

Evaluating Thailand's Domestic Implementation of Prevention of Grave Breaches under the Geneva Conventions

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Abstract

International Humanitarian Law (IHL) is the law that aims to reduce human suffering in situations of armed conflict. The contemporary roots of treaty-based IHL can arguably be traced back to the four Geneva Conventions, to which Thailand is also a party. States may choose from a wide variety of methods to domestically implement IHL. One such method is through national legislation. The Geneva Conventions, in particular, oblige its state parties to criminalize grave breaches. This article aims to assess this one aspect of the domestic implementation of IHL within Thailand. To accomplish this, Swiss and Malaysian laws are used as examples for the analysis of Thai law to reflect upon. It is argued that the current rules scattered through the Thai legal system are doctrinally insufficient to ensure the complete applicability of the grave breaches regime. The article will then suggest how the current Thai legal regime may be improved to ensure better compliance with the obligations to prevent grave breaches within the Geneva Conventions.

Keywords: Grave Breaches — Thai military criminal law — Geneva Conventions — Prisoners of war — International criminal law — International humanitarian law

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I. INTRODUCTION

International humanitarian law (IHL) is an area of public international law, compliance with which is necessary to prevent unnecessary suffering during armed conflict.¹ The four Geneva Conventions of 1949 are treaties fundamental to modern IHL.² Each imposes upon state signatories an express obligation to implement criminalization of so-called grave breaches.³ Grave breaches are a category of war crime during international armed conflicts committed against a particular group of persons or properties.⁴ Thailand, as a party to all four Geneva Conventions, has likewise implemented criminalization of such crimes.⁵

However, Thailand's implementation method is inadequate for fully realizing the obligation envisioned by the Geneva Conventions. This article evaluates this doctrinal deficiency by providing a comparative international perspective on criminalizing grave breaches in Malaysia and Switzerland. The current method in Thailand of implementing criminalization of grave breaches will be evaluated and suggestions provided on how Thailand might criminalize grave breaches with more efficacy.

II. COMPARATIVE PERSPECTIVE ON DOMESTIC CRIMINALIZATION OF GRAVE BREACHES

¹ Jonathan Crowe and Kylie Weston-Scheuber, "Principles of International Humanitarian Law" (Edward Elgar Publishing 2013) 1 <<https://doi.org/10.4337/9781781002735>>.

² Knut Dörmann, "The Geneva Conventions Today" *International Committee of the Red Cross* (9 July 2009) <<https://www.icrc.org/en/doc/resources/documents/statement/geneva-conventions-statement-090709.htm#:~:text=Conclusion,The%20Geneva%20Conventions%20remain%20the%20cornerstone%20for%20the%20protection%20and,relevant%20in%20contemporary%20armed%20conflicts>>.

³ The First Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field (adopted 22 August 1864, entered into force 21 October 1950) 75 UNTS 31 (the First Geneva Convention) art 50; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (adopted 21 April 1949, entered into force 21 October 1950) 75 UNTS 85 (the Amelioration Convention) art 51; Geneva Convention Relative to the Treatment of Prisoners of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135 (the Treatment of Prisoners of War Convention) art 130; Geneva Convention Relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287 (Protection of Civilian Persons Convention) art 147.

⁴ Guénaél Mettraux, *International Crimes and the Ad Hoc Tribunals* (Oxford University Press 2006) 54 <<https://doi.org/10.1093/acprof:oso/9780199207541.001.0001>>.

⁵ University of Minnesota Human Rights Center, "Ratification of International Human Rights Treaties—Thailand" *University of Minnesota Human Rights Library* <<http://hrlibrary.umn.edu/research/ratification-thailand.html>>.

Implementing IHL domestically requires efforts on different fronts: transposing treaties and customary international laws into domestic law; transmitting knowledge about IHL; issuing guidelines and manuals; cooperating with national IHL societies and other civil society groups; and creating a national IHL committee. All are essential for successfully implementing IHL domestically.⁶ For the grave breaches regime in particular, domestic criminalization is a vital transposition method. This is because the Geneva Conventions expressly require states to “enact any legislation necessary to provide effective penal sanctions” for the commission of grave breaches.⁷

Criminalization of grave breaches must be effective.⁸ According to the International Committee of the Red Cross (ICRC) commentary, five elements apparently support effectiveness of criminalization of grave breaches. First, the law criminalizing commission of grave breaches must be “sufficiently dissuasive” to prevent violations.⁹ Secondly, the law must be understandable by actors in a conflict who are usually not well-versed with technical legal terminology.¹⁰ Thirdly, the law must be applied indiscriminately.¹¹ Fourthly, international criminal law principles such as statute of limitations and command responsibility may be used in domestic law to ensure more effective criminalization.¹² Fifthly, the jurisdiction for grave breaches prosecution should be universal.¹³

However, despite ICRC guidelines, states usually fall short of their obligations to criminalize grave breaches.¹⁴ There has been little to no domestic jurisprudence on grave breaches prosecution.¹⁵ However, this paucity should not discourage the quest to search for best existing practices for criminalizing grave breaches across jurisdictions. In efforts to implement criminalization of grave breaches, states have adopted several different methods.¹⁶ This article will attempt to comparatively assess

⁶ Delegation of France to the UN, “Call for Action to Strengthen Respect for International Humanitarian Law and Principled Humanitarian Action” (8 July 2019) 2 <https://onu.delegfrance.org/IMG/pdf/humanitarian_call_for_action.pdf>.

⁷ The First Geneva Convention, art 50; the Amelioration Convention, art 51; the Treatment of Prisoners of War Convention, art 130; the Protection of Civilian Persons Convention, art 147.

⁸ *ibid.*

⁹ “Commentary of 2020 of the Convention (III) relative to the Treatment of Prisoners of War Geneva, 12 August 1949, Article 130: Grave Breaches” *International Committee of the Red Cross* para 5108 <<https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=BoBAF7DBF7E5B3FAC1258584004494BF#208>>.

¹⁰ *ibid.*

¹¹ *ibid* para 5109.

¹² *ibid* para 5111.

¹³ *ibid* para 5112.

¹⁴ James G. Stewart, “The Future of the Grave Breaches Regime” (2009) 7(4) *Journal of International Criminal Justice* 855, 866 <<https://doi.org/10.1093/jicj/mqp059>>; Dieter Fleck, “Shortcomings of the Grave Breaches Regime” (2009) 7(4) *Journal of International Criminal Justice* 833, 853 <<https://doi.org/10.1093/jicj/mqp054>>.

¹⁵ Ward Ferdinandusse, “The Prosecution of Grave Breaches in National Courts” (2009) 7(4) *Journal of International Criminal Justice* 723, 725 <<https://doi.org/10.1093/jicj/mqp053>>.

¹⁶ Knut Dormann and Robin Geib, “The Implementation of Grave Breaches into Domestic Legal Orders” (2009) 7(4) *Journal of International Criminal Justice* 703, 710 <<https://doi.org/10.1093/jicj/mqp056>> citing Helmut Kreicker, “Völkerstrafrecht im

efforts in Thailand by comparison with grave breaches criminalization in Switzerland and Malaysia.

