia*, 16 MICH. J. INT’L L. 783, 798 (1995) (“The lists are not identical”).

<sup>7</sup> The Geneva Conventions of 12 August 1949: Commentary (I-IV) (Jean Pictet ed., 1952-58) (collectively GC Commentary) [hereinafter GC III Commentary or GC IV Commentary].

and as such [] could not be punished to the same degree.”<sup>8</sup> The list of grave breaches included in the Geneva Conventions relied heavily on those crimes prosecuted after WWII by the International Military Tribunal at Nuremberg (“IMT”), the International Military Tribunal for the Far East (“IMTFE”), and by national courts.<sup>9</sup>

Only the first three types of grave breaches (willful killing, torture or inhumane treatment, and willfully causing great suffering or serious injury to body or health) are listed in all four conventions.<sup>10</sup> To rise to the level of a grave breach, the act must be committed against persons or property that qualify as “protected” under the provisions of the applicable Convention.<sup>11</sup> Under treaty law and customary international law, grave breaches may only be committed in an international armed conflict.<sup>12</sup>

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<sup>8</sup> *Id.* In discussing the use of the expression “grave breaches,” the Commentary explains that:

The very term “grave breaches” gave rise to rather lengthy discussion. The delegate of the USSR would have preferred the use of the word “serious crimes” or “war crimes”. Finally, the Conference showed its preference for the expression “grave breaches” although such breaches are called “crimes” in the penal legislation of almost all countries; the choice of the words is justified by the fact that “crime” has a different meaning in different legislations[.]

*Id.* See also FINAL RECORD OF THE DIPLOMATIC CONFERENCE OF GENEVA (1949).

<sup>9</sup> See, e.g., CUSTOMARY INT’L HUMANITARIAN LAW, VOL. I: RULES, JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK (ICRC 2005) [hereinafter HENCKAERTS & DOSWALD-BECK VOL. I]; CUSTOMARY INT’L HUMANITARIAN LAW, VOL. II: PRACTICE, JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK (ICRC 2005) [hereinafter HENCKAERTS & DOSWALD-BECK VOL. II].

<sup>10</sup> Gross, *supra* note 6, at 798. The remaining six grave breaches are found in the following conventions: extensive destruction and appropriation of property (GC I, GC II, GC IV); compelling a POW or a protected person to serve in the forces of the hostile power (GC III and GC IV); Willfully depriving a POW or protected person of the rights of fair and regular trial (GC III and GC IV); unlawful deportation or transfer or unlawful confinement of a civilian (GC IV); and taking civilians as hostages (GC IV). *Id.*

<sup>11</sup> See, e.g., GC I, *supra* note 4, art. 13; GC II, *supra* note 4, art. 13; GC III, *supra* note 4, art. 4; and GC IV, *supra* note 4, art. 4.

<sup>12</sup> Prosecutor v. Tadic, Case No, IT-94-1-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, paras. 79-84 (Oct. 2, 1995) (holding that Article 2 of the Statute of the ICTY, which confers the tribunal with jurisdiction to prosecute persons committing or ordering grave breaches of the Geneva Conventions of 12 August 1949, “only applies to offences committed within the context of international armed conflicts.”); Rome Statute of the International Criminal Court, art. 8, July 1, 2002, 2187 U.N.T.S. 90. *But see* Prosecutor v. Tadic, Case No, IT-94-1-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Separate Opinion of Judge Abi-Saab, part IV (Oct. 2, 1995) (arguing that growing

To date, four individuals have been charged under Article 6 of the ECCC Law: Kaing Guek Eav (*alias* Duch) (“Duch”), Ieng Sary (*alias* Van), Khieu Samphan (*alias* Hem), and Nuon Chea.<sup>13</sup> Only Duch has been indicted and sent to trial<sup>14</sup> while the other three remain in provisional detention pending indictment as “charged persons.”<sup>15</sup>

Throughout the period April 17, 1975 to January 7, 1979, Democratic Kampuchea was a party to hostilities of varying intensity with neighboring Vietnam, Laos, and Thailand.<sup>16</sup> Cambodia became a party to the Geneva Conventions on August 8, 1958.<sup>17</sup> Similarly, Vietnam, Laos, and Thailand were all parties to the Geneva Conventions prior to 1975.<sup>18</sup> In its analysis of potential “war crimes” committed by the Khmer Rouge, the *UN Group of Experts* concluded that “certain Khmer Rouge atrocities took place in the course of warfare with other States, especially Viet Nam, as well as with certain domestic

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practice and *opinio juris* support the view that grave breaches may be committed in internal armed conflicts); Theodor Meron, *The Continuing Role of Custom in the Formation of International Humanitarian Law*, 90 AM. J. INT’L L. 238, 243 (1996) (lamenting the *Tadic* Appeals Chamber’s limited attention to “the possibility that, divorced from some of their conventional and formal aspects, the core offenses listed in the grave breaches provisions may have an independent existence as a customary norm applicable also to violations of at least common Article 3.”); George H. Aldrich, *Jurisdiction of the International Criminal Tribunal for the Former Yugoslavia*, 90 AM. J. INT’L L. 64, 66-7 (1996).

<sup>13</sup> See ECCC, Office of the Co-Investigating Judges, Closing Order Indicting Kaing Guek Eav *alias* Duch, [hereinafter Duch Indictment]; ECCC, Office of the Co-Investigating Judges, Provisional Detention Order for Ieng Sary *alias* Van [hereinafter Ieng Sary PDO]; ECCC, Office of the Co-Investigating Judges, Provisional Detention Order for Khieu Samphan *alias* Hem [hereinafter Khieu Samphan PDO]; ECCC, Office of the Co-Investigating Judges, Provisional Detention Order for Nuon Chea [hereinafter Nuon Chea PDO].

<sup>14</sup> Duch Indictment, *supra* note 13. Duch’s trial formally began on February 17, 2009. Sopheng Cheng, *Cambodia Genocide Trial Begins*, ASSOCIATED PRESS, Feb. 17, 2009.

<sup>15</sup> *Id.*

<sup>16</sup> Duch Indictment, *supra* note 13, paras. 16-8. See also Suzannah Linton, *Putting Cambodia’s Extraordinary Chambers into Context*, 11 S.Y.B.I.L. 195, (page 27) (2007).

<sup>17</sup> ICRC Webpage listing State Parties to the Geneva Conventions of 12 August 1949, available at: <http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=375&ps=P> [hereinafter GC State Parties].

<sup>18</sup> *Report of the Group of Experts for Cambodia Established Pursuant to General Assembly Resolution 52/135*, para. 72, U.N. Doc. A/53/850, S/1999/231 (Mar. 16, 1999) [hereinafter *Group of Experts Report*]. The Provisional Revolutionary Government of the Republic of Vietnam became a party in 1974 and the Socialist Republic of Vietnam confirmed on July 4, 1976 that it remained bound by the Conventions. *Id.* at note 22. Laos became a party in 1956, and Thailand became a party in 1954. GC State Parties, *supra* note 17.

resistance forces. . . .”<sup>19</sup> Therefore, the extent to which any accused may be held criminally responsible for grave breaches committed during the tribunal’s mandate depends on how the tribunal characterizes this “warfare;” in particular, at what point in time was Democratic Kampuchea engaged in an international armed conflict such that the grave breaches provisions of the Geneva Conventions were applicable. After all, the ECCC Law does not allow for the prosecution of war crimes that occurred during an internal armed conflict.<sup>20</sup>

There appear to be two prevailing approaches for addressing this issue. The first approach is to view the relevant period as part of “a single internationalised armed conflict through the direct involvement of other States in armed conflict in Cambodia...[,]” thereby triggering the application of the rules of international armed conflict.<sup>21</sup> The second approach tracks the recommendations of the U.N. Group of Experts and entails viewing the “warfare” with Vietnam as triggering the applicability of

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<sup>19</sup> *Group of Experts Report*, supra note 18, para. 73. According to the Duch Indictment, official acknowledgement by Democratic Kampuchea and the Socialist Republic of Vietnam of an international armed conflict did not occur until December 31, 1977. Duch Indictment, supra note 13, para. 17. Following hostilities on the border between the two nations in early 1978, the ICRC “reminded the authorities of both countries of their obligation to respect ‘the international humanitarian norms.’” Hans-Peter Gasser, *Internationalized Non-International Armed Conflict: Case Studies of Afghanistan, Kampuchea, and Lebanon*, 33 AM U. L. REV. 145, 152 (1983). Shortly thereafter, the ICRC called upon both sides to adhere to the Third Convention to ensure the humane treatment of prisoners taken. Whereas Vietnam responded by expressing its intent to uphold its obligations under the Conventions, the DK regime “made no reply.” *Id.* The Vietnamese reply stated that its adherence to the Conventions remained “‘subject to its previously stated reservations and local conditions.’” *Id.*

<sup>20</sup> Linton, supra note 16, at 27.

<sup>21</sup> *Id.* This approach might encompass the U.S. aerial bombings of Cambodia, hostilities between Vietnam and the Khmer Rouge, assistance given by other States to the DK regime, the eventual invasion and occupation of Cambodia by Vietnam, and the roles played by other States in aiding parties to the continued fighting until the withdrawal of Vietnam in 1989. *Id.* For a related discussion of the inherent complexities involved in characterizing an armed conflict, see Aldrich, supra note 12, at 66-7 (refusing to believe that “warfare on the scale that has existed in Bosnia-Herzegovina, and with the involvement of various states cannot be considered an international armed conflict without forcing such absurd conclusions” concerning what crimes would amount to grave breaches, and that the appeals chambers’ determination that both types of conflicts existed in the territory of the former Yugoslavia was “quite unnecessary”).

the Conventions “during nearly the entirety of Democratic Kampuchea’s rule” but does not cover any crimes committed during internal armed conflict.<sup>22</sup>

In the Closing Order Indicting Kaing Guek Eav (“Duch’s Closing Order”), the Co-Investigating Judges (“CIJs”) appear to have adopted the latter approach according to which the constituent crimes were committed against the backdrop of an international armed conflict such that the grave breaches provisions of the Conventions apply to offenses perpetrated between April 17, 1975 and January 6, 1979.<sup>23</sup> It seems highly likely that the CIJs will adopt the same position vis-à-vis the three “charged persons” also alleged to have violated Article 6 of the ECCC Law.

In their defense, the accused persons may claim that the DK regime was not bound by the Conventions because of the regime change and the DK’s revolutionary agenda, which necessitated a complete rejection of the legal and political structures, and international legal obligations associated with the Khmer Republic.<sup>24</sup> Regardless, it is

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<sup>22</sup> *Group of Experts Report*, supra note 18, para. 73 (stating that “[t]he border skirmishes in May 1975 and the continuation of incidents make a strong case” for such an approach.)

<sup>23</sup> Duch Indictment, supra note 13, paras. 16-9. For his part, Duch has confessed to being aware of the existence of armed hostilities with Vietnam from mid April 1975 to at least January 6, 1979. *Id.*, para. 49. The Group of Experts concluded as follows in their report: “[t]he grave breaches of the provisions of the Geneva Conventions thus apply, although criminality extended beyond these grave breaches under the customary law at the time.” *Group of Experts Report*, supra note 18, para. 73.

<sup>24</sup> While highly dubious in light of common Article 63/62/142/158 of the Geneva Conventions, which addresses denunciation, this issue is beyond the scope of this paper and requires an analysis of state succession to international treaties under general principles of law according to the law as it existed in 1975. See, e.g., Jordan J. Paust & Albert P. Blaustein, *War Crimes Jurisdiction and Due Process: The Bangladesh Experience*, 11 VAND. J. TRANSNAT’L L. 1, 9 & n. 28 (1978) (“not[ing] that the new State of Bangladesh, under generally accepted principles of international law, should be obligated to honor Pakistan’s treaty commitments concerning the laws of war, genocide, and human rights, until a formal and permissible claim of contrary obligations is asserted by Bangladesh.”); Vienna Convention on Succession of States in Respect of Treaties, arts. 34, 35, U.N. Doc. A/CONF./80/31, reprinted in 17 I.L.M. 1488, 1509 (1978); Detlev F. Vagts, *State Succession: The Codifiers’ View*, 33 VA. J. INTL’L L. 275, 289-94 (1993). See also *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, para. 218 (June 27) (citing the common article on denunciation in support of assertion that certain articles of the Geneva Conventions are declaratory of customary law) [hereinafter *Nicaragua*]; Jordan J. Paust, *Applicability of International Criminal Laws to Events in the Former Yugoslavia*, 9 AM. U. J. INT’L L. & POL’Y 499, 501-2, note 8 (concluding that “existing treaty obligations apply to the new, or newly independent state, unless the “states

conceivable that officials within the DK regime may still have been criminally responsible for grave breaches of the Geneva Conventions under customary international law if the norms expressed in common Articles 50/51/130/147 of the Geneva Conventions had ripened into customary international law by 1975.<sup>25</sup>

To defeat likely challenges to the applicability of Article 6 via the defense of *nullum crimen sine lege*,<sup>26</sup> the Co-Prosecutors must therefore prove that the provisions were sufficiently established under customary international law by 1975 such that the accused had notice that violations could trigger individual criminal responsibility.<sup>27</sup> This paper thus seeks to answer whether the offenses described in Article 6 of the ECCC Statute formed part of customary international law in 1975.