Yet implementation methods in other jurisdictions must be analyzed cautiously. Jurisdictions which have ratified the Rome Statute are likelier to provide more effective and detailed penal sanctions for international crimes, due to the incentive created by the complementary jurisdiction within the Rome Statute.¹⁷ Therefore, these jurisdictions will attempt to transcend merely criminalizing commission of grave breaches.

A. Switzerland

Switzerland, as home to the ICRC's headquarters,¹⁸ is seen as the birthplace of IHL.¹⁹ This precedent makes Switzerland an ideal standard jurisdiction for criminalizing grave breaches. As mentioned earlier, being a party to the Rome Statute may have incentivized Switzerland's criminalization of more than grave breaches.²⁰

Switzerland criminalizes grave breaches in its civilian and military penal codes. In the civilian Swiss Criminal Code of 21 December 1937, grave breaches are criminalized in Article 264c in Title Twelve *ter*, concerning "war crimes," explicitly designated as pertaining to "serious violations of the Geneva Conventions." The text of this Article follows:

Article 264c:

The penalty is a custodial sentence of not less than five years for any person who commits a serious violation of the Geneva Conventions of 12 August 1949 in connection with an international armed conflict by carrying out any of the following acts against persons or property protected under the Conventions:

- a. intentional homicide;
- b. hostage taking;
- c. causing severe pain or suffering or serious injury, whether physical or mental, in particular by torture, inhuman treatment or biological experiments;
- d. extensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly;
- e. compelling a person to serve in the forces of a hostile power;
- f. unlawful deportation or transfer or unlawful confinement;

Ländervergleich" in Albin Eser, Ulrich Sieber, and Helmut Kreicker (eds), *National Prosecution of International Crimes* (Vol. 7, Berlin: Max Planck Institute 2006) 358.

¹⁷ Dormann and Geib (n 16) 717.

¹⁸ "Switzerland" *International Committee of the Red Cross* <<https://www.icrc.org/en/where-we-work/europe-central-asia/switzerland>>.

¹⁹ "Switzerland is Committed to Strengthening International Humanitarian Law" *Federal Department of Foreign Affairs of Switzerland* (18 October 2021) <<https://www.eda.admin.ch/eda/en/fdfa/fdfa/aktuell/newsuebersicht/2020/11/ikrk-humanitaeres-voelkerrecht.html>>.

²⁰ "Switzerland" *Coalition for the International Criminal Court* <<https://www.coalitionfortheicc.org/country/switzerland>>.

g. denying the right to a fair and regular trial before the imposition or execution of a severe penalty.

Acts in terms of paragraph 1 committed in connection with a non-international armed conflict are equivalent to serious violations of international humanitarian law if they are directed against a person or property protected by international humanitarian law.

In especially serious cases, and in particular where the offence affects a number of persons or the offender acts in a cruel manner, a custodial sentence of life may be imposed.

In less serious cases under paragraph 1 letters c–g, a custodial sentence of not less than one year may be imposed.²¹

As for the military penal code, grave breaches are criminalized in Article 111 of the Switzerland Military Penal Code of 13 June 1927.²² This article also explicitly addresses “serious violations of the Geneva Conventions” while Chapter 6 *bis*, where the Article is found, also concerns “war crimes,” as in its civilian counterpart. In fact, Article 111 of the Swiss Military Penal Code adopts the same text as Article 264c of the Civilian Code.

The first paragraph of Article 264c of the civilian Swiss Criminal Code imposes a minimum sentence of five years’ imprisonment on offenders who commit grave breaches of the Geneva Conventions during an international armed conflict. The Article refers directly to the Geneva Conventions by name; this approach allows the provision to directly link to international law. Article 264c then proceeds to provide, through subsections a. to g., a textual domestically-adapted definition of acts constituting grave breach offenses.

Swiss law extends application of the grave breaches regime over the scope required by international law. Article 246b notes that provisions within the chapter on war crimes, including the provision on grave breaches, also apply to cases of non-international armed conflict. The second paragraph provides that acts against protected persons or property during non-international armed conflict also constitute a grave breach. The separation of grave breach regime applicability to non-international armed conflict in a separate paragraph may help emphasize Swiss intentions to augment regime applicability to non-international armed conflict, while also clarifying that Switzerland’s stance that the obligation to prosecute grave breaches pertains only to international armed conflicts.

Although there is no limit to maximum sanction for a custodial sentence of at least five years in the first paragraph of Article 246c, paragraphs 3 and 4 provide more details regarding criminal sanction. The third paragraph provides that a life imprisonment sentence may be imposed upon two considerations: 1) the number of persons affected; and 2) cruelty of the action. Alternatively, the fourth paragraph

²¹ Penal Code, *Recueil Systématique*, 311.0, *Recueil officiel*, 54 781, art 264c (Switzerland).

²² Military Penal Code, 13 June 1927, *Recueil systématique*, 321.0, *Recueil officiel*, 43 375, ch 6 *bis* (Switzerland).

allows the court to impose imprisonment of at least one year for less serious grave breach offenses. Through different ranges of sanctions accorded to each grave breach offense, the court is provided with guidelines for discreetly sanctioning each grave breach offense according to gravity. This detailed system clarifies provisions, allowing sentences to be imposed more uniformly.²³

Apart from Article 246c, directly criminalizing grave breaches, Article 264j also supplements effective criminalization of grave breaches. Article 264j imposes a fine or minimum of three years' imprisonment upon IHL violation during an armed conflict, if the violation is an offense under customary international law or international treaty binding Switzerland. Article 264j of the Swiss Criminal Code provides for general criminalization of international crimes. General reference to these two international law sources could potentially allow Switzerland to prosecute grave breaches, even if the definition of the act constituting a grave breach offense in international law is altered.

Other provisions support criminalization of grave breaches. For instance, Article 101 exempts the statute of limitations for international crimes, including commission of grave breaches.²⁴ Swiss law also allots specific punishment for the preparation to commit international crimes.²⁵ Immunity and procedures required to punish individuals who have committed individual crimes are also removed.²⁶ A detailed command responsibility doctrine is provided in Article 264k.²⁷ Article 264l prohibits subordinates from using the acting on orders defense.²⁸

Finally, Article 264m provides for universal jurisdiction for Swiss courts for international crimes with some qualifications.²⁹ The first paragraph of Article 264m provides that perpetrators may be prosecuted by Swiss courts, regardless of where the crime is committed, unless the perpetrator has been extradited or sent to an international criminal court. Under the second paragraph, if both perpetrator and victim are not of Swiss nationality, Swiss courts may still take measures to gather evidence and adjudicate the case; the Swiss court could only refuse to adjudicate if another domestic or international court has exercised jurisdiction or if the perpetrator is not in, or expected to be in, Switzerland. According to the last paragraph, if the case is decided by another jurisdiction, Swiss courts may still adjudicate if the prior sentence was pronounced to shield the perpetrator from prosecution. These paragraphs show that in Switzerland, extensive effort has been made to regulate the extent of universal jurisdiction. The consequence of this regulation appears to be that Switzerland retains a doctrinally effective universal jurisdiction for international crimes, while protecting courts from double jeopardy. The law essentially leaves room

²³ Andrew Ashworth and Jeremy Horder, *Principles of Criminal Law* (7th edn, Oxford University Press 2013) 25 <<https://doi.org/10.1093/he/9780199672684.001.0001>>.

²⁴ Penal Code, *Recueil Systématique*, 311.0, *Recueil officiel*, 54 781, art 101 (Switzerland).