Although the specific acts recognized as grave breaches in the Geneva Conventions vary from convention to convention, all of the grave breaches provisions share the undeniable common theme of protecting the most important values recognized under the laws and customs of war. An examination of the “[l]ists of war crimes in

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concerned” agree otherwise and thus the new states or entities emerging from the former Yugoslavia and those involved in these processes are bound by Yugoslavia’s multilateral treaty commitments.). In addition, articles 6 and 158 of the Fourth Convention appear to preclude a country’s refusal to accept a treaty obligation from taking effect until after hostilities have ceased. GC IV, *supra* note 4, arts. 6 & 158; Jordan J. Paust & Albert P. Blaustein, *supra* note 19, at 502.

<sup>25</sup> Custom requires a pattern of uniform, consistent and widespread state practice combined with *opinio juris et necessitatis*. See IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 6-12 (6th ed. 2003). Moreover, even if the Geneva Conventions were applicable, their application would not necessarily “subsume” or “supervene” customary international law. Theodor Meron, *The Geneva Conventions as Customary Law*, 81 Am. J. Int’l. L. 348, 367-8 *citing* Nicaragua, *supra* note 24, para. 179 (holding that even where the U.N. Charter applies, “customary international law continues to exist and to apply, separately from international treaty law, even where the two categories of law have an identical content.”)

<sup>26</sup> See generally, ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW § 2.3 (2d. ed. 2008); BETH VAN SCHAACK & RONALD SLYE, INTERNATIONAL CRIMINAL LAW AND ITS ENFORCEMENT 825 (Foundation Press 2007). *Nullum crimen* is alternatively referred to as the doctrine of legality.

<sup>27</sup> While there were 133 States Party to the Geneva Conventions as of April 17, 1975, “the practice of states parties may merely indicate that certain states [were] complying with their treaty obligation “to ensure respect” for the Conventions.” Meron, *The Geneva Conventions as Customary Law*, *supra* note 24, at 353.

various treaties and other international instruments, national legislation and case law, shows that violations are treated as serious, and therefore as war crimes, if they breach important values.”<sup>28</sup> By the time the Khmer Rouge seized control of Phnom Penh on April 17, 1975, all of the offenses recognized in the grave breaches provisions of the Geneva Conventions had achieved the status of customary international such that violations triggered individual criminal responsibility for war crimes. That the act is deemed a grave breach affects aspects of punishment and trial and not the criminality of the act.

This paper is divided into two main sections. Part I provides an overview of the four individuals charged under Article 6 of the ECCC Law and their alleged roles in committing the acts in violation thereof. Part II comprises the bulk of this paper and explores the status of grave breaches of the Geneva Conventions in customary international law as of 1975. The paper concludes by examining the evidence set forth in Part II in its totality, which decisively establishes that the grave breaches provisions replicated in Article 6 of the ECCC Law had reached the status of customary international law. Consequently, the ECCC should find that charged persons may be held responsible for violations under Article 6.

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<sup>28</sup> HENCKAERTS & DOSWALD-BECK V. I, *supra* note 9, at 569.

## I. OVERVIEW OF THE ACCUSED PERSONS AND THE GRAVE BREACHES CHARGES AGAINST THEM

Article 6 of the ECCC Law states that only those who “committed or ordered the commission” of grave breaches of the Geneva Conventions may be prosecuted under the provision.<sup>29</sup> However, Article 29 qualifies Articles 3-8 by articulating the various modes of liability by which individual criminal responsibility for the crimes defined by those provisions may be established.<sup>30</sup> ECCC Law thus makes available the two principal doctrines according to which criminal responsibility for grave breaches of the Geneva Conventions can be established under international law: individual responsibility and superior responsibility.<sup>31</sup>

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<sup>29</sup> ECCC Law, *supra* note 1, art. 6.

<sup>30</sup> Article 29 expressly includes planning, instigating, ordering, aiding and abetting, and committing. *Id.*, art. 29. Contemporary international tribunals, starting with the ICTY Appeals Chamber in the *Tadic* decision and followed by the Special Court of Sierra Leone and the International Tribunal for Rwanda, have read joint criminal enterprise (“JCE”) liability into their respective statutes as a mode of commission. *See, e.g., Tadic*, Case No. IT-94-1-A, para. 226; *Prosecutor v. Karemera et. al.*, Case No. ICTR-98-44-T, Decision on the Preliminary Motions by the Defence of Joseph Nzirorera, Édouard Karemera, Andre Rwamakuba and Mathieu Ndirumpatse Challenging Jurisdiction in Relation to Joint Criminal Enterprise, para. 43 (11 May 2004). For a discussion of the applicability of common plan liability / JCE before the ECCC, *See* Jared L. Watkins & Randle C. DeFalco, *Nullum Crimen Sine Lege, The Jurisdiction of the Extraordinary Chambers in the Courts of Cambodia & Joint Criminal Enterprise* (Sept. 2007) (unpublished paper, on file with the Documentation Center of Cambodia). In addition, Article 29 of the ECCC Law sets forth the standard for superior responsibility as follows:

The fact that any of the referred to in Articles 3 new, 4, 5, 6, 7 and 8 were committed by a subordinate does not relieve the superior of personal criminal responsibility if the superior had effective command and control or authority and control over the subordinate, and the superior knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators.

ECCC Law, *supra* note 1, art. 29.

<sup>31</sup> *See, e.g., HEDER & TITTEMORE, supra* note 1, at 56.

**A. The Prosecution's General Case Theory**

According to the Co-Prosecutor's Statement of 18 July 2007, the initial 5 charged persons<sup>32</sup> are alleged to have participated in a "common criminal plan constituting a systematic and unlawful denial of basic rights of the Cambodian population and the targeted persecution of certain groups."<sup>33</sup> This criminal plan resulted, according to the Statement, in the commission of "crimes against humanity, genocide, grave breaches of the Geneva Conventions, homicide, torture and religious persecution."<sup>34</sup>

Duch's Closing Order arguably offers the most insight to date regarding how the Office of the Co-Prosecutor ("OTP") and the CIJs seek to frame the context in which the alleged grave breaches of the Geneva Conventions were committed. According to the CIJs, international armed conflict between Cambodia and Vietnam began "almost immediately" after the army of the Communist Party of Kampuchea ("CPK"), the Kampuchea People's National Liberation Armed Forces ("KPNLAF"), seized control of Phnom Penh on April 17, 1975.<sup>35</sup> While the CIJs acknowledge that Democratic Kampuchea and Vietnam did not "officially recognise[]" a state of international armed conflict until December 31, 1977, sufficient evidence exists of "escalating and

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<sup>32</sup> This includes Duch, Ieng Sary, Khieu Samphan, Nuon Chea, and former DK Minister of Social Affairs Ieng Thirith.

<sup>33</sup> Statement of the Co-Prosecutors, Extraordinary Chambers in the Courts of Cambodia, Office of the Co-Prosecutors, at 3 (18 July 2007), [http://www.genocidewatch.org/images/Cambodia\\_18\\_Jul\\_07\\_Statement\\_of\\_the\\_Co-Prosecutors.pdf](http://www.genocidewatch.org/images/Cambodia_18_Jul_07_Statement_of_the_Co-Prosecutors.pdf) [hereinafter "Statement of the Co-Prosecutors"].

<sup>34</sup> *Id.* at 4. The Co-Prosecutors base these charges on "twenty-five distinct factual situations of murder, torture, forcible transfer, unlawful detention, forced labor and religious, political and ethnic persecution."  
*Id.*

<sup>35</sup> Duch Indictment, *supra* note 13, para. 16.

increasingly frequent armed violence between the two states” beginning in mid-April 1975.<sup>36</sup>

The conflict reached a level of “full-scale war” by late 1977 as evidenced by the penetration of Vietnamese forces deep into Cambodian territory and the DK’s eventual decision “to seize the United Nations Security Council of the matter” on December 31, 1978.<sup>37</sup> The conflict continued until at least January 6, 1979, after which the RAK “was forced to flee Phnom Penh and, from that point forward, the regime rapidly lost effective control of the greater part of Cambodian territory.”<sup>38</sup>

**B. The Roles of the Accused and the Grave Breaches Charges Against Them**

This section briefly discusses the roles occupied by Duch, Nuon Chea, Ieng Sary, and Khieu Samphan within the DK regime, and the grave breaches charges against each of them. It is important to bear in mind that only Duch’s case has reached the trial phase; the CIJs have yet to issue closing orders indicting any other charged persons. Therefore, investigations into these cases remain open. For this and for a variety of other reasons, this section does not purport to predict either the exact nature of any grave breaches charges ultimately brought against these three or the factual circumstances giving rise thereto.

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<sup>36</sup> *Id.*, para. 17. In support of this assertion, the CIJs point to fighting between the Revolutionary Army of Kampuchea (“RAK”)(formerly the KPNLAF) and the Vietnam People’s Army in the Cambodian territories of: Ratanakiri; Mondulkiri; Kratie; Kompong Cham; Prey Veng; Svay Rieng; Kandal; Takeo; Kampot; and the islands of Wai, Koh Ach, Koh Tral, Koh Ses, Koh Thmei, Koh Sampoch, Koh Rong, and Koh Muk Ream. *Id.*

<sup>37</sup> *Id.*, para. 18.

<sup>38</sup> *Id.*

i. *Duch and Tuol Sleng*

From 1975-79, Duch served as Deputy Secretary and then Secretary of “Security Office 21” (“S-21”), also known as Tuol Sleng, the notorious secret facility used by the Khmer Rouge for the detention, interrogation, torture, and extermination of individuals accused of opposing *Angkar*.<sup>39</sup> Many of the grave breaches charges against Nuon Chea, Ieng Sary, and Khieu Samphan are also based on evidence relating to the operations of S-21. Unlike the other four other accused persons before the tribunal, Duch has confessed to his role in many of the crimes with which he is charged and asked for forgiveness from the victims of crimes committed at S-21.<sup>40</sup>

In addition to other charges, Duch is accused of committing the following grave breaches: wilful killing;<sup>41</sup> torture or inhumane treatment;<sup>42</sup> willfully causing great suffering or serious injury to body or health;<sup>43</sup> willfully depriving a prisoner of war or civilian the rights of fair and regular trial;<sup>44</sup> and unlawful confinement of a civilian.<sup>45</sup>

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<sup>39</sup> “Tuol Sleng” translates to “a poisonous hill or a place on a mound to keep those who bear or supply guilt [toward *Angkar*]. Tuol Sleng Genocide Museum Information Pamphlet [hereinafter TS Pamphlet]. Approximately 1,720 people worked in S-21 during its tenure. *Id.*

<sup>40</sup> See Stephen Kurczyk, *From Khmer Rouge Torturer to Born Again Christian*, THE CHRISTIAN SCIENCE MONITOR, April 6, 2009; Seth Mydans, *Khmer Rouge Defendant Apologizes for Atrocities*, THE NEW YORK TIMES, March 31, 2009. However, Duch has since claimed at trial that he was “duped into confessing.” *K. Rouge Prison Chief Says He was Duped by UN*, AGENCE FRANCE PRESSE, April 21, 2009.

<sup>41</sup> Duch’s Indictment states as follows: “S21 personnel wilfully caused the death of at least 400 protected persons both directly and indirectly, through a variety of means.” Duch Indictment, *supra* note 13, para. 151.

<sup>42</sup> Duch’s Indictment states as follows:

S21 personal wilfully caused severe pain or suffering, whether physical or mental, to protected persons during interrogation. The purpose of using such methods within the course of the interrogation was to extract confessions aimed at obtaining military information and supporting CPK propaganda.

S21 personnel wilfully caused serious mental harm or physical suffering or injury, or submitted them to conditions which amounted to a serious attack upon the human dignity of the prisoners at S21.

*Id.*, paras. 149-50.

<sup>43</sup> Duch’s Indictment states as follows:

According to OTP, at least 12,380 men, women and children were detained at S-21.<sup>46</sup> While most of those detained were Cambodian, other foreign nationals were victims of S-21 including Vietnamese, Laotians, Thai, Indians, Pakistanis, British, Americans, Canadians, New Zealanders, and Australians.<sup>47</sup>

At least 400 prisoners are believed to have been Vietnamese.<sup>48</sup> Of these, approximately 150 were recorded as “Prisoners of War” and at least 100 were definitely civilians.<sup>49</sup> Many of the Vietnamese POWs were captured “in or near the main conflict

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These protected persons were wilfully subjected to serious mental and physical suffering due to inhumane acts which included deliberate deprivation of adequate food, sanitation and medical treatment. Prisoners were beaten and subjected to stringent restrictions during detention. These severe conditions individually or collectively depressed, degraded, and dehumanised detainees ensuring that they were always afraid.

*Id.*, para. 148.

<sup>44</sup> Duch’s Indictment states as follows:

At least 400 protected persons were wilfully denied their right to be judged by an independent and impartial court as defined by the Geneva Conventions of 1949. In particular, the right to be promptly informed of their offences; to be protected from collective penalty; to be protected by the principle of legality; or to be sentenced by a competent court.

*Id.*, para. 147.

<sup>45</sup> Duch’s Indictment states as follows: “More than a hundred Vietnamese civilians were detained at S21. There was no difference in treatment between Vietnamese civilians and other individuals subjected to imprisonment at S21, all were arbitrarily deprived of their liberty.” *Id.*, para. 146.

<sup>46</sup> Duch Indictment, *supra* note 13, para. 47. S-21 officials maintained careful records of the flow of prisoners to and from S-21. These reports were discovered after the Khmer Rouge were expelled from Phnom Penh in 1979. In 1978 and 1979, an average of 1,200 – 1,500 prisoners were detained at S-21 at any given time with detention typically ranging from two to four months. TS Pamphlet, *supra* note .

<sup>47</sup> Tuol Sleng Genocide Museum Information Pamphlet. *See also* Duch Indictment, *supra* note 13, para. 49.

<sup>48</sup> Duch Indictment, *supra* note 13, paras. 48-9. The first documented arrest of a “Vietnamese” person was on February 7, 1976. The number of Vietnamese prisoners subsequently increased as the conflict with Vietnam grew in intensity. *Id.*

<sup>49</sup> *Id.*, para. 49. These numbers are corroborated by Duch, who “acknowledged that Vietnamese civilians and soldiers were detained at S21 and estimated that they numbered in the hundreds.” *Id.*

zone on the border with Vietnam.”<sup>50</sup> There is conflicting evidence with regards to how and under whose orders the POWs were transported to S-21.<sup>51</sup>

Evidence shows that the use of torture to obtain confessions from prisoners within S-21 was “systematic” and “applied uniformly to all detainees.” (para. 85). Duch has stated that “anyone taken for interrogation mostly could not avoid torture.” Methods of torture used for interrogation included beatings, electric shock, suffocation, water torture, pulling out finger/toe nails, rape, and mutilation.<sup>52</sup> In the case of interrogations of Vietnamese prisoners, the *Angkar* sought both to gather intelligence and to use confessions for propaganda purposes.<sup>53</sup> In total, over 12,380 individuals detained at S-21 were executed, many being executed and buried at Choeng Ek.<sup>54</sup>

ii. *Nuon Chea*

There is considerable evidence that Nuon Chea, commonly known as “Brother Number Two,” was one of the most powerful members of the DK regime and a key architect of Communist Party of Kampuchea (“CPK”) policy. He is alleged to have committed crimes against humanity and war crimes in his capacity as the Deputy Secretary of the CPK, member of the CPK Central and Standing Committees, Chairman of the Democratic Kampuchea People’s Assembly, and as the acting prime minister and the Vice Chairman of the CPK Centre Military Committee.<sup>55</sup> Specifically, Nuon Chea is accused of committing the following grave breaches: Wilful Killing, Torture or Inhumane Treatment, Wilfully Causing Great Suffering or Serious Injury to Body or Health, Wilful

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<sup>50</sup> *Id.*

<sup>51</sup> *See Id.*, para. 54.

<sup>52</sup> *See Id. paras.* 75-109. *See also* DY, *supra* note 1, at 52; TS Pamphlet, *supra* note 39.

<sup>53</sup> *Id.*

<sup>54</sup> *See Id.*, para. 112.

<sup>55</sup> Nuon Chea PDO, *supra* note 13, para. 1.

Deprivation of Rights to a Fair Trial, Unlawful Confinement and Unlawful Deportation or Transfer.<sup>56</sup> Nuon Chea maintains his innocence with respect to all of the crimes of which he stands accused.<sup>57</sup>

Nuon Chea played a leading role in the DK's internal security apparatus including in the development and implementation of DK's execution policies.<sup>58</sup> As such, he oversaw the operation of S-21 and other Khmer Rouge detention facilities throughout the country.<sup>59</sup> There is thus strong evidence that, under a theory of superior responsibility, Nuon Chea may be criminal liability for those grave breaches committed at S-21.<sup>60</sup> In addition, according to research by Stephen Heder and Brian D. Tittmore, Nuon Chea may also share responsibility for war crimes committed by DK forces along the Vietnamese front. As of early 1978, Nuon Chea received repeated communications seeking:

[A]dvice about what to do with Vietnamese prisoners of war, mentioning the torching of civilian targets in Vietnam and the "smashing" of Vietnamese civilians on Vietnamese territory, and reporting Vietnamese protests about alleged DK massacres of civilians and shelling of civilian targets.<sup>61</sup>

This evidence, and the way in which the communications were drafted, indicate "that it was not CPK policy to take all necessary precautions in its military operations to avoid injury, loss or damage to civilian populations . . . ."<sup>62</sup>

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<sup>56</sup> *Id.*

<sup>57</sup> *Id.*, para. 4.

<sup>58</sup> See HEDER & TITTEMORE, *supra* note 1, at 59-75.

<sup>59</sup> *Id.* at 62; Nuon Chea PDO, *supra* note 13, para. 2.

<sup>60</sup> HEDER & TITTEMORE, *supra* note 1, at 70.

<sup>61</sup> *Id.* at 89. These telegrams directed to Nuon Chea addressed, among other subjects, the "smashing" or killing of Vietnamese civilians, rocket attacks indiscriminately targeting Vietnamese towns, and the burning of Vietnamese civilian areas. *Id.* at 68.

<sup>62</sup> *Id.*

iii. *Ieng Sary*

Ieng Sary served as the Minister of Foreign Affairs, where he is alleged to have “exercis[ed] authority and effective control over the Ministry and all of its constituent and subordinate organs.”<sup>63</sup> He is also alleged to have been a “full rights member” of the Central and Standing Committees.<sup>64</sup> In addition to other charges, Ieng Sary is accused of committing the following grave breaches: Wilful Killing, Wilfully Causing Great Suffering or Serious Injury to Body or Health, Wilful Deprivation of Rights to a Fair Trial of prisoners of war or civilians, Unlawful Confinement and Unlawful Deportation or Transfer.<sup>65</sup> Ieng Sary has refused to accept guilt for the crimes with which he is charged and demanded that proof of his guilt be established before the tribunal.<sup>66</sup>

Much of Ieng Sary’s potential liability for grave breaches likely derives from his involvement in the Central and Standing Committees, and also from public speeches and statements given as foreign minister in support of CPK policies. Ieng Sary repeatedly praised efforts to “smash” CIA-KGB-Vietnamese conspirators seeking to overthrow the DK regime.<sup>67</sup> Such statements were made with knowledge of DK atrocities against protected persons in the international armed conflict with Vietnam. For example, Ieng Sary was copied on the telegrams sent to Nuon Chea regarding the treatment of Vietnamese POWs and operations along the Vietnamese border previously discussed.<sup>68</sup>

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<sup>63</sup> Ieng Sary PDO, *supra* note 13, para. 2.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*, para. 1. Thus, in contrast to Nuon Chea, Ieng Sary has not to date been charged with torture or inhumane treatment as a grave breach.

<sup>66</sup> *Id.*, para. 4. Ieng Sary declared that “there are certain accusations that I cannot accept,” and expressed his desire “to know the truth about a dark period in our history” in order to discover “where the truth lies.”  
*Id.*

<sup>67</sup> See HEDER & TITTEMORE, *supra* note 1, at 77-81.

<sup>68</sup> See text *supra* at 15.

iv. *Khieu Samphan*

Khieu Samphan is alleged to have committed crimes against humanity and war crimes in his capacity as DK Head of State (Chairman of the State Presidium), as a leader and eventually Chairman of “Office 870,” and as a “full rights member” of the CPK Central Committee. He is accused of committing the following grave breaches: wilful killing, wilfully causing great suffering or serious injury to body or health, wilful deprivation of rights to a fair trial of prisoners of war or civilians, unlawful deportation or transfer or unlawful confinement of a civilian.<sup>69</sup> Evidence suggests that he was both aware of and took steps to promote the DK’s execution policies.<sup>70</sup> Khieu Samphan’s defense appears to be premised on the idea that he was a figurehead within the regime who held no effective power.

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<sup>69</sup> Khieu Samphan PDO, *supra* note 13, para. 1.

<sup>70</sup> HEDER & TITTEMORE, *supra* note 1, at 98.

## II. GRAVE BREACHES UNDER CUSTOMARY INTERNATIONAL LAW AS OF 1975

This section will analyze the specific offenses recognized as grave breaches of the Geneva Conventions. While investigations into the crimes committed by Nuon Chea, Ieng Sary, and Kheiu Samphan remain open, there is little doubt that all of them will be charged with some combination of at least five of the eight acts specifically listed in Article 6 of the ECCC Law.<sup>71</sup> Put otherwise, the only three acts that the CIJ's have not accused Duch or the three charged persons with having committed are: destruction and serious damage to property, not justified by military necessity and carried out unlawfully or wantonly; compelling a prisoner of war or a civilian to serve in the forces of a hostile power; and taking civilians as hostages. Therefore, while the status of all three of these acts will be addressed in this section, greater focus will be given to the status of the other five acts under customary international law as of 1975.

### A. Sources of the Law of War

Attempting to ascertain the law of war at any given point in history is no different than a comparable inquiry into other areas of international law.<sup>72</sup> Article 38 of the Statute

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<sup>71</sup> These are: wilful killing; torture or inhumane treatment; willfully causing great suffering or serious injury to body or health; willfully depriving a prisoner of war or civilian the rights of fair and regular trial; and unlawful deportation or transfer or unlawful confinement of a civilian. See Duch Indictment, *supra* note 13, para. 1; Nuon Chea PDO, *supra* note 13, para. 1; Ieng Sary PDO, *supra* note 13, para. 1; and Kheiu Samphan, *supra* note 13, para. 1.

<sup>72</sup> See, e.g., Law of War website, available at <http://www.lawofwar.org/principles.htm#Sources%20of%20the%20Law%20of%20War>. Of particular utility to the current inquiry is a discussion of the sources of the law of war by the International Military Tribunal at Nuremberg ("IMT") in its judgement:

The law of war is to be found not only in treaties, but in the customs and practices of states which gradually obtained universal recognition, and from the general principles of justice applied by jurists and practiced by military courts. This law is not static, but by continual adaptation follows the needs of a changing world. Indeed, in many cases treaties do no more than express and define for more accurate reference the principles of law already existing.

of the International Court of Justice recognizes four sources: (1) international treaties; (2) international custom, as evidence of a general practice accepted as law; (3) the general principles of law recognized by civilized nations; and (4) judicial decisions and the teachings of the most highly qualified publicists.<sup>73</sup>

**B. Grave Breaches of the Geneva Conventions and Customary International Law**

This section is divided into two subsections. The first subsection examines sources of international law including international treaties, judgments of international tribunals and quasi-judicial bodies, state practice, and the writings of expert commentators that speak to the customary status of grave breaches of the Geneva Conventions as a collective entity. While there is clearly some overlap, numerous sources of international law deal more specifically with one or more of the prohibited acts under the grave breaches provisions of the Geneva Conventions (i.e. willful killing or torture). The second subsection explores these sources. Where relevant, attention is given to “the emergence of customary law in other fields of international law” prior to 1975 and what this may suggest about “the transformation of the parallel norms of the Geneva Conventions (those with an identical content) into customary norms.”<sup>74</sup>

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Judgment of Nuremberg Tribunal, International Military Tribunal, Nuremberg (1946), 41 AM. J. INT. L. 172 (1947) [hereinafter IMT Judgment].

<sup>73</sup> Statute of the International Court of Justice (1945), art. 38(1), June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993.

<sup>74</sup> Meron, *The Geneva Conventions as Customary Law*, *supra* note 25, at 368 (describing the probable effect that the recognition of customary norms under international human rights law will have on the interpretation and even status of the parallel norms in international humanitarian law).

i. *Grave Breaches Collectively as Customary International Law*

On August 12, 1949, the Geneva Conventions were opened for signature, thereby formally introducing the grave breaches system. However, as previously stated, the creation of this system did not mean that those acts classified as grave breaches were previously unrecognized as giving rise to individual responsibility under the law of war. On the contrary, many of the grave breaches listed in the Geneva Conventions and their “correlative responsibilities” were previously established in general international law prior to 1949.<sup>75</sup>

In fact, the notion that the serious acts now recognized as grave breaches under the Geneva Conventions previously gave rise to individual criminal responsibility is codified in three of the foundational legal documents from the post-World War II period: the London Charter of the International Military Tribunal (“Nuremberg Charter”),<sup>76</sup> Control Council Law Number 10 (“Control Council No. 10”),<sup>77</sup> and the Charter of the International Military Tribunal for the Far East (“Tokyo Charter”).<sup>78</sup> All of these statutes,

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<sup>75</sup> IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 546 (2d. ed. 1973).