²⁵ *ibid* art 260.

²⁶ *ibid* art 264n.

²⁷ *ibid* art 264k.

²⁸ *ibid* art 264l.

²⁹ *ibid* art 264m.

for the court to recuse itself from adjudication if another jurisdiction is already substantially involved or is better suited. In addition, the provision on universal jurisdictions for prosecuting international crimes within a separate Title of the Criminal Code implies that Switzerland may provide a specific universal jurisdiction rule for international crimes without creating confusion about its application to other crimes.

On criminalization of grave breaches in the Swiss Military Penal Code, the content is the same as provided in the civilian counterpart. The text of Article 111 of the Swiss Military Penal Code on grave breach violation is identical to that of Article 246c of the civilian code. Article 114 of the military code on other infractions of IHL also follow verbatim Article 264j of its counterpart except for paragraph 2 of Article 114, providing for an additional possibility of disciplinary sanctions. Articles 59, 114a, and 114b provide concepts of removing the statute of limitations, command responsibility, and removing immunity, respectively, similar to the civilian code. Article 10 of the military code also provides for universal jurisdiction in the same manner as the civilian code. As for personal jurisdiction, the military penal code extends applications to cover allied combatants, civilians, and enemy combatants in case of offenses under international criminal law.³⁰ Despite the contents on grave breach criminalization in the civilian and military penal codes being identical, including provisions in the military code might have positive practical consequences. Relevant actors might refer more to military penal codes during armed conflict due to the convenience of referring to one set of laws in high-pressure situations. In this way, actors engaged in conflict will be likelier to know and comply with the law if the same provisions are provided in the military penal code. In addition, including grave breach provisions in both codes also emphasizes the gravity of violations.

In conclusion, Switzerland has a detailed method of implementing the grave breaches regime. A chapter on international crimes is in the penal codes, facilitating the discovery of grave breaches provisions. Extension of provisional application to non-international armed conflicts while acknowledging international limits of grave breach regime applicability to solely international armed conflict is a useful legislative method: it clarifies the Swiss stance on international rules while extending applicability of grave breaches provisions.

Establishing guidelines for sanction levels based on gravity of offense in the grave breach provision increases provisional clarity. This allows the justice system to impose more uniform sentences for commission of grave breaches. Providing for command responsibility, disallowing the “act on order” defense, removing the statute of limitations, and decreasing immunity might also heighten effectiveness of domestic implementation of international criminal crimes, including grave breach provisions.³¹ Finally, the Swiss example shows that universal jurisdiction may be achieved in a way that limits the Court from interfering with an ongoing case in another jurisdiction.

³⁰ *ibid* art 5.

³¹ International Committee of the Red Cross, “Commentary” (n 9), para 5111.

B. Malaysia

Malaysia is a federal state with a constitutional monarchy,³² with a jurisdiction in the same geographical region as Thailand. Analyzing criminalization of grave breaches in Malaysia may provide insights into how a nation with a similar economic status and development level tackles this international obligation.³³ Malaysia also resembles Thailand insofar as neither state is party to the Rome Statute; thus, Malaysia similarly lacks the additional incentive, provided by complementary jurisdiction under the Rome Statute, to prosecute international crimes.³⁴

The main legal instrument criminalizing grave breaches in Malaysia is the Geneva Conventions Act, 1962.³⁵ Malaysia, similarly to other common law jurisdictions, follows the United Kingdom's approach in criminalizing grave breaches by separate Act of parliament.³⁶ The Malaysian Geneva Conventions Act, 1962 includes substantive rules criminalizing grave breaches, procedural rules on trials of prisoners of war and protected internees, and the substantive rule criminalizing prohibited use of humanitarian emblems. This article will only analyze substantive rules criminalizing grave breaches.

The first part of the Malaysian Geneva Conventions Act, 1962 defines terms in the Act. Malaysia provides the full text of all four Geneva Conventions in the schedule to the domestic Geneva Conventions Act, 1962 and offers a definition referring to the Geneva Conventions within its schedules. This method allows Malaysia to refer to the international treaty text while upholding the legality principle, since the international Geneva Conventions text is cited in the Act itself. If the international Geneva Conventions text were to change, legislators would have to amend the domestic schedules to match international conventions.

After definitions, in Article 3 the Malaysian Geneva Conventions Act, 1962 provides a provision on "Grave breaches of scheduled conventions."³⁷ The first

³² "Background" *Official Portal of the Parliament of Malaysia* (23 January 2013) <<https://www.parlimen.gov.my/pengenalan.html?&uweb=p&view=23&lang=en#:~:text=Malaysia%20practices%20Parliamentary%20Democracy%20with,for%20this%20system%20to%20exist>>.

³³ "Country Comparison Thailand vs Malaysia" *Countryeconomy* <<https://countryeconomy.com/countries/compare/thailand/malaysia>>.

³⁴ "Malaysia Backtracks on Accession to the Rome Statute" *Coalition for the International Criminal Court* <<https://www.coalitionfortheicc.org/news/20190412/malaysia-backtracks-accession-rome-statute#:~:text=Malaysia%20not%20to%20accede%20to,of%20signing%20the%20accession%20instrument>>.

³⁵ Aisya Abdul Rahman, "72 Years of the Geneva Conventions: What They Mean for Malaysia" *International Committee of the Red Cross* (13 August 2021) <<https://www.icrc.org/en/document/72-years-geneva-conventions-malaysia#:~:text=When%20Malaysia%20signed%20the%20Geneva,as%20long%20as%20conflict%20exists>>; Geneva Conventions Act, first published in Law No. 5 of 1962, Official Gazette, vol VI, no 4, 24 February 1962 (Malaysia).

³⁶ For examples of legislations criminalizing grave breaches in common law countries, please see: Geneva Conventions Act 1957 (United Kingdom), Geneva Conventions Act (R.S.C., 1985, c. G-3) (Canada), Geneva Convention Act, 1960 Act No. 6 of 1960 (India).

³⁷ Geneva Conventions Act, first published in Law No. 5 of 1962, Official Gazette, vol VI, no 4, 24 February 1962, Article 3 (Malaysia).

paragraph of Article 3 of the Act begins with the concept of universal jurisdiction for grave breaches, permitting prosecution wherever the crime is committed and no matter the citizenship or nationality of its perpetrator: “Any person, whatever his citizenship or nationality, who, whether in or outside Malaysia, . . .”; Article 3 proceeds to criminalize commission of the crime and its accessory acts: “commits, or aids, abets or procures the commission by any other person.” Although this is an extension of the personal scope of grave breaches crimes, it is insufficient for covering all aspects of command responsibility. Providing the express concept of command responsibility by law facilitates proving guilt of high-ranking officers,³⁸ making criminalization of grave breaches more effective.

The method used by Article 3 of the Malaysian Geneva Conventions Act, 1962 is to criminalize the “grave breach of any of the scheduled conventions as is referred to in the following articles respectively of those conventions.” Paragraph 1 of Article 3 refers to Articles 50, 51, 130, and 147 of the First, Second, Third, and Fourth Geneva Conventions, respectively. Essentially, the Malaysian legislators chose to specifically and directly refer to Articles in the international conventions, the texts of which were incorporated in the schedule of the domestic Act. This simplifies compliance with the law; parties to an armed conflict may cross-reference the Act to find rules by which to abide relatively efficiently. However, this method would require that Malaysian courts be informed about international criminal law and be capable of interpreting texts adapted from international conventions.