<sup>76</sup> Agreement by the Government of the United Kingdom of Great Britain and Northern Ireland, the Government of the United States of America, the Provisional Government of the French Republic, and the Government of the Union of Soviet Socialist Republics for the Prosecution and Punishment of the Major War Criminals of the European Axis and Charter of the International Military Tribunal, art. 6, Aug. 8, 1945, 82 U.N.T.S. 279 [hereinafter Nuremberg Charter].

<sup>77</sup> Control Council Law No. 10, in *Official Gazette of the Control Council for Germany* (1946), vol. 3, at 50 [hereinafter CCL 10].

<sup>78</sup> Charter of the International Military Tribunal for the Far East, art. 5 [hereinafter “IMTFE Charter”], reprinted in SENATE COMMITTEE ON FOREIGN RELATIONS & DEPARTMENT OF STATE, *A DECADE OF AMERICAN FOREIGN POLICY: BASIC DOCUMENTS 1941-49* (U.S. Gov. Printing Office 1950). The IMTFE Charter was largely modeled on the Nuremberg Charter. Cassese, *supra* note 26, at 322. Article 5 confers the Tribunal with subject matter jurisdiction to prosecute crimes against peace, conventional war crimes defined as “violations of the laws of war,” and crimes against humanity. *Id.* art. 5. In contrast to the IMT, which derived its legitimacy from an international agreement, the IMTFE was established by a decree issued by Allied Supreme Commander General Douglas MacArthur. The Eleven judges who presided over the IMTFE were from Australia, Canada, China, France, Great Britain, India, the Netherlands, New Zealand, the Philippines, the Soviet Union, and the United States. PETER H. MAGUIRE, *LAW AND WAR: AN AMERICAN STORY*, 132 (Columbia University Press 2000).

like the Geneva Conventions that they helped spawn, fit into the paradigm articulated by the ICJ in the *Nicaragua* case as being “. . .in some respects a development, and in other respects no more than the expression, of [general principles of humanitarian law].”<sup>79</sup>

*IMT Declarations of Customary International Law*

Many of the specific acts listed in Article 6 of the ECCC Law were listed as war crimes in Article 6(b) of the Nuremberg Charter, which states:

WAR CRIMES: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;<sup>80</sup>

In applying the law relating to war crimes, the IMT concluded that it was bound to apply the definition of war crimes defined by Article 6(b) of the Nuremberg Charter.<sup>81</sup>

However, the IMT also clearly acknowledged the legal bases for recognizing those offenses as war crimes under international law. Indeed, the offenses “were covered by Articles 46, 50, 52, and 56 of the Hague Convention of 1907, and Articles 2, 3, 4, 46, and 51 of the Geneva Convention of 1929.”<sup>82</sup> The IMT thus dismissed the claim that

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<sup>79</sup> *Nicaragua*, *supra* note 24, para. 218.

<sup>80</sup> Nuremberg Charter, *supra* note 76, art. 6(b).

<sup>81</sup> Trial of the Major War Criminals Before the International Military Tribunal (1947) [hereinafter IMT Judgement].

<sup>82</sup> Among other things, Article 46 of the 1907 Hague Convention (IV) called for respect for the lives of persons and private property; Article 50 prohibits punishing a population for the acts of individuals; Article 52 sets limits on the requisition of property and services from populations in occupied territories; and Article 56 prohibits destruction to specially designated property. 1907 Hague Convention (IV) [hereinafter Hague Convention (IV)]. Article 2 of the 1929 Geneva Convention Relative to the Treatment of Prisoners of War requires humane treatment and protection against acts of violence; Article 3 requires that all POWs are entitled to respect for their persons and honor; Article 4 requires the detaining power to provide for the maintenance of POWs and sets for limited permissible grounds on which disparate treatment may be justified; Article 46 requires that POWs be subjected to the same penal procedures as prescribed for the armed forces of the detaining power and prohibits “all forms of cruelty whatsoever;” Lastly, Article 51

violations of these provisions did not give rise to individual criminal responsibility as “...too well settled to admit of argument.”<sup>83</sup>

The IMT further clarified the position that such acts gave rise to individual criminal responsibility under customary international law by rejecting the argument that a State needed to be a party to the Hague Conventions for their provisions to apply.<sup>84</sup> It reasoned that “by 1939 these rules laid down in the Convention were recognized by all civilized nations, and were regarded as being declaratory of the laws and customs of war which are referred to in Article 6(b) of the Charter.”

*IMT Charter and Judgments as Customary International Law by 1975*

On December 11, 1946, the UN General Assembly unanimously adopted a resolution affirming ‘the principles of international law recognized by the Charter of the Nuremberg Tribunal and the judgment of the tribunal.’<sup>85</sup> While UN General Assembly resolutions do not usually bind member states, the unanimous adoption of these general norms amounts to strong “*evidence* of the opinion of governments in the widest forum for the expression of such opinions.”<sup>86</sup>

In 1950, pursuant to G.A. Resolution 177(II), paragraph (a), the International Law Commission clearly set forth these principles of international law, thereby lending further

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specifies that escaped POWs may not be subject to liability for offenses committed during the attempt and that those aiding the escape may only be subject to disciplinary punishment. 1929 Geneva Convention Relative to the Treatment of Prisoners of War, June 19, 1931, 118 L.N.T.S. 343 [hereinafter 1929 GC].

<sup>83</sup> IMT Judgment, *supra* note 81.

<sup>84</sup> *Id.* See also HENRY J. STEINER, PHILIP ALSTON & RYAN GOODMAN, INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS 1, \_\_ (3d. ed. 2008).

<sup>85</sup> IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 546 (2d. ed. 1973).

<sup>86</sup> BROWNLIE, *supra* note 25, at. 15.

clarification and support for the acceptance of these norms.<sup>87</sup> According to Principle VI, the war crimes listed in the Nuremberg Charter were “punishable as crimes under international law.”<sup>88</sup> Although denial of the right to a fair trial was not expressly included as a war crime in the Nuremberg Charter, Principle V nevertheless recognizes that “[a]ny person charged with a crime under international law has a right to a fair trial on the facts and law.”<sup>89</sup> Although the Principles do not include the prohibition against hostage taking, this is by no means dispositive of whether the prohibition had achieved the status of customary international law by 1975.<sup>90</sup>

With specific regard to the crimes set forth under Article 6 of the Nuremberg Charter, including Article 6(b)’s definition of war crimes, distinguished commentator Ian Brownlie concluded in 1973 that, regardless of any doubts that may have existed about the state of the law in 1945, “Article 6 of the Nuremberg Charter has since come to represent general international law.”<sup>91</sup>

### Other Post-WWII Sources

Control Council Law No. 10 authorized the four occupying authorities in Germany to prosecute suspected war criminals within their respective zone of occupation.<sup>92</sup> However, because the law sought to build a “uniform legal basis in Germany” to prosecute war criminals, Article 1 of the Law explicitly incorporated both

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<sup>87</sup> Report of the International Law Commission to the General Assembly on the Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal, 5 U.N. GAOR, Supp. No. 12, at 11-14, U.N. Doc. A/1316 (1950) [hereinafter ILC Nuremberg Principles].

<sup>88</sup> *Id.*, Principle VI.

<sup>89</sup> *Id.*, Principle V.

<sup>90</sup> See text *infra* at 43-5.

<sup>91</sup> IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 546 (2d. ed. 1973).

<sup>92</sup> CCL 10, *supra* note 77. The Law was issued by the Allied Control Council on December 20, 1945.

the Moscow Declaration and the Nuremberg Charter as “integral parts of [the] law.”<sup>93</sup> As a result, the War Crimes listed in Article 1 are identical to those in the Nuremberg Charter.

The case of *United States v. von Leeb* (“The High Command Case”) before the NMT addressed the status of the norms codified in the 1929 Geneva Convention Relative to the Treatment of Prisoners of War under customary international law.<sup>94</sup> The principal issue was the extent to which Nazi Germany was bound to uphold its obligations as a party to the 1929 Geneva Conventions during its invasion of the USSR, which was not a party to the treaty. The NMT relied upon the IMT’s aforementioned reasoning with regard to the Hague conventions to buttress its own conclusion:

[I]t would appear that the IMT . . . followed the same lines of thought with regard to the Geneva Convention as with respect to the Hague Convention to the effect that they were binding insofar as they were in substance an expression of international law as accepted by the civilized nations of the world, and this Tribunal adopts this viewpoint.

Most of the provisions of the Hague and Geneva Conventions, considered in substance, are clearly an expression of the accepted views of civilized nations and binding upon Germany and the defendants on trial before us in the conduct of the war against Russia.<sup>95</sup>

Such a pronouncement further supports the claim that those war crimes codified in the Nuremberg Charter and Control Council Law No. 10 had already achieved an independent legal basis under international law such that defendants were on notice that

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<sup>93</sup> *Id.* preamble, art. 1. The military proceedings envisioned under Control Council Law No. 10 were thus explicitly authorized by an international agreement between the Allied occupying powers, and each Zone Commander operated within a framework established under Control Council Law No. 10. (*e.g.*, Art. III(3) which states that persons wanted for trial by an IMT could not be tried without the consent of the Committee of Chief Prosecutors.)<sup>93</sup> However, each Zone Commander exercised expansive discretion under the arrangement, which included the authority to determine the tribunal forum and rules of procedure. *See* art. III(2).

<sup>94</sup> US, NMT, *Von Leeb (high Command) case*.

<sup>95</sup> *Id.* *See also* Meron, *The Geneva Conventions as Customary Law*, *supra* note 25, at 359-60 & n. 41.

they could be held individually criminally responsible for such acts regardless of the applicability of the treaties expressing such principles.

ii. *The Specific Acts as Customary International Law*

*Wilful Killing*

The prohibition against wilful killing or murder was well established under customary international law by 1975 as evidenced by international instruments including the Hague Conventions, the Nuremberg Charter and Judgement, the Geneva Conventions, and various human rights treaties.

Article 23 of the 1907 Hague Convention prohibits both the treacherous killing or wounding of the enemy and the killing or wounding of an enemy who has surrendered by laying down his arms or being incapable of defending himself.<sup>96</sup>

Murder of civilians and POWs was specifically listed as a war crime in Article 6(b) of the Nuremberg Charter.<sup>97</sup> Indeed, in its judgement, the IMT found that acts of murder committed against both POWs and civilian populations in occupied territories were “not only in defiance of the well-established rules of international law, but in complete regard of the elementary dictates of humanity.”<sup>98</sup>

All four of the Geneva Conventions include “wilful killing” as a grave breach.<sup>99</sup> Common Article 3 prohibits “violence to life and person, in particular murder of all kinds” of civilians and persons *hors de combat*. Each convention prohibits the detaining

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<sup>96</sup> Hague Convention (IV), *supra* note 82, art. 23.

<sup>97</sup> Nuremberg Charter, *supra* note 76, art. 6. *See also* IMTFE Charter, *supra* note 78, art. 5; CCL 10, *supra* note 77, art. II(2).

<sup>98</sup> IMT Judgement, *supra* note 81. *See also* ILC Nuremberg Principles, *supra* note 87, Principle VI.

<sup>99</sup> GC I, *supra* note 4, art. 50; GC II, *supra* note 4, art. 51; GC III, *supra* note 4, art. 130; GC IV, *supra* note 4, art. 147.

power from committing acts of murder against the protected persons concerned therein.<sup>100</sup>

Human Rights treaties opened for ratification prior to 1975 prohibit wilful killing by seeking to prevent the “arbitrary deprivation of the right to life.”<sup>101</sup> The scope of the right to life includes unlawful killing in conduct of hostilities, particularly the killing of civilians and persons *hors de combat* not in the custody.<sup>102</sup> The prohibition against wilful killing is of such importance that no derogation is allowed.<sup>103</sup>

The prohibition against wilful killing can also be seen in numerous other instruments.<sup>104</sup> For example, according to the 1919 Report of the Commission on Responsibility established after the First World War, acts of murder, massacres and executing hostages were considered violations of the laws and customs of war warranting criminal prosecution.<sup>105</sup> In addition, U.N. Military Commissions in Korea had jurisdiction over “murder of civilians or POWs.”<sup>106</sup>

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<sup>100</sup> GC I, *supra* note 4, art. 12; GC II, *supra* note 4, art. 12; GC III, *supra* note 4, arts. 13 & 42; GC IV, *supra* note 4, art. 27.

<sup>101</sup> International Covenant on Civil and Political Rights, art. 6(1), Dec. 16, 1966, S. Exec. Doc. E, 95-2, 999 U.N.T.S. 171 [hereinafter ICCPR]; American Convention on Human Rights, art. 4, Nov. 22, 1969, 1144 U.N.T.S. 123 [hereinafter ACHR]; African Charter on Human and People’s Rights, art. 4, June 27, 1981, 1520 U.N.T.S. 217 [hereinafter ACHPR]. *See also* Convention for the Protection of Human Rights and Fundamental Freedoms, art. 2, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter ECHR]; Convention on the Prevention and Punishment of the Crime of Genocide, art. 2, Jan. 12, 1951, 78 U.N.T.S. 277 [hereinafter Genocide Convention].

<sup>102</sup> HENCKAERTS & DOSWALD-BECK VOL. I, *supra* note 9, at 314.

<sup>103</sup> ICCPR, *supra* note 101, art. 4(2), ACHR, *supra* note 101, art. 27(2), ECHR, *supra* note 101, art. 15(2).

<sup>104</sup> *See e.g.*, Instructions for the Armies for the Government of the United States in the Field (1863), arts. 23-4, 56, 61, & 71 (prohibiting killing of civilians and all wanton violence against persons in the invaded country, including killing) [hereinafter Lieber Code]; Universal Declaration of Human Rights, art. 2, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1<sup>st</sup> plen. Mtg., U.N. Doc A/810 (Dec. 12, 1948) [hereinafter UDHR]; ILC Nuremberg Principles, *supra* note 87, Principle VI; Panmunjon Armistic Agreement, para. I(3) (1953); Agreement on Ending the War and Restoring Peace in Viet-nam, arts. 8a & 8(b) (1973); 1974 UN Declaration on Protection of Women and Children in Emergency and Armed Conflict, para. 5.

<sup>105</sup> HENCKAERTS & DOSWALD-BECK VOL. II, *supra* note 9, at 2064.

<sup>106</sup> *Id. citing* Rule 4 of the 1950 UN Command Rules and Regulations for Military Commissions of UN Command in Korea.

### Torture or Inhumane Treatment

The prohibition against torture or inhumane treatment was well established under customary international law by 1975.<sup>107</sup> In particular, the prohibition may be seen in numerous international instruments and in widespread state practice.

Prior to the Geneva Conventions, the prohibition could be discerned from the provisions of various international instruments. Article 28 of the Geneva Convention of 1906 states that “the signatory governments also engage to take, or to recommend to their legislatures, the necessary measures to repress, in time of war, individual acts of ... ill

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<sup>107</sup> Most sources do not define the terms “torture” or “inhumane treatment,” preferring instead to state the prohibition in general language. None seek to provide an exhaustive list of those acts that rise to the level of torture. However, Article 1 of the 1984 Convention Against Torture defines torture as follows:

[A]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 1(1), Dec. 10, 1984, S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 85, [hereinafter CAT]. *But see* Prosecutor v. Kunarac, ICTY, Case IT-96-23-T, Judgement, para. 496 (Feb. 22, 2001) (adopting the position that the elements of the crime of torture under international humanitarian law differ from those under human rights law and thus “the presence of a state official or of any other authority-wielding person in the torture process is not necessary for the offence to be regarded as torture under international humanitarian law.”) Article 1 of CAT is understood as codifying customary international law. J. HERMAN BURGERS & HANS DANIELIUS, THE UNITED NATIONS CONVENTION AGAINST TORTURE: A HANDBOOK ON THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT 1 (1988) (“[T]he *Convention* is based upon recognition that [the prohibition against torture and other cruel, inhuman or degrading treatment or punishment] is already established under international law.”). The definition in CAT slightly modifies the definition approved by the U.N. General Assembly in 1975. Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 3452, U.N. GAOR, 30th Sess., Supp. No. 34, at 91 (1975), 23 I.L.M. 1027 [hereinafter 1975 Declaration]. The 1975 Declaration also articulates the accepted understanding that “torture” and “inhuman treatment” are inseparable insofar as “[t]orture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment.” *Id.*, art. 1(2).

treatment of the sick and wounded of the armies.”<sup>108</sup> The Geneva Convention of 1929, which replaced this treaty, expressly prohibits the use of any pressure on POWs “to obtain information,” including exposing those that refuse to cooperate to threats, insults, or “unpleasantness or disadvantages of any kind whatsoever.”<sup>109</sup>

The “ill treatment” of civilians and prisoners of war was listed as a war crime under Article 6(b) of the Nuremberg Charter.<sup>110</sup> Like with the war crime of murder, the IMT in its judgement found that acts of ill-treatment and torture committed against POWs and civilian populations in occupied territories were “not only in defiance of the well-established rules of international law, but in complete regard of the elementary dictates of humanity.”<sup>111</sup>

The IMTFE in its Judgement<sup>112</sup> found that Japanese troops practiced torture and other inhumane treatment against POWs and civilian internees throughout the Pacific War in both Japan and in occupied territories.<sup>113</sup> The practice was so ubiquitous and

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<sup>108</sup> Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, art. 28, July 6, 1906. This norm was sufficiently established such that following the First World War, the 1919 Report of the Commission on Responsibility included torture of civilians, ill-treatment of prisoners and internment of civilians under inhuman conditions as a violation of the laws and customs of war that should be subject to criminal prosecution. See HENCKAERTS & DOSWALD-BECK VOL. II, *supra* note 9.

<sup>109</sup> 1929 GC, *supra* note 82, art. 5. See also Lieber Code, *supra* note 104, arts. 16 & 56 (prohibiting “torture to extort confessions” and inflicting upon any POW “any suffering, or disgrace, by cruel imprisonment...or any other barbarity.”

<sup>110</sup> Nuremberg Charter, *supra* note 76, art. 6. See also IMTFE Charter, *supra* note 78, art. 5(c) (crimes potentially constituting crimes against humanity include “inhumane acts committed against any civilian population, before or during the war”); CCL 10, *supra* note 77, art. II(1) (“torture...or other inhumane acts committed against any civilian population” is a crime against humanity).

<sup>111</sup> IMT Judgement, *supra* note 81. See also ILC Nuremberg Principles, *supra* note 87, Principle VI.

<sup>112</sup> The Tokyo Trial was heavily criticized both during and after the event for a variety of legal and non-legal reasons including being “victor’s justice.” See Cassese, *supra* note 26, at 322.

<sup>113</sup> IMTFE Judgement, Ch. VIII, at 1057. In discussing the applicable law, the IMTFE in stated that the duty to care for POWs and civilian internees “extends to the prevention of mistreatment,” and thereby includes “acts of inhumanity to prisoners which are forbidden by the customary law of nations as well as by conventions . . .” *Id.*, Ch. II, at 28-9.

systematic “as to indicate policy both in training and execution.”<sup>114</sup> Physical acts of torture punished as a war crime included “the water treatment, burning, electric shocks, the knee spread, suspension, kneeling on sharp instruments and flogging.”<sup>115</sup>

The drafters of the Geneva Conventions included “torture or inhuman treatment” as a grave breach in all four conventions.<sup>116</sup> Each convention prohibits torture or inhuman treatment against the protected persons concerned therein, and the numerous provisions throughout the conventions emphasize the need to prevent this crime.<sup>117</sup> In addition, common article 3 requires the humane treatment of all persons taking no part in hostilities, and unequivocally prohibits “violence to life and person, in particular...cruel treatment and torture.”<sup>118</sup>

The prohibition against torture and inhuman treatment also finds strong support in major human rights instruments introduced prior to 1975. The 1950 European Convention on Human Rights (“ECHR”), the ICCPR, and the 1969 American Convention on Human Rights (“ACHR”) all prohibit torture or inhuman treatment or punishment and allow for no derogation regardless of whether a state of war exists.<sup>119</sup>

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<sup>114</sup> *Id.*, at 1057.

<sup>115</sup> *Id.*, at 1057-8. Mental torture, such as that imposed on the Doolittle fliers, was also recognized by the IMTFE. *Id.* at 1063.

<sup>116</sup> GC I, *supra* note 4, art. 50; GC II, *supra* note 4, art. 51; GC III, *supra* note 4, art. 130; GC IV, *supra* note 4, art. 147.

<sup>117</sup> See GC I, *supra* note 4, art. 12 (violence to wounded and sick members of the armed forces in the field shall be strictly prohibited, in particular torture); GC II, *supra* note 4, art. 12 (violence to wounded, sick and shipwrecked members of the armed forces at sea shall be strictly prohibited, in particular torture); GC III, *supra* note 4, art. 17 (no physical or mental torture, nor any other form of coercion, may be inflicted on POWs), art. 87 (“any form of torture or cruelty is forbidden”), art. 89 (no inhuman disciplinary punishments to POWs); GC IV, *supra* note 4, art. 32 (prohibition against use of torture or other brutality by high contracting parties against protected persons).

<sup>118</sup> *Id.*, art. 3.

<sup>119</sup> ECHR, *supra* note 101, arts. 3, 15(2); ICCPR, *supra* note 101, arts. 4(2), 7; ACHR, *supra* note 101, arts. 5(2) & 7(2). See also UDHR, *supra* note 104, art. 5 (“no one shall be subjected to cruel, inhuman or degrading treatment or punishment”); 1975 Declaration, *supra* note 107.

Respect for the prohibition against torture is evident in the state practice of countries party to other armed conflicts in the Southeast Asia region. In particular, the Protocol to the 1973 Agreement on Ending the War and Restoring Peace in Viet-Nam concerning the Return of Captured Military Personnel sets forth that all captured personnel “shall be protected against ... torture and cruel treatment, and outrages upon personal dignity.”<sup>120</sup>

The prohibition against torture or inhumane treatment can also be found in national practice, including in military manuals,<sup>121</sup> national legislation,<sup>122</sup> national case law,<sup>123</sup> and official government statements.<sup>124</sup>

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<sup>120</sup> 1973 Agreement on Ending the War and Restoring Peace in Viet-Nam concerning the Return of Captured Military Personnel, arts. 8(a) & 8(b). *See also* UN Command Rules and Regulations for Military Commission of the UN Command in Korea, Rule 4, 1950 (conferring jurisdiction over offenses such as ill-treatment of civilians or prisoners of war).

<sup>121</sup> *See, e.g.*, HENCKAERTS & DOSWALD-BECK VOL. II, *supra* note 9, *citing* Argentina, *Law of War Manual* (1969), § 2.016 (prohibiting the use torture or any type of coercion on prisoners to obtain any type of information); France, *Disciplinary Regulations as amended* (1975), Art. 9 *bis* (2) (prohibiting torture and cruel, inhuman or degrading treatment of wounded, sick and shipwrecked, prisoners and civilians); Indonesia, *Field Manual* (1979), Section 1 § 4 and Section 3, § 5 (requiring Indonesian armed forces to uphold the personal dignity of POWs in all circumstances); UK, *Military Manual* (1958), §§ 42, 205, 282 and 549 (prohibiting any measures against POWs and civilians which would cause physical suffering, including torture and brutal treatment), § 131 (restating common Art. 3 of Geneva Conventions), § 625(a) (providing that “torture or inhumane treatment” of POWs is a grave breach of the Geneva Conventions); US, *Field Manual* (1956), §§ 93, 163, 215, 271 and 326 (restating common article 3 of Geneva Conventions); § 11 (“torture or inhuman treatment” is a war crime under GC).

<sup>122</sup> *See, e.g.*, HENCKAERTS & DOSWALD-BECK V. II, *supra* note 9, *citing* Argentina, *Code of Military Justice as amended* (1951) Art. 746; Australia, *War Crimes Act* (1945), §§ 3, 6(1), 7(1); Australia, *Geneva Conventions Act as Amended* (1957), § 7(1); Botswana, *Geneva Conventions Act* (1970), § 3(1); Bulgaria, *Penal Code as amended* (1968), Arts. 410(a), 411(a) and 412(a); Cameroon, *Penal Code as amended* (1967), Art. 132 *bis*; Chile, *Code of Military Justice* (1925), Arts. 261(1) and 262; China, *Law Governing the Trial of War Criminals*, Arts. 3(16), (19), and (29); Cyprus, *Geneva Conventions Act* (1966); Czech Republic, *Criminal Code as amended* (1961), Arts. 259(a)(1) and 263(1); Dominican Republic, *Code of Military Justice* (1953), Art. 201(1); El Salvador, *Code of Military Justice* (1934), Art. 69(1); Ethiopia, *Penal Code* (1957), Arts. 282(a), 283(a) and 284(a); India, *Geneva Conventions Act* (1960), § 3(1); Iraq, *Military Penal Code* (1940), Art. 115(c); Ireland, *Geneva Conventions Act as amended* (1962), § 3(1); Israel, *Nazis and Nazi Collaborators (Punishment) Law* (1950), § 1(b); Italy, *Wartime Military Penal Code* (1941), Arts. 209, 211, and 212(1); Lithuania, *Criminal Code as amended* (1961), Art. 335; Luxembourg, *Law on the Repression of War Crimes* (1947), art. 2(3); Malawi, *Geneva Conventions Act* (1967), § 4(1); Malaysia, *Geneva Conventions Act* (1962), § 3(1); Mauritius, *Geneva Conventions Act* (1970), § 3(1); Mexico, *Penal Code as amended* (1931), Art. 149 *bis*, art. 225 (XII); Myanmar, *Defense Services Act* (1959), Section 45(a); Netherlands, *Definition of War Crimes Decree* (1946), Art. 1; New Zealand, *Geneva Conventions Act as amended* (1958), § 3(1); Niger, *Penal Code as amended* (1961), Art. 208.3(2)-(3);

Willfully Causing Great Suffering or Serious Injury to Body or Health

The prohibition against willfully causing great suffering or serious injury to body or health was well established under customary international law by 1975 as evidenced by the Nuremberg Charter and other international instruments.