Article 3 of the Malaysian Geneva Conventions Act, 1962 addresses sanctions. For willful killing, life imprisonment is imposed. For other grave breach offenses, imprisonment for up to 14 years is mandated. The higher level of sanction specific to the act of willful killing signals Malaysia’s perception of this crime as a more serious offense. Different sanction levels for different acts based on gravity make the law more comprehensible to conflicting parties at times of armed conflict; since parties to armed conflicts are not well-versed with the law, easily understandable provisions might lead to better compliance.³⁹ Still, the Malaysia Geneva Conventions Act only accords a specific sanction for willful killing, but no specific guidelines for other grave breach offenses. Instead, it categorizes them by a general group, for which the court has discretion to impose sentences up to 14 years. Arguably, other grave breaches such as torture, inhuman treatment, and unethical human experimentation should also warrant higher punishment levels. There, the Malaysian sanctioning approach may benefit from further expansion.

Paragraph 2 of Article 3 of the Malaysian Geneva Conventions Act, 1962 reaffirms the principle of universal jurisdiction by allowing Malaysian courts to prosecute grave breach offenses as if they had been committed where the prosecuting court is situated. The remaining paragraphs provide rules specific to the Malaysian

³⁸ Jamie Allan Williamson, “Some Considerations on Command Responsibility and Criminal Liability” (2008) 90(870) *International Review of the Red Cross* 306 <<https://doi.org/10.1017/S1816383108000349>>.

³⁹ International Committee of the Red Cross, “Commentary” (n 9).

jurisdiction. Paragraph 3 removes the jurisdiction of the Magistrate Court, while paragraph 6 allows Malaysia court martials to prosecute civil offenses notwithstanding the Act. Meanwhile, the rule in paragraph 4 appears to be against effective criminalization of grave breaches, by limiting the way grave breaches prosecution may be brought to Malaysian courts. It provides that prosecution for grave breach offenses may only be initiated by a public prosecutor. At times of armed conflicts, the Malaysian government might be party to the conflict. Public prosecutors would be little incentivized to bring grave breach cases against members of the Malaysian government and its allies. In this way, requiring cases to be brought by a public prosecutor may abusively limit the application of the grave breach provision solely to perpetrators unconnected with the government. In addition, paragraph 5 provides that a question of interpreting the armed conflict nexus required for applying the grave breach provision shall be referred to the government for determination. This paragraph essentially allows the Malaysian government to determine whether an armed conflict exists and is international in nature. This is also susceptible to abuse, insofar as the Malaysian government may disable applicability of grave breaches provisions by using the discretion provided in paragraph 5.

In conclusion, Malaysia's approach to criminalizing grave breaches of the Geneva Conventions within a parliamentary Act allows the grave breach provision to be comprehensive and summarized within a single instrument. Incorporating texts of the Geneva Conventions into the Act in its schedule permits Malaysia to maintain the principle of legality due to the entire contents of the international treaty being spelled out in domestic law. Malaysia also refers directly to grave breach provisions in the Geneva Conventions. However, this common law approach may not be applicable to the Thai context, since Thailand does not normally include international conventions in schedules attached to domestic Acts of parliament. The Malaysian example also suggests that it is possible to provide different sanctions for different crimes. Finally, aspects in the Malaysian Geneva Conventions Act, 1962 potentially limiting effective application of the grave breaches regime, such as requiring grave breach cases to be brought solely by public prosecutors, are negative precedents that Thailand should not imitate.

III. THE THAI APPROACH TO CRIMINALIZING GRAVE BREACHES

With examples from other jurisdictions as guidelines, Thailand's effort to criminalize grave breaches will be assessed. The two main laws representative of the regime criminalizing grave breaches are the Military Penal Code of Thailand and Act for the Enforcement of the Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949 (B.E. 2498).

A. The Military Penal Code of Thailand

The provision most resembling criminalization of grave breaches is found in Section 48 of the Military Penal Code:

During wartime, whoever acts mercilessly upon a wounded or sick person of either side or commits any form of theft according to sections 249 to section 259 and section 288 to section 303 of the Criminal Law, shall be given additional punishment which amounts to half the punishment for such provisions.

First, Thailand's choice to criminalize grave breaches in the Military Penal Code instead of its civilian counterpart will be assessed. Adding criminalization of grave breaches to the military code has the advantage of more effectively procuring compliance by military personnel.⁴⁰ Soldiers tend to follow military orders primarily, rather than civilian prescriptions.⁴¹ However, lack of criminal provisions in the civilian criminal code reduces awareness of these offenses among the general public. Ignorance of grave breaches among the public may lessen fear of apprehension. Potential perpetrators may believe that they risk no additional punishment for the additional gravity of these types of offenses. The effective deterrence of grave breach provisions would thereby be reduced according to the economic approach to crime.⁴² As grave breaches may be committed by anyone during an armed conflict, civilians more accustomed to the civilian criminal code may commit grave breaches, if they are not aware of the context of these offenses. Provisions of the Military Penal Code of Thailand remain obscure due to archaic language and public obliviousness. There is also a paucity of research on this area of Thai law. Therefore, lack of awareness of grave breach provisions is a real danger. In addition, ordinary criminal law applies to soldiers since enlistment does not mean losing citizenship status. In this way, disadvantages of placing the grave breaches provision solely in the Military Penal Code outweigh the advantages. More effective compliance might be obtained by adding criminalization of grave breaches to the civil criminal code; this approach was adopted in Switzerland, where including identical provisions verbatim in the military and civilian codes ensures utmost awareness of the law.

Secondly, Section 48 of the Military Penal Code does not refer to the Geneva Conventions, nor does it mention its grave breaches regime. The sole aspect of Section 48 citing the text of international conventions is designation of the victim of offenses as the "wounded or sick" of either side. The criminal requirement that the perpetrator "acts without mercy" does not imply that the offense would fall under the grave breaches regime. There is also no adoption or incorporation of an international text

⁴⁰ Anne-Marie La Rosa, "Preventing and Repressing International Crimes: Towards an 'Integrated' Approach Based in Domestic Practice—Report of the Third Universal Meeting of National Committees for the Implementation of International Humanitarian Law Volume I" *ICRC Advisory Service on International Humanitarian Law* (2014) 65.

⁴¹ *ibid* 65.