The crime directly follows “torture or inhumane treatment” in the grave breaches provision of each Geneva Convention and is closely related.<sup>125</sup> The Commentary to the Conventions explains that the language “willfully causing great suffering” is intended to refer to “suffering inflicted as a punishment” that cannot be classified as torture or biological experiments.<sup>126</sup> The purpose for which the suffering is inflicted is thus an

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Nigeria, *Geneva Conventions Act* (1960), Section 3(1); Norway, *Military Penal Code as amended* (1902), § 108; Papua New Guinea, *Geneva Conventions Act* (1976), § 7(2); Philippines, *War Crimes Trial Executive Order* (1947), Part II(b)(2), Part II(b)(3); Romania, *Law on the Punishment of War Criminals* (1945), Art. I(a)-(b) and (e); Romania, *Penal Code* (1968), Art. 358; Singapore, *Geneva Conventions Act* (1973), § 3(1); Slovakia, *Criminal Code as amended* (1961), arts. 259(a)(1) and 263(1); Sweden, *Penal Code as amended* (1962), Art. 22(6); Thailand, *Prisoners of War Act* (1955), §§ 13-14, 18; Uganda, *Geneva Conventions Act* (1964), § 1(1); UK, *Geneva Conventions Act as amended* (1959), Section 1(1); US, *Regulations Governing the Trial of Accused War Criminal in the Pacific Region I* (1945) Regulation 5; US, *Regulations Governing the Trial of Accused War Criminal in the Pacific Region II* (1945) Regulation 2(b); US, *Foreign Assistance Act as amended* (1961), Sections 116 and 502(B).

<sup>123</sup> Following WWII, Australia, China, Israel, Netherlands, Norway, and the U.S. all tried cases in which defendants were convicted of having tortured or ill-treated POWs and civilians. *See, e.g.*, Australia, Military Court at Rabaul, *Baba Masao case*, Judgement, June 2, 1947; China, War Crimes Military Tribunal of the Ministry of National Defence at Nanking, *Takashi Sakai case*, Judgement, Aug. 29, 1946; Israel, District Court of Jerusalem, *Eichmann case*, Judgement, Dec. 12, 1961; Netherlands, Temporary Court-Martial at Makassar, *Motomura case*, Judgement, July 18, 1947; Netherlands, Temporary Court-Martial at Makassar, *Notomi Sueo case*, Judgement, Jan. 4, 1947; Norway, Eidsivating Lagmansrett and Supreme Court of Norway, *Trial of Karl-Hans Klinge*, Dec. 8, 1945 and Feb. 27, 1946; Norway, Court of Appeal, *Bruns case*, Judgement, March 20, 1946; US, NMT, *List (Hostages Trial) case*, Judgement Feb. 19, 1948; U.S., Military Commission at Shanghai, *Sawada case* (finding that Sawada allowed “cruel and brutal atrocities and other offences to be committed against” a U.S. serviceman unlawfully denied POW status); US, IMTFE Judgement, *supra* note 113.

<sup>124</sup> *See, e.g.*, HENCKAERTS & DOSWALD-BECK V. II, *supra* note 9, citing Egypt, Note to the ICRC, July 7, 1967, annexed to Letter dated July 17, 1967 to the UN Secretary-General, UN Doc. S/8064, July 17, 1967, p. 3, §§ 1 and 1(B) (declaring that “torture of captives, wounded and civilians by barbaric means” is a “flagrant violation of the elementary principle of humanity, and a serious breach of the laws of war and the Geneva Conventions of 1949”).

<sup>125</sup> GC I, *supra* note 4, art. 50; GC II, *supra* note 4, art. 51; GC III, *supra* note 4, art. 130; GC IV, *supra* note 4, art. 147.

<sup>126</sup> GC III & IV Commentary, *supra* note 7.

essential factor in making this determination.<sup>127</sup> Moreover, the language encompasses psychological suffering, including moral suffering, independent of any physical suffering.<sup>128</sup> In determining what is meant by “serious injury to body or health,” reference is to be had to domestic penal codes, “which usually take as a criterion of seriousness the length of time the victim is incapacitated for work.”<sup>129</sup> Each Convention thus contains multiple provisions with language, which when interpreted in conjunction with the general aim of the Conventions to ensure the humane treatment of POWs and persons *hors de combat*, seeks to prevent acts intended to cause great suffering or serious injury to the body or health of protected persons.<sup>130</sup>

Although “willfully causing great suffering or serious injury to body or health” was not listed as a war crime under Article 6(b) of the Nuremberg Charter, the Charter included the more inclusive language “ill-treatment,” which encompasses such conduct.<sup>131</sup>

In addition, under Article 2 of the 1948 Genocide Convention, “causing serious bodily or mental harm to members of the group” may amount to the crime of genocide when certain conditions are met.<sup>132</sup>

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<sup>127</sup> The commentary provides the examples of punishment inflicted for reasons of pure sadism or revenge as conduct falling within the “willfully causing great suffering” grave breach. *Id.*

<sup>128</sup> *Id.* (“Since the Conventions do not specify that only physical suffering is meant, it can quite legitimately be held to cover moral suffering also.”)

<sup>129</sup> *Id.*

<sup>130</sup> See, e.g., GC I, *supra* note 4, arts. 3, 12; GC II, *supra* note 4, arts. 3, 12; GC III, *supra* note 4, arts. 3, 13; GC IV, *supra* note 4, arts. 3, 27.

<sup>131</sup> See text *supra* at 28. See also ILC Nuremberg Principles, *supra* note 87, Principle VI.

<sup>132</sup> Genocide Convention, *supra* note 101, art. 2.

The prohibition is also enshrined in major human rights instruments introduced prior to 1975 and discussed *infra* with regards to the prohibition against torture and inhuman treatment.

*Willfully Depriving a Prisoner of War or Civilian the Rights of Fair and Regular Trial*

Depriving a protected person of essential fair trial guarantees was well established under customary international law by 1975 as a serious violation of the law of war. In particular, the right to a fair trial is protected in numerous international instruments and in widespread state practice.

The failure to ensure a protected person any trial whatsoever before punishment constitutes a flagrant violation of the right.<sup>133</sup> While it was not listed as a war crime in Article 6 of the Nuremberg Charter, the right to a fair trial is recognized in Article 16 of the Nuremberg Charter, which guarantees a “[f]air trial for defendants” and provides a list of mandatory procedural safeguards “in order to ensure fair trial for the defendants.”<sup>134</sup>

The failure to ensure POWs and civilians fair trial rights was punished as a war crime in national trials following World War II and prior to the adoption of the Geneva

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<sup>133</sup> See, e.g., Lieber Code, *supra* note 104, art. 148 (“the law of war does not allow proclaiming either an individual belonging to the hostile army, or a citizen, or a subject of the hostile government, an outlaw, who may be slain without trial by any captor, any more than the law of peace allows such intentional outlawry.”); UK, Military Court at Almelo, *Almelo case*, Judgement, 24-26 Nov. 1945 (convicting the accused for the killing of a British soldier alleged to be a spy in the absence of any trial); US, Military Commission at Rome, *Dostler case*, Judgement, 12 Oct. 1945 (German army commander found guilty for ordering the shooting of 15 American POWs in violation of the 1907 Hague Conventions and of long-established laws and customs of war, and stating that POWs are still entitled to a lawful trial even if they are treated as spies.).

<sup>134</sup> Nuremberg Charter, *supra* note 76, arts. 12 & 16. (setting forth a list of procedural fair trial requirements related to the presence of the defendant, the indictment, the language, counsel for the accused, evidence for defense, and production of evidence for the defense). See also IMTFE Charter, *supra* note 78, art. 9 (mirroring the language used in Article 16 of the Nuremberg Charter); ILC Nuremberg Principles, *supra* note 87, Principle V.

Conventions, including false trials based on fraudulent evidence.<sup>135</sup> In determining that the accused had wholly deprived POWs and civilians of this right by subjecting them to “unfair” trials, the Nuremberg Military Tribunal (“NMT”) in *U.S. v. Alstotter* (“*The Justice Trial*”) stated:

The trials of the accused...did not approach a semblance of fair trial or justice. The accused...were arrested and secretly transported to Germany and other countries for trial. They were held incommunicado. In many instances they were denied the right to introduce evidence, to be confronted by witnesses against them, or to present witnesses on their own behalf. They were tried secretly and denied the right of counsel of their own choice, and occasionally denied the aid of any counsel. No indictment was served in many instances and the accused learned only a few moments before trial of the nature of the alleged crime for which he was to be tried. The entire proceedings from the beginning to end were secret and no public record was allowed to be made of them.<sup>136</sup>

The definition of “fair trial” was addressed more directly by the Judge Advocate in the *Ohsahi* case before the Australian Military Court at Rabaul. The Judge Advocate outlined the following elements as essential to any “fair trial”:

- (1) consideration by a tribunal comprised of one or more persons who will endeavor to judge the accused fairly upon the evidence using their own common knowledge of ordinary affairs and if they are soldiers their military knowledge, honestly endeavoring to discard any preconceived belief in the guilt of the accused or any prejudice against him or her.
- (2) the accused should know the exact nature of the charge against him/her
- (3) the accused should know what is alleged against him/her by way of evidence

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<sup>135</sup> See U.S., *U.S.A. v. Alstotter et al*, Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, Judgement Dec. 4, 1947, Vol. III; U.S., Military Commission at Shanghai, *Sawada case* (finding that the trial of eight members of U.S. Army forces by a Japanese Military Tribunal were criminal in character based upon “false and fraudulent charges” and “false and fraudulent evidence”); U.S., Military Commission at Shanghai, *Isayama case*, Judgement 25 July 1946 (convicting Lt-Gen. Isayama and other members of Japanese Military Tribunal for “permit[ing], authoriz[ing] and direct[ing] an illegal, unfair, unwarranted and false trial [of POWs]...upon false and fraudulent evidence and without affording said prisoners of war a fair hearing.”); UK, Military Court at Almelo, *Almelo Case*.

<sup>136</sup> U.S., *U.S.A. v. Alstotter et al*. See also UK, Military Court at Wuppertal, *Rhode case*, Judgement, June 1, 1946 (“executions in the absence of a fair trial” constitute war crimes).

- (4) he should have full opportunity to give his own version of the case and produce evidence to support it
- (5) the court should satisfy itself that the accused is guilty before awarding punishment. It would be sufficient if the court believed it to be more likely than not that the accused was guilty
- (6) the punishment should not be one which outrages the sentiments of humanity

Willfully depriving a prisoner of war or civilian the rights of fair and regular trial is recognized as a grave breach in GC III and GC IV. The Commentary to GC IV makes clear that this breach encompasses multiple offenses and that reference is to be made to the numerous provisions in the Conventions explicating the “conditions under which protected persons may be tried before the courts.”<sup>137</sup>

The Third Geneva Convention explicitly states that under no circumstances may a POW be tried by a court that “does not offer the essential guarantees of independence and impartiality as generally recognized, and, in particular, the procedure of which does not afford the accused the rights and means of defence provided for in Article 105.”<sup>138</sup>

Article 105 secures a POW the right to choose his counsel, and the right to call witnesses.<sup>139</sup> No moral or physical coercion may be used to induce a prisoner to admit guilt.<sup>140</sup> Investigations must be conducted as “rapidly” as possible.<sup>141</sup> To protect the right to a speedy trial, a POW cannot be confined for more than three months— even where national security concerns are involved.<sup>142</sup>

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<sup>137</sup> GC IV Commentary, *supra* note 7. See, e.g., GC I, *supra* note 4, arts. 49-50; GC III, *supra* note 4, arts. 102-8; GC IV, *supra* note 4, arts. 66-75, 78 & 147.

<sup>138</sup> GC III, *supra* note 3, art. 84.

<sup>139</sup> *Id.*, art. 105(1).

<sup>140</sup> *Id.*, art. 99.

<sup>141</sup> *Id.*, art. 103.

<sup>142</sup> *Id.*, art. 103.

The right to a fair trial has been enshrined in international human rights treaties<sup>143</sup> and other international instruments.<sup>144</sup> National practice, as evidenced by military manuals<sup>145</sup> and domestic legislation also reflects widespread recognition for the right to a fair trial affording all essential judicial guarantees.<sup>146</sup>

### Unlawful Deportation or Transfer or Unlawful Confinement of a Civilian

The prohibition against the unlawful deportation or transfer or unlawful confinement of a civilian in an occupied territory was well established under customary international law by 1975 as a serious violation of the law of war. Key support for this principle may be derived from the Nuremberg Charter, and the jurisprudence of the IMT and other national case law immediately following World War II.