⁴² Gary S. Becker, "Crime and Punishment: An Economic Approach" in Gary S. Becker and William M. Landes (eds), *Essays in the Economics of Crime and Punishment* (NBER 1974).

listing offenses. Instead, Section 48 refers to provisions in the ordinary civilian penal code, presumably Criminal Laws R.E. 127. Sections 249 to 259 of Criminal Laws R.E. 127 concerns offenses to life and bodily integrity, while sections 288 to 303 concern offenses against property.⁴³ In essence, Section 48 merely imposes a higher level of penalty when an ordinary crime is committed against the “wounded or the sick,” which is only one group protected by the Geneva Conventions. Absence of reference to the international text may advantageously permit Thai legislators and the judiciary to approach grave breaches more contiguously with the domestic legal context. Courts interpreting Section 48 of the Military Penal Code are not obliged to constantly refer to, or have knowledge of, international law; their existing knowledge of Thai ordinary criminal provisions is generally sufficient to determine guilt. However, lack of reference to international law may cause the domestic text to become awkwardly unaligned with its international counterpart.⁴⁴

In addition, in terms of the aforementioned disadvantages of prosecuting grave breaches based on ordinary criminal provisions, the text of ordinary criminal provisions referred to in Section 48 does not cover all types and elements of grave breach offenses as listed in the Geneva Conventions. This is specifically the case with Section 48 since domestic crimes referred as a basis for prosecution do not explicitly include acts such as “torture” or “biological experiments” as mentioned in the Geneva Conventions. The ordinary criminal provisions cited merely refer to comparable acts causing serious bodily harm; the wording lacks any comparable level of linguistic deterrence used in international conventions. To resolve this issue, additional references to the Geneva Conventions or terms translating to grave breach could be added to the current law to signify the seriousness of grave breach offenses and direct the judiciary towards interpreting the provision in accordance with international standards.

Thirdly, the reference to ordinary civilian criminal provisions alludes to provisions in Criminal Laws R.E. 127. This is because in the current Thailand Criminal Code B.E. 2499 (1956), Sections 249 to 259 pertain to offenses with currencies as well as seals, stamps and tickets, while Sections 288 to 303 relate to mortal offenses, bodily assault, and abortion. These references do not cohere to the context of Section 48 of the Military Penal Code. Although Sections 288 to 303 of the Thailand Criminal Code B.E. 2499 (1956) may relate to grave breach offenses, the text of Section 48 of the Military Penal Code specifically designates these sections as offenses related to theft, not covered by Sections 288 to 303 of the Thai Criminal Code. Therefore, it is likely that offenses referred to in Section 48 of the Military Penal Code are the offenses in Criminal Laws R.E. 127. Since Criminal Laws R.E. 127 was repealed and overridden by the Thailand Criminal Code B.E. 2499 (1956), the grave breaches provision of Section 48 of the Military Penal Code basically refers to an obsolete law. Although it remains doctrinally possible for Section 48 to be effective, reference to a repealed law raises

⁴³ กฎหมายลักษณะอาญา ร.ศ. 127, ราชกิจจานุเบกษา เล่ม 25 หน้า 206 (1 มิถุนายน 2460) [Criminal Law R.E. 127, Government Gazette vol 25 p 206 (1 June 1917)] (Thai).

⁴⁴ La Rosa, “Integrated Approach” (n 40) 33.

doubts about appropriateness and the legitimacy of its provisions, undermining the seriousness of related offenses. Some may argue that reference to a repealed law entirely invalidates Section 48 due to the need to strictly interpret criminal provisions. This suggests the urgency to amend Section 48 of the Thailand Military Code to refer instead to the Thailand Criminal Code. Otherwise, the reference to ordinary criminal provisions should be wholly replaced by a new system more compliant with international standards.

Fourthly, Section 48 of the Military Penal Code requires that the act constituting an offense must be committed during “war time.” This leaves unresolved the armed conflict prerequisite for effectively criminalizing grave breaches. Under the Geneva Conventions, it is widely accepted that grave breach offenses during an international armed conflict must be effectively prosecuted,⁴⁵ with some commentators also arguing that grave breaches committed during non-international armed conflict must likewise be prosecuted.⁴⁶ The minimum international standard is that the criminal context should be international armed conflict. Doctrinally, an armed conflict does not require a formal declaration of war,⁴⁷ nor need states engaging in armed conflict recognize a “state of war.”⁴⁸ An armed conflict of an international character is constituted by “a resort of armed force between states.”⁴⁹ A low threshold of intensity is required for international armed conflict, with some commentators defining it as any fighting whatsoever between armed forces.⁵⁰ Indeed, IHL has already

⁴⁵ Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, *Dusko Tadić* (IT-94-1-AR72), Appeals Chamber, 2 October 1995, para 79–84; Mettraux, *International Crimes* (n 4) 54; Marko Divac Öberg, “The Absorption of Grave Breaches into War Crimes Law” (2009) 91(873) *International Review of the Red Cross* 163 <<https://doi.org/10.1017/S181638310999004X>>.

⁴⁶ Chile Eboe-Osuji, “‘Grave Breaches’ as War Crimes: Much Ado About . . . ‘Serious Violations’?” *International Criminal Court* 9 <<https://www.icc-cpi.int/sites/default/files/NR/rdonlyres/827EE9EC-5095-48C0-AB04-E38686EE9A80/283279/GRAVEBREACHESMUCHADOABOUTSERIOUSVIOLATIONS.pdf>>; ICTY, Separate Opinion Of Judge Abi-Saab, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, *Tadić* (IT-94-1), Appeals Chamber, 2 October 1995, 418 <<https://international-review.icrc.org/sites/default/files/S0020860400075938a.pdf>>.

⁴⁷ Geneva Academy of International Humanitarian Law and Human Rights, “International Armed Conflict” (RULAC, 30 August 2017) <<https://www.rulac.org/classification/international-armed-conflict>> citing Tristan Ferraro and Linsey Cameron, “Article 2: Application of the Convention” (2016) ICRC Commentary on the First Geneva Convention, para 212; Judgment, *Ljube Boškoski and Johan Tarčulovski* (IT-04-82-T), Trial Chamber, 10 July 2008, para 174.

⁴⁸ Dapo Akande, “Classification of Armed Conflicts: Relevant Legal Concepts” (20 August 2012) in Elizabeth Wilmschurst (ed), *International Law and the Classification of Conflicts* (Oxford University Press 2012) 35 <<https://doi.org/10.2139/ssrn.2132573>> citing Jean Pictet, *Commentary on the Geneva Conventions of 12 August 1949* (1952) Vol IV 21.

⁴⁹ *Dusko Tadić* (IT-94-1-AR72), Appeals Chamber, 2 October 1995, para 70; “How is the Term ‘Armed Conflict’ Defined in International Humanitarian Law?” *International Committee of the Red Cross* (March 2008) 5 <<https://www.refworld.org/docid/47e24eda2.html>>.

⁵⁰ International Committee of the Red Cross, “Armed Conflict” (n 49) 2 citing Hans-Peter Gasser, “International Humanitarian Law: An Introduction” (1993) in Hans Haug (ed), *Humanity for All: The International Red Cross and Red Crescent Movement* (Paul Haupt Publishers 1993) 510–11 and Dietrich Schindler, *The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols* (RCADI Vol 163, 1979-II) 131; Judgment, *Mucic et al* (IT-96-21-T), Trial Chamber, 16 November 1998, para 184; Dapo Akande, “Classification of Armed Conflicts: Relevant Legal Concepts”

distanced itself from the traditional concept of war to the more encompassing concept of armed conflict⁵¹ since the UN Charter was adopted.⁵² As ambiguities remain for interpreting the term “war” as used in Section 48 of the Military Penal Code of Thailand, it is possible that interpretation of war in the Thai domestic provision would not cover every international armed conflict, which is the minimum international standard. For example, intense, short-lived skirmishing between armed forces of two states would suffice for invoking application of IHL due to its classification as an international armed conflict;⁵³ yet it is unlikely that this type of incident would be classified as a war. Therefore, Section 48 fails to meet the international standard by not prosecuting all grave breach offenses related to international armed conflict. To ensure more effective criminalization, the term “war time” in Section 48 of the Military Penal Code of Thailand might be replaced by the term “armed conflict.”