Given the horrors of the holocaust and Nazi Germany's extensive reliance on slave labor, the crime of deportation received considerable attention from the IMT.

Article 6(b) of the Nuremberg Charter lists as a violation of the laws of war "deportation

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<sup>143</sup> See ECHR, *supra* note 101, art. 6; ICCPR, *supra* note 101, art. 14; ACHR, *supra* note 101, art. 8.

<sup>144</sup> See, e.g., UDHR, *supra* note 104, art 11; American Declaration of the Rights and Duties of Man, art. XVIII, O.A.S. Res. XXX (1948) [hereinafter American Declaration]; ILC Principles, *supra* note 87, Principle V. See also Draft Rules for the Limitation of the Dangers incurred by the Civilian Population in Time of War, art. 19, (ICRC 1956).

<sup>145</sup> See, e.g., HENCKAERTS & DOSWALD-BECK V. II, *supra* note 9, citing Argentina, *Law of War Manual* (1969), §§ 4.003, 5.029(5), 8.001; Cameroon, *Disciplinary Regulations* (1975), art. 32; France, *Disciplinary Regulations as amended* (1975), art. 9 *bis* (2); UK, *Military Manual* (1958), §§ 88, 131(1)(d), 282, 570, 625(b)-(c), 626(1).

<sup>146</sup> See, e.g., HENCKAERTS & DOSWALD-BECK V. II, *supra* note 9, citing Australia, *Geneva Conventions Act as amended* (1957), § 7(1); Bangladesh, *International Crimes (Tribunal) Act* (1973), § 3(2)(e); Botswana, *Geneva Conventions Act* (1970), § 3(1); Bulgaria, *Penal Code as amended* (1968), arts. 411(c) & 412(e); Cyprus, *Geneva Conventions Act* (1966), § 4(1); Ethiopia, *Penal Code* (1957), art. 292; India, *Geneva Conventions Act* (1960), § 3(1); Ireland *Geneva Conventions Act as amended* (1962), §§ 3(1), 4(1) & (4); Italy, *Wartime Military Penal Code* (1941), art. 183; Kenya, *Geneva Conventions Act* (1968), § 3(1); Lithuania, *Criminal Code as amended* (1961), art. 336; Malawi, *Geneva Conventions Act* (1962), § 3(1); Malaysia, *Geneva Conventions Act* (1962), § 3(1); Mauritius, *Geneva Conventions Act* (1970), § 3(1); New Zealand, *Geneva Conventions Act as amended* (1958), § 3(1); Niger, *Penal Code as amended* (1961), Art. 208.3(5); Nigeria, *Geneva Conventions Act* (1960), § 3(1); Norway, *Military Penal Code as amended* (1902), § 108; Papua New Guinea, *Geneva Conventions Act* (1976), § 7(2); Singapore, *Geneva Conventions Act* (1973), § 3(1); Thailand, *Prisoners of War Act* (1955), §§ 16 & 18; Uganda, *Geneva Conventions Act* (1964), § 1(1); UK, *Geneva Conventions Act as amended* (1959), § 1(1).

to slave labor or for any other purpose of civilian population of or in occupied territory.”<sup>147</sup>

The IMT understood Article 52 of The Hague Convention as providing the legal basis of the war crime of deportation to forced labor as set forth in the Nuremberg Charter.<sup>148</sup> Nevertheless, Article 52 states that “[r]equisition in kind and services shall not be demanded from municipalities or inhabitants except for the needs of the army of occupation,” and establishes that any requisition be proportionate to the country’s resources and be conducted without involving the civilians “in military operations against their own country.”<sup>149</sup>

The IMT held that the forced labor policy of the German occupation authorities, including the deportation, constituted a “flagrant violation” of the Hague Convention. It found that “[c]ivilians populations were deported and subjected to slave labor.”<sup>150</sup> Indeed, the IMT estimated that Nazi Germany succeeded in “deporting at least 5,000,000 persons to Germany to serve German industry and agriculture,” often through the use of

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<sup>147</sup> Nuremberg Charter, *supra* note 76, art. 6(b). *See also* Control Council Law No. 10, art. II; IMTFE Charter, art. 5(C) (listing deportation of any civilian population before or during the war as a Crime against Humanity); ILC Nuremberg Principles, *supra* note 87, Principle VI.

<sup>148</sup> IMT Judgement, *supra* note 81. It should be noted that the Tribunal lumped its analysis of deportation and forced labor together, thereby making it difficult to discern a completely independent legal basis for unlawful deportation, transfer, or confinement separate from the resulting forced labor. Nevertheless, the IMT is quite clear in its intent to punish the crime of unlawful deportation or transfer or confinement of a civilian. Similarly, the IMTFE punished Japanese defendants for this crime, and specifically discussed the Death Marches, Other Forced Marches, and Japanese Prison ships as violations of the laws of war “in the movement of prisoners of war from one place to another.” IMTFE Judgement, *supra* note 78, Ch. 8, at 1043-8, 1068-72.

<sup>149</sup> *Id. citing* Hague Convention (IV), *supra* note 82, art. 52. For examples of other pre-WWII instruments not mentioned by the IMT but nevertheless reflecting the prohibition, *see* Lieber Code, *supra* note 104, art. 23 (“private citizens are no longer ... carried off to distant parts.”); HENCKAERTS & DOSWALD-BECK VOL. II, *supra* note 9 *citing* 1919 WWI report (identifying deportation of civilians under inhuman conditions as a violation of the laws and customs of war).

<sup>150</sup> *Id.*

“drastic and violent methods.”<sup>151</sup> With respect to the actual deportation process, civilians were transported “under guard to Germany, often packed in trains without adequate heat, food, clothing or sanitary facilities.” Moreover, the fact that the Tribunal made specific mention of the German policy of transferring “all aged, insane, and incurable people... to special institutions where they were killed” suggests that the acts of deportation, transfer, or confinement were illegal under the Charter and the law of war independent of the purpose for which they were removed.<sup>152</sup> Lastly, in the IMT’s discussion of the persecution of the Jews and the lengthy record demonstrating “consistent and systematic inhumanity on the greatest scale,” the tribunal addresses the ‘final solution’ and the shipment of Jews from throughout occupied territories to extermination camps.

Unlawful deportation or transfer or unlawful confinement of a civilian is listed as a grave breach in Geneva Convention IV.<sup>153</sup> Article 49 of the Convention prohibits individual or mass forcible transfers and deportations of protected persons from occupied territory to any other country.<sup>154</sup> However, an exception to the prohibition allows “total or partial evacuation of a given area if the security of the population or imperative military reasons so demand.”<sup>155</sup> Even then, the Occupying Power may not transfer the protected persons outside of the occupied territory unless otherwise impossible, and the

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<sup>151</sup> *Id.* The means employed to capture civilians for deportation “were described by the defendant Rosenberg as having their origin ‘in the blackest periods of the slave trade.’” *Id.*

<sup>152</sup> *Id.* With respect to unlawful confinement, the Commentary to the Conventions note that the crime might be covered under traditional penal law but that the exceptional conditions of armed conflict would make it difficult to adequately address. GC IV Commentary, *supra* note 7. It also notes that “internment for no particular reason, especially in occupied territory, could come within the definition of this breach.” *Id.*

<sup>153</sup> GC IV, *supra* note 4, art. 147.

<sup>154</sup> *Id.*, art. 49. The deportation or transfer of a deporting states’ own nations thus falls outside of the scope of this provision. *See* Gross, *supra* note 6, at 815.

<sup>155</sup> *Id.*

Power is obligated to return the individuals to their homes once hostilities in that area have ended.<sup>156</sup>

Numerous countries including China, France, Israel, the Netherlands, Poland, and the United States prosecuted and convicted defendants following World War II for the unlawful deportation or transfer or confinement of civilians during the war.<sup>157</sup>

Unlawful deportation or transfer or unlawful confinement of a civilian is also prohibited in major human rights instruments introduced prior to 1975.<sup>158</sup>

*Destruction and Serious Damage to Property, Not Justified by Military Necessity and Carried Out Unlawfully and Wantonly*

The prohibition against destruction and serious damage to property, not justified by military necessity and carried out unlawfully and wantonly, was well established under customary international law by 1975 as a serious violation of the law of war. Evidence of this customary principle finds strong support in the Hague Conventions and the Nuremberg Charter and Judgement.

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<sup>156</sup> *Id.*

<sup>157</sup> China, War Crime Military Tribunal of the Ministry of National Defence, *Takashi Sakai case* (finding accused guilty of war crimes and crimes against humanity for role in inciting or permitting subordinates to commit, *inter alia*, acts of deportation of civilians); France, General Tribunal at Rastadt for the Military Government for the French Zone of Occupation in Germany, *Roehling case*; Israel, District Court of Jerusalem, *Eichmann case*, Judgement, Dec. 12, 1961 (convicting defendant for violations of Israel's Nazis and Nazi Collaborators Punishment Law for *inter alia* the deportation and detention of Jews in ghettos, transit camps and concentration camps); Netherlands, Special Court of Cassation, *Zimmerman case*; Poland, Supreme National Tribunal at Poznan, *Trial of Gauleiter Artur Greiser* (July 7, 1946) in the United Nations War Crimes Commission, Vol. XIII, p. 114 (finding the defendant, the supreme authority in the Wartheland, guilty *inter alia* of the crime of deportation in implementation of the germanization plan in Polish territory); U.S., NMT, *Krauch case*, *Krupp case*, *Milch case*, *List case*, *Von Leeb case*.

<sup>158</sup> See, e.g., ECHR, *supra* note 101, art. 4 (prohibiting slavery and forced labor); 1963 Protocol 4 to ECHR, art. 3(1) ("no one shall be expelled, by means either of an individual or of a collective measure, from the territory of the State of which he is a national"); ICCPR, *supra* note 101, art. 13; ACHR, *supra* note 101, art. 22(5), 22(9).

Article 23(g) of the 1907 Hague Convention on the Laws and Customs of War on Land makes it “especially forbidden...[t]o destroy or seize the enemy’s property, unless such destruction or seizure be imperatively demanded by the necessities of war.”<sup>159</sup>

In 1920 U.S. Army Colonel and distinguished military commentator William Winthrop recognized the centrality of necessity in analyzing the legality of any destruction of private property during armed conflict. Critical to any such inquiry was the urgency of the circumstances: that “the exigency [be] immediate, not contingent or remote.”<sup>160</sup> According to Winthrop, the commander giving the order was liable in damages for failure to satisfy these requirements.<sup>161</sup>

Article 6(b) of the Nuremberg Charter lists as a violation of the laws of war: “plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity.” In its judgement, the IMT found that “Cities and towns were wantonly destroyed without military justification or necessity.”<sup>162</sup>

Extensive destruction to property is listed as a grave breach in the first, second, and fourth Geneva Conventions.<sup>163</sup>

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<sup>159</sup> Hague Convention (IV), *supra* note 82, art. 23. *See also* Lieber Code, *supra* note 104, arts. 15-6; Declaration of Brussels, *Concerning the Laws and Customs of War Adopted By the Conference of Brussels*, art. 13(g), Aug. 27, 1874 (strictly prohibiting “all destruction or seizure of the property of the enemy which is not imperatively required by the necessity of war.”).

<sup>160</sup> WILLIAM WINTHROP, *WINTHROP’S MILITARY LAW AND PRECEDENTS* 78 (2d ed. 1920).

<sup>161</sup> *Id.*

<sup>162</sup> IMT Judgement, *supra* note 81. *See also* ILC Nuremberg Principles, *supra* note 87, Principle VI.

<sup>163</sup> GC I, *supra* note 4, art. 50, GC II, *supra* note 4, art. 51; GC IV, *supra* note 4, art. 147. Note that the language in the grave breaches provisions is the “extensive destruction and appropriation of property...” However, as the appropriation component is not included in the grave breaches included in Article 6 of the ECCC Law, emphasis will be given to destruction of property.

*Compelling a Prisoner of War or a Civilian to Serve in the Forces of a Hostile Power*

The prohibition against compelling a prisoner of war or a civilian to serve in the forces of a hostile power was well established under customary international law by 1975 as a serious violation of the law of war. Key support for this customary principle may be found in the Hague Conventions, and in the Nuremberg Charter and Judgement.

The basic rationale for making this act a war crime lies in the “distressing and dishonorable nature of making persons participate in military operations against their own country – whether or not they are remunerated.”<sup>164</sup>

Article 6 of the Annex to the Fourth Hague Convention respecting the Laws and Customs of War on Land, provides that: “[t]he State may employ the labour of prisoners of war, other than officers, according to their rank and capacity. The work shall not be excessive and shall have no connection with the operations of the war.” In addition, Article 23(h) of the Convention forbids belligerents from “compel[ling] the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerents service before the commencement of the war.”<sup>165</sup>

Article 31 of the 1929 Geneva Convention reinforces the principle articulated in Article 6 of the Fourth Hague Convention by requiring that “work done by prisoners of war shall have no direct connection with the operations of the war.”<sup>166</sup>

Article 6(b) of the Nuremberg Charter does not explicitly list forced labor as a war crime in and of itself. However the Charter does prohibit “deportation to slave labour,” and also leaves open the possibility that defendants could be prosecuted for other

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<sup>164</sup> HENCKAERTS & DOSWALD-BECK V. I, *supra* note 9, at 334.