Fifthly, the concept of universal jurisdiction is never mentioned in relation to Section 48 of the Military Penal Code of Thailand. Still, the personal scope of Section 48 is unlimited. In the Military Penal Code of Thailand, sections criminalizing offenses only committed by soldiers as defined in the Code (Thai military) will usually use the term “soldier” within provision relating to related offenses. The term “whoever” is used in provisions to describe offenses potentially committed by anyone of any status. As Section 48 of the Military Penal Code of Thailand uses the term “whoever,” any participant in armed conflict committing offenses therein described could be prosecuted, whether soldier, enemy combatant, or civilian. Despite the grave breaches provision in the military penal code, potentially causing misunderstandings, criminalization of grave breaches in Thailand still does not unreasonably limit the personal scope of perpetrators. Still, unlike the rule in Section 7 of the Thailand Criminal Code B.E. 2499 (1956), there is no specific provision granting Thai Courts universal jurisdiction to prosecute offenses under Section 48 of the Military Penal Code of Thailand. This lack of universal jurisdiction prevents the grave breaches regime in Thailand from meeting international standards.⁵⁴

Finally, concepts such as command responsibility, removing the acting on orders defense, the statute of limitations exemption, and immunity in relation to offenses under Section 48 of the Military Penal Code of Thailand are also missing. These international criminal law concepts, adopted into domestic law by jurisdictions

in Elizabeth Wilmshurst (ed), *International Law and the Classification of Conflicts* (Oxford University Press 2012) 13 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2132573&rec=1&srcabs=1117918&alg=1&pos=6>.

⁵¹ “Fundamentals of IHL | How Does Law Protect in War?” *International Committee of the Red Cross* <https://casebook.icrc.org/law/fundamentals-ihl#_ftn_017> citing Jean Pictet, *Commentary of the First Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (International Committee of the Red Cross, 1952) 32.

⁵² “Final Report on the Meaning of Armed Conflict in International Law” *International Law Association at the Hague Conference on the Use of Force* (2010) <https://www.rulac.org/assets/downloads/ILA_report_armed_conflict_2010.pdf>.

⁵³ *Juan Carlos Abella v Argentina*, Case 11.137, Report No. 55/97, Inter-Am CHR, OEA/Ser.L/V/II.98, Doc 6 rev, 18 November 1997, para 155.

⁵⁴ International Committee of the Red Cross, “Commentary” (n 9).

such as Switzerland in relation to criminalizing grave breaches, may not be necessary for regime implementation, since ICRC commentaries to the Geneva Conventions merely encouraged, rather than required, adoption of these concepts.⁵⁵ However, they remain useful in prosecuting grave breaches in accordance with obligations under the Geneva Conventions. Their adoption will help ensure that court jurisdiction extends to those responsible for grave breaches crimes, regardless of where those crimes are committed and whether those responsible for the order to commit the crimes personally participated. If the grave breaches regime in Thailand were to be revised, these concepts might be added to the law to ensure more doctrinally effective criminalization.

B. Act for the Enforcement of the Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949 (B. E. 2498) (Prisoners of War Act)⁵⁶

The Prisoners of War Act in Thailand was created to implement the Fourth Geneva Convention relative to the Treatment of Prisoners of War. The Prisoners of War Act governs the conduct of prisoners of war and their treatment. Provisions criminalizing grave breaches in the Prisoners of War Act are in Chapter 2 of the Act pertaining to “Offenses Against Prisoners of War.” Two provisions in Chapter 3 of the Act pertaining to “Offenses Committed to Non-International Armed Conflict” also support the grave breaches regime. According to Section 3, provisions of the Prisoners of War Act would prevail over conflicting provisions, so in case of conflict with Section 48 of the Military Penal Code of Thailand, the more specific rules in the Prisoners of War Act would apply.

Still, the related provisions within the Prisoners of War Act cover only grave breach offenses committed against prisoners of war in an attempt to implement only one of the four Geneva Conventions. Therefore, even in areas where the Prisoners of War Act might augment the effectiveness of grave breach prosecution provided for in the Military Penal Code of Thailand, this supplementation would only pertain to the Third Geneva Convention. Effective protection pertaining to protected persons within other Geneva Conventions would not be bettered by the Prisoners of War Act.

The first aspect of the Prisoners of War Act to consider is Section 4, defining terms. In essence, the act explicitly refers to the Third Geneva Convention whenever the term “Convention” is used. Section 4 also directly refers to Article 4 of the Third Geneva Convention to define the term prisoner of war. Evidently, this legislation’s explicit reference to the international text would allow definitions of victims of grave breaches to meet international standards. If the definition of prisoner of war within

⁵⁵ *ibid* paras 5104 and 5109.

⁵⁶ พระราชบัญญัติบังคับให้เป็นไปตามอนุสัญญาเจนีวาเกี่ยวกับการปฏิบัติต่อเชลยศึก ลงวันที่ 12 สิงหาคม พ.ศ. 2492 พ.ศ. 2498, ราชกิจจานุเบกษา เล่ม 72 ตอนที่ 83 (18 ตุลาคม 2498) [The Act Governing the Treatment of Prisoners of War to be in Accordance with the Geneva Convention on Prisoners of War B.E. 2498, Government Gazette, vol 72 ch 83 (18 October 1955)] (Thai).

the Third Geneva Convention were to change, the definition within the domestic Prisoner of War Act would be flexible enough to reflect this alteration.

The first substantive section pertaining to grave breaches conducted against prisoners of war is Section 12:

Whoever subjects a prisoner of war to medical, biological, or scientific experiments of any kind which are not justified by the medical treatment of the prisoner concerned shall be liable to a fine of up to three thousand five hundred baht and imprisonment for up to seven years.⁵⁷

Section 12 prohibits conducting “biological treatment” on prisoners of war, one of the grave breaches acts enshrined in the Third Geneva Convention. Section 12 likewise expands the definition of the act of conducting biological experiments to cover other forms of similar experiments; this expansion essentially removes the need to prove that the experiment is “biological in nature.”⁵⁸ In other words, all experiments, whether classified as chemical, biological, or physical, should fall under the scope of this Section if conducted on the human body. Section 12 also further defines the international qualification of experiments as “inhumane;” the qualification under the domestic Section 12 that the experiment must be “unjustifiable by medical treatment” has a wide scope of application and would cover all “inhumane” experiments. This qualification in Section 12 is arguably more objective than merely requiring the experiment to be “inhumane” and is in line with interpretation of the international text as well.⁵⁹ As for the sanction under Section 12, imprisonment for at least seven years with a maximum fine of 3,500 baht may still be considered appropriate, since the sentence is consequential, compared to ordinary criminal law sanctions for similar conduct; yet the fine imposed by Section 12 should be increased to meet modern standards. Under ordinary criminal law, grievous bodily harm involving torture would result in imprisonment from 2 to 10 years and a 40,000 to 200,000 baht fine.⁶⁰ All in all, Section 12 of the Prisoners of War Act seems to provide an effective sanction against one type of grave breach offense committed against prisoners of war.