<sup>165</sup> Hague Convention (IV), *supra* note 82, art. 23(h).

<sup>166</sup> 1929 GC, *supra* note 82, art. 31.

violations of the laws of war. In its Judgment, the IMT held that the forced labor policy of the German occupation authorities constituted a “flagrant violation” of Article 52 of the Hague Convention.<sup>167</sup> Specifically, the IMT found that “the German occupation authorities did succeed in forcing many of the inhabitants of the occupied territories to work for the German war effort, and in deporting at least 5,000,000 persons to Germany to serve German industry and agriculture.”<sup>168</sup> Several defendants were convicted of this crime.

Compelling a prisoner of war or a civilian to serve in the forces of a hostile power is listed as a grave breach in the third and fourth Geneva Conventions. Article 40 of the Fourth Geneva Convention sets forth the limited circumstances under which civilian aliens in the territory of a party to the conflict may be compelled to work, and echoes the principle that the work may not be “directly related to the conduct of military operations.”<sup>169</sup> Within occupied territory, civilians may not be compelled to serve in the occupying power’s armed forces or auxiliary forces.<sup>170</sup> Similarly, civilians may not be forced to do “any work that would involve them in the obligation of taking part in hostilities.”<sup>171</sup>

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<sup>167</sup> IMT Judgment, *supra* note 81.

<sup>168</sup> *Id.*

<sup>169</sup> GC IV, *supra* note 4, art. 40. Protected persons of enemy nationality may only be forced to “do work which is normally necessary to ensure the feeding, sheltering, clothing, transport and health of human beings.” *Id.*

<sup>170</sup> *Id.*, art. 51. However, protected persons over the age of eighteen in occupied territory may be forced to work where necessary for needs of the occupying army, the public utility services, or for those needs recognized in article 40. *Id.*

<sup>171</sup> *Id.*

Numerous countries including Canada, France, the Netherlands, the United Kingdom, and the United States prosecuted and convicted defendants following World War II for forcing prisoners of war and / or civilians to do work related to war.<sup>172</sup>

International treaties addressing the issue of forced labor include the Forced Labour Convention and the ICCPR.<sup>173</sup>

### Taking Civilians as Hostages

While the legal status under customary international law by 1975 of taking civilians as hostages was less well-settled than many of the aforementioned criminal acts, it was nevertheless recognized as a crime.

As an example of practice by an international organization, the ICRC during World War II urged parties to the War to uphold the rights of individuals to be free from “arbitrary treatment and not to be made responsible for the acts he has not committed.”<sup>174</sup>

The crime is not listed among those acts included as war crimes under Article 6(b) of the Nuremberg Charter. Nevertheless, in the IMT Judgement, Judge Parker states in his general discussion of war crimes and crimes against humanity that “[h]ostages were

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<sup>172</sup> See, e.g., HENCKAERTS & DOSWALD-BECK V. II, *supra* note 9, citing Canada, Federal Court of Appeal, *Rudolph and Minister of Employment and Immigration Case* (use of civilians in the production of V2 rockets); France, General Tribunal at Rastadt of the Military Government of the French Zone of Occupation in Germany, *Roechling case* (POWs working in metallurgical industry); Netherlands, Temporary Court-Martial of Makassar, *Koshiro case* (convicting 1<sup>st</sup> Lt. Koshiro of the Japanese Navy for employing POWs in “war work” where POWs were forced to build and fill up an ammunition depot); Netherlands, Special Court of Cassation, *Rohrig and Others case* (civilians constructing fortifications); UK, Military Court at Luneberg, *Student Case* (POWs unloading arms, ammo, and warlike stores from aircraft); US, NMT, *Krauch (I.G. Farben Trial) case* (POWs working in coal mines); US, NMT, *Von Leeb (high Command) case* (civilians constructing fortifications); US, NMT, *List (Hostages Trial) Case*.

<sup>173</sup> Forced Labour Convention, (ILO No. 29), May 1, 1932, 39 U.N.T.S. 55; ICCPR, *supra* note 101, art. 8(3) (“No one shall be required to perform forced or compulsory labour.”).

<sup>174</sup> GC IV Commentary, *supra* note 7, art. 34.

taken in very large numbers from civilian populations and were shot as suited the German purposes” in clear violation of “well-established rules of international law.”<sup>175</sup>

The Fourth Geneva Convention lists taking of hostages as a grave breach.<sup>176</sup> Article 34 of the Fourth Geneva Convention establishes an “absolute” prohibition against the taking of hostages.<sup>177</sup> In addition, Common Article 3 to the Conventions prohibits hostage taking.<sup>178</sup>

The Commentary to the Conventions explain that inclusion of the prohibition against hostage taking was prompted by the experiences of two world wars in which hostage taking was practiced and the hostages were subsequently deprived of many of the most basic human rights.<sup>179</sup> The ICRC, as reflected in the drafting history of the Convention, thus sought to establish the prohibition as “one of the essential elements in the new Convention.”<sup>180</sup>

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<sup>175</sup> IMT Judgement, *supra* note 81. *See generally* ILC Nuremberg Principles, *supra* note 87.

<sup>176</sup> GC IV, *supra* note, art. 147. The Commentary to the Conventions provide the following explanation for hostage taking:

Hostages might be considered as persons illegally deprived of their liberty, a crime which most penal codes take cognizance of and punish. However, there is an additional feature, i.e. the threat either to prolong the hostage's detention or to put him to death. The taking of hostages should therefore be treated as a special offence. Certainly, the most serious crime would be to execute hostages which, as we have seen, constitutes wilful killing. However, the fact of taking hostages, by its arbitrary character, especially when accompanied by a threat of death, is in itself a very serious crime; it causes in the hostage and among his family a mortal anguish which nothing can justify.

GC IV Commentary, *supra* note 7, art. 147.

<sup>177</sup> *See Id.*, art. 34; Gross, *supra* note 6, at 819 (characterizing the prohibition as “categorical and absolute”).

<sup>178</sup> *See* GC I-IV, *supra* note 4, art. 23.

<sup>179</sup> GC IV Commentary, *supra* note 7, art. 34.

<sup>180</sup> *Id.* The brief language contained in Article 34 was “approved at all preparatory meetings and adopted without change by the Diplomatic Conference.”

Nevertheless, Henckaerts and Doswald-Beck view the provisions in the Geneva Conventions as “to some extent[,] a departure from IL as it stood at that time, articulated in the *List (Hostages) case* in 1948,” in which the NMT “did not rule out the possibility of an occupying power taking hostages as a measure of last resort and under certain strict provisions.”<sup>181</sup> However, they conclude that practice since then demonstrates that the prohibition against hostage taking is now part of customary international law.

In attempting to ascertain the state of the law as of 1975, it worth noting that the prohibition against hostage taking was reaffirmed (and enhanced) as a fundamental guarantee for civilians and persons *hors de combat* in the 1977 Protocols Additional I and II to the Geneva Conventions.

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<sup>181</sup> HENCKAERTS & DOSWALD-BECK V. I, *supra* note 9, at 334.

## CONCLUSION

There is extensive evidence from myriad sources establishing that the grave breaches provisions replicated in Article 6 of the ECCC Law had reached the status of customary international law as of 1975. Those sources examined in the preceding section may be loosely grouped into five categories from which the overarching value of their content in support of this conclusion becomes readily apparent.

First, statutes of international courts and tribunals and – in particular the Nuremberg Charter – warrant special weight and militate strongly in favor of such a conclusion. The Nuremberg Charter, the legally binding product of a multilateral agreement between the Allied Powers following World War II, explicitly conferred jurisdiction on the IMT to prosecute those responsible for *inter alia* war crimes. With the exception of depriving a POW or civilian the rights of fair and regular trial and the taking of civilians as hostages, every other act enumerated in Article 6 of the ECCC law was also prohibited under Article 6(b) of the Nuremberg Charter as a violation of the laws or customs of war. Moreover, the Nuremberg Charter explicitly recognized the right of defendants to a fair trial. The UN General Assembly’s unanimous adoption of a resolution affirming ‘the principles of international law recognized by the Charter of the Nuremberg Tribunal and the judgment of the tribunal’ and the subsequent introduction of the ILC Nuremberg Principles corroborate the legitimacy and weight of these sources in the eyes of the international community.

Second, international treaties such as the Geneva Conventions overwhelmingly support this conclusion and are of primary importance both due to their legally binding effect on contracting parties and their potential value “as evidence of the crystallization of

customary rules.”<sup>182</sup> Treaties such as the Regulations annexed to the Fourth Hague Convention of 1907 and the Geneva Conventions provide substance to the law of war, especially to the grave breaches framework.<sup>183</sup> Moreover, the development of parallel norms in international human rights law prior to 1975 as reflected in widely accepted treaties such as the ICCPR, the ECHR, and the ACHR lend further support to the customary status of those serious acts.

Third, the IMT Judgement and the decisions of numerous other national courts that prosecuted international crimes following World War II emphatically sustain this conclusion and are extremely useful both because of what they explicitly *and* implicitly reveal about the customary status of the acts listed in the grave breaches provisions at the time of judgement.<sup>184</sup> In particular, when examined from a pulled back perspective, the case law from the IMT and the NMT informs us that core provisions of both the Hague Conventions of 1907 and the 1929 Geneva Convention were accepted by all civilized nations as being declaratory of the laws and customs of war and were therefore binding on *all* countries. These norms were enhanced, not diminished, by developments in the law preceding 1975.

Fourth, there is compelling evidence of state practice and *opinio juris* probative of this conclusion as seen in national military manuals, legislation, official statements, and case law. While further research would be required to fairly assess its independent value

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<sup>182</sup> CASSESE, *supra* note 26, at 16.

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*, at 17 (explaining that “both customary rules and principles may normally be drawn or inferred from judicial decisions, which to a very large extent have been handed down, chiefly in the past, by *national* courts . . .”).

as forming custom, such evidence taken in conjunction with the extensive record of international instruments serves to bolster the credibility of this determination.

Fifth, teachings of the most highly qualified publicists such as Ian Brownlie establish that the acts recognized as grave breaches of the Geneva Conventions had an independent legal basis under customary international law by 1975; indeed, many of the acts were established prior to their codification as “grave breaches” in 1949.

Therefore, assuming that the Tribunal agrees that DK was engaged in an international armed conflict between 1975 and 1979, defendants may be held individually responsible for these grave breaches regardless of whether the Geneva Conventions actually apply to the conflict as a treaty. While defendants may challenge the scope of the prohibition as it existed in 1975, they will be hard pressed in attempting to legitimately claim that the prohibitions for the core crimes did not exist. This is especially the case when the war crimes listed as grave breaches in the Geneva Conventions and codified in Article 6 of the ECCC law find strong support in the major international treaties governing the law of war and in the legal underpinnings and jurisprudence of the IMT and the various national post-World War II trials. That there were 133 States Parties to the Geneva Convention by 1975, including Cambodia, is particularly telling in this regard.

Moreover, a cursory examination of available evidence suggests that DK leadership were aware of the existence of a legal regime governing the treatment of protected persons during armed conflict. Most striking in this regard is the fact that Cambodia became a party to the Geneva Conventions on August 8, 1958. The significance of this fact to proving knowledge on this point cannot be overstated. In

addition, repeated high-level communications concerning DK activities along the Vietnamese front combined with the existence of Tuol Sleng records delineating certain prisoners as Vietnamese POWs reflect knowledge of the classification system used in armed conflict at the very least. Inherent in this knowledge is the basic notion that civilians and POWs are entitled to certain treatment as a result of their status. Moreover, the International Committee of the Red Cross contacted DK authorities multiple times starting in early 1978, urging respect for core norms of international humanitarian law, especially the need to ensure humane treatment of POWs taken during the course of the conflict.

The four individuals charged to date with grave breaches under the ECCC Law dedicated themselves to a revolutionary cause that condemned history as irrelevant while seeking to restart civilization in year zero. Fortunately, the lawyers for the charged persons cannot eliminate the well-documented, voluminous history exposing the criminality of such acts under customary international law. While the Tribunal must undertake an earnest and impartial examination of the issue, the legal foundation for this independent status is formidable. For the ECCC to find that the grave breaches provisions of the Geneva Conventions did not have an independent legal basis under customary international law by 1975 would be almost as disingenuous as feigning a lack of knowledge that the law of war requires adherence to the most “elementary dictates of humanity.”<sup>185</sup>

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<sup>185</sup> IMT Judgement, *supra* note 81.