As for Section 13, it provides that “whoever threatens, insults, or subjects a prisoner of war to humiliating or degrading treatment shall be liable to a fine of up to five hundred baht or imprisonment for up to one year or both.”⁶¹ Section 13 fulfills and surpasses the obligation in the Geneva Convention by also criminalizing acts not normally considered grave offenses. Section 13 has a wide application scope potentially applicable in situations ranging from verbal abuse, which would not

⁵⁷ Translation of the Thai Military Penal Code acquired from Equipo Nizkor and Derechos Human Rights, “Act for the Enforcement of the Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949” *Derechos* <<https://www.derechos.org/intlaw/doc/tha3.html>>.

⁵⁸ International Committee of the Red Cross, “Commentary” (n 9) para 5251.

⁵⁹ *ibid*, para 5261.

⁶⁰ พระราชบัญญัติให้ใช้ประมวลกฎหมายอาญา พ.ศ. 2499, ราชกิจจานุเบกษา เล่ม 73 ตอนที่ 95 ฉบับพิเศษ (15 พฤศจิกายน 2499) มาตรา 298 [Thai Criminal Code B.E. 2499, Government Gazette vol 73 ch 95 Special Edition, Article 298 (15 November 1946)] (Thai).

⁶¹ *Derechos*, “Translation” (n 57).

amount to grave breach in most circumstances, to serious inhuman acts done against a prisoner of war's individual dignity. In this way, Section 13 criminalizes a wide array of "inhuman treatment" towards prisoners of war and its application would further protect the dignity of prisoners of war. Still, sanctions under Section 13 might be increased to reflect the seriousness of the grave breach regime.

Section 14 states:

Whoever inflicts physical or mental torture or any other form of coercion on a prisoner of war to secure information of any kind whatsoever, or threatens, insults, or exposes a prisoner of war who refuses to answer to any unpleasant or disadvantageous treatment of any kind whatsoever shall be liable to a fine of up to 1500 baht or imprisonment for up to three years or both.⁶²

Section 14 criminalizes grave breach offenses of torture. The text of Section 14 expands on the definition of "torture" in the international text by explicitly including both psychological and physical forms in accordance with interpretation of the international text.⁶³ However, Section 14 requires specific intent to obtain information, while "torture" in the international text of the Third Geneva Convention could be committed with a wider range of specific intent.⁶⁴ Torture committed for other purposes than to obtain information would not fall under the scope of Section 14. Since Thailand lacks any provision specifically dealing with the "crime of torture," torture committed for other purposes would likely be regarded at most as aggravated commission of grievous bodily harm.⁶⁵ Therefore, despite Section 14, the Thai legal system still lacks any provision effectively criminalizing all instances of torture against persons protected by IHL. Therefore, the contribution of Section 14 to effective criminalization of grave breaches is minimal, especially if low sanction levels in the Section are considered.

By contrast, Section 15 deals directly with a grave breach offense under the Third Geneva Convention. Section 15 states: "Whoever coerces a prisoner of war into active service with his enemy's forces shall be liable to a fine of up to two thousand five hundred baht or imprisonment for up to five years or both." The action criminalized by Section 15 mirrors the act of "compelling a prisoner of war to serve in the forces of the hostile Power" as enshrined in the Third Geneva Convention.⁶⁶ However, the Section 15 text only prohibits impressment of prisoners of war into active service. It fails to prevent coercion of prisoners of war to serve in non-active functions in enemy armed forces. Therefore, Section 15 may be seen as implementing the grave breach offense into domestic law by providing a narrow interpretation of the international text. This interpretation may potentially fail to fulfill the obligation of Thailand to

⁶² *ibid.*

⁶³ International Committee of the Red Cross, "Commentary" (n 9) para 5226.

⁶⁴ *ibid* para 5239.

⁶⁵ Thai Criminal Code B.E. 2499 (n 60) art 298.

⁶⁶ *Derechos*, "Translation" (n 57); Geneva Convention Relative to the Treatment of Prisoners of War (12 August 1949), 75 UNTS 135 entered into force 21 October 1950, Article 130.

effectively prosecute grave breaches. In this case, “compelling prisoners of war to serve in the force of a hostile power” would be given wide protection to also cover compelling prisoners of war to serve in non-active duty related to war efforts due to increased protection afforded by this interpretation. For example, forcing a prisoner of war to work in a military factory will not breach Section 15 of the Prisoners of War Act, but would still constitute “compelling a prisoner of war to serve in the forces of the hostile Power” in the meaning of the Third Geneva Convention.⁶⁷ The limited scope of Section 15 leaves room for improvement in terms of more effective grave breach criminalization.

The final relevant provision is Section 17: “Whoever does anything to keep a prisoner of war from having an impartial trial or a trial according to the rules set out in the Convention shall be liable to a fine of up to 1500 baht or imprisonment for up to three years or both.”⁶⁸ Section 17 prohibits the act of “willfully depriving a prisoner of war of the rights of fair and regular trial” in the Third Geneva Convention by referring directly to the international text with its reference to the “Convention.”⁶⁹ Through the phrase “whoever does anything,” Section 17 also prescribes a wide scope for the offense by focusing more on consequences of the act or omission instead of focusing on the method used to commit the act. In this way, Section 17 fundamentally imports the complete international protection of prisoners of war by fair trial into the domestic provision. If Thai Courts interpret the international rule within the Third Geneva Convention in line with the international standard, effective prosecution for deprivation of fair trial should be achieved. However, the amount of sanction may not match the gravity of the offense and may require augmentation.

Despite not being directly related to grave breaches, the contents of Sections 18 and 19 pertaining to crimes committed during non-international armed conflict are worth mentioning. Section 18 provides that “in the case of armed conflict not of an international character, whoever commits any of the acts specified in Section 12, Section 13, Section 14 of this Act with respect to the persons listed in Article 3 of the Convention shall be liable to the punishment provided in those sections” while Section 19 prescribes that “in the case of armed conflict not of an international character, whoever takes a hostage, shall be liable to a fine of up to 1500 baht or imprisonment for up to three years or both.”⁷⁰ These two provisions supplement protection within the domestic grave breach regime by also criminalizing acts committed during non-international armed conflicts. Significantly, Section 18 somewhat implements application of Common Article 3 of the Geneva Conventions into Thai law. Although violations of Common Article 3 are to be distinguished from the grave breaches regime due to the latter arguably applying during international armed conflict,⁷¹ an effort to also criminalize Common Article 3 violations is a positive development.

⁶⁷ International Committee of the Red Cross, “Commentary” (n 9) para 5275.

⁶⁸ Derechos, “Translation” (n 57).

⁶⁹ *ibid.*

⁷⁰ Derechos, “Translation” (n 57).

⁷¹ Stewart (n 14) 864.

In sum, provisions in the Prisoners of War Act may somewhat complement the grave breaches regime in the Military Penal Code of Thailand. However, many aspects remain unresolved. First, the Prisoners of War Act only concerns treatment of prisoners of war and not grave breaches committed against protected persons omitted from the Third Geneva Convention. Secondly, texts of the provisions in the Prisoners of War Act remain inadequately aligned with the obligation of Thailand to prosecute grave breaches under the Third Geneva Convention. The scope of offenses within the domestic text are too narrow, compared to the standard imposed by interpreting the Third Geneva Convention and the provisions fail to cover all types of grave breach offenses. Thirdly, sanctions for offenses committed against prisoners of war are outdated and do not reflect the gravity of the offenses. Therefore, despite the existence of the Prisoners of War Act, there remains room for improvement.

IV. TOWARD A MORE EFFECTIVE PROSECUTION OF GRAVE BREACHES IN THAI LAW

As mentioned, the Thai grave breaches regime imperfectly ensures effective criminalization of grave breaches. This final section will suggest ways in which the current grave breaches regime may be improved.

The first option for Thailand is to adopt a separate criminal statute dealing specifically with grave breaches violations. The ICRC has promulgated a model law which countries could adopt for this purpose.⁷² Although the model law is intended for common law countries, Thailand could draw inspiration from this model law to create its own domestic Act criminalizing grave breaches. This will ensure Thailand's compliance with international standards, especially since the ICRC is the leading authority in IHL development. Domestic definitions would also be better aligned with definitions in the international text. Effective criminalization would also be achieved by compiling grave breach offenses in one statute, more legally comprehensive than the current framework where grave breaches are criminalized in two separate and lesser-known venues (Military Penal Code and the Prisoners of War Act). In addition, the Model Law is designed specifically to criminalize grave breaches; its application does not extend to other types of international crimes, so adopting a domestic law based on its template will meet with less resistance. The example of Malaysia shows that grave breaches may still be criminalized without criminalizing other forms of international crimes. Still, using the Model Law's template may pose incompatibility problems with the current legal framework, and ensuring domestic adaptation doctrinal suitability will be a challenging task. Placing the grave breaches provision in

⁷² "Geneva Conventions (Consolidation) Act Legislation for Common Law States on the 1949 Geneva Conventions and their 1977 and 2005 Additional Protocols (Model Law)" *International Committee of the Red Cross Advisory Service on International Humanitarian Law* <<https://www.icrc.org/en/download/file/1399/geneva-conventions-additionnal-protocols-model-lawi.pdf>>.

a separate statute would decrease awareness and accessibility, potentially impeding effective deterrence to offenses.

The second option is to compile all grave breaches provisions within the ordinary Criminal Code, with a new chapter added to the current criminal code. Switzerland shows that this option is possible. Similar to the first option, compilation of the grave breaches provision in one instrument would benefit legal certainty more than dispersing grave breaches provisions in two different legal instruments. Compiling grave breaches provisions into the Criminal Code would likewise make them even more accessible to the general public, thereby ensuring better awareness and compliance. So although the first option of creating a new criminal statute is viable, the second option of creating a new chapter in the ordinary Criminal Code is preferable. Section 48 of the Military Penal Code of Thailand already somewhat criminalizes grave breaches, yet having grave breaches provisions in the ordinary civilian penal code, while also providing for the armed conflict nexus, appears to be a better option.⁷³ This is because the general public is unfamiliar with the Military Penal Code of Thailand, which mostly applies to Thai Armed Forces soldiers. In turn, other belligerents in an armed conflict would not normally consult the Military Penal Code of Thailand to self-regulate their conduct in compliance with rules of warfare. Finally, due to existing doctrinal deficiencies of Section 48 of the Military Penal Code of Thailand, as discussed above, it would be more efficient to completely change the Thai grave breaches regime; placing it as a separate chapter in the civilian criminal code would allow for more detailed provisions and concepts such as universal jurisdiction to be legally incorporated. Therefore, adding a new chapter on grave breaches to the civilian penal code is possibly the best option.

For these options to fit into Thai law, amendments to the Prisoners of War Act will be necessary. Provisions criminalizing offenses committed against prisoners of war must be removed to allow for new provisions, either in a new statute or new chapter of the Criminal Code, as the sole source for criminal liability. Making the new compilation the only place where grave breach offenses may be found would clarify the regime and make it more comprehensive.

Thai legislators have two options for the text of Section 48 of the Military Penal Code. First, the Section could be dispensed with entirely, allowing newly created provisions to be the sole source in which grave breaches are criminalized. Secondly, the Section 48 text of the Military Penal Code might be amended to refer to new criminal provisions specifically addressing grave breaches instead of outdated ordinary criminal law provisions currently referred to. This second option would allow the Section 48 text to reflect the new grave breaches provisions. Swiss law is an example where grave breaches provisions are found in both ordinary and military penal codes, with criminal elements nearly identical. This approach emphasizes the seriousness of grave breaches while awareness of grave breaches grows during peacetime and wartime. To go further, the new amended text Section 48 of the Military Penal Code may impose additional penalties if grave breaches are committed by

⁷³ Dormann and Geib (n 16) 715.

soldiers enlisted in the Thai Armed Forces while still maintaining other identical criminal elements as new grave breaches provisions in civilian law. There is some evidence of jurisdictions increasing sanctions for international crimes committed by members of the military,⁷⁴ and this approach would increase compliance with the grave breaches regime by military members. Thus, repealing Section 48 of the Military Penal Code in its entirety or amending the Section would be viable choices for Thai legislators.

There are several considerations for the text of the newly created grave breaches provisions, preferably in the civilian criminal code. First, references to grave breaches provisions in the Geneva Conventions should be made in domestic texts. The latter should at least provide for criminalization of the “grave breaches of the Geneva Conventions” before further elaborating on more specific elements of each grave breach offense. This method allows provisions to be easily recognizable as grave breaches provisions. Moreover, reference to international law allows the domestic text to be more in line doctrinally with its international counterparts. Regarding details of specific elements of grave breach offenses, Thai law should provide for a domestically adapted text to ensure compliance with the legality principle. A detailed description of the grave breaches act complementary to a direct reference to the Geneva Conventions would make the law doctrinally compliant with Thailand’s international obligation and respect the domestic legality principle.

Next, the newly created grave breaches provisions could be separated into multiple provisions, each assigning different sanction levels to grave breaches acts of different gravity. This method, inspired by Malaysian law, would make the law more rational, enhancing will for compliance. Significantly, the newly created grave breaches must cover all types of grave breach offenses as required by international law despite being separated into different provisions. For this purpose, it would be ideal to have a general provision criminalizing general grave breach offenses not falling under the scope of other grave breaches provisions. Swiss and Malaysian laws have adopted this approach. Indeed, Thai law could criminalize violation of “the laws and customs of war” in this general provision; but the extent of sanction for violation of this general provision may need to be lower than provisions criminalizing more specific grave breach offenses, since general reference to IHL causes this type of general provision to be susceptible to arbitrariness.

In the grave breaches provisions, a nexus with an armed conflict should also be included. Since the temporal scope for committing offenses in the Geneva Conventions transcends acts committed during a formally declared war, as mentioned, a wartime nexus should be avoided. At least, compliance with the Geneva Conventions requires effective criminalization of grave breaches committed during international armed

⁷⁴ La Rosa, “Integrated Approach” (n 40) 39.

conflicts.⁷⁵ Requiring that the acts be committed during international armed conflicts, as in the Swiss approach, is the minimum obligation.

Still, if politically possible, extending applicability of the newly created grave breaches provisions to non-international armed conflicts would be a welcome addition. An extension to non-international armed conflicts would allow grave breaches provisions to apply to the Deep Southern provinces of Thailand (Pattani, Yala, Narathiwat, and Songkla Provinces), an area of ongoing conflict between the Thai military and separatists.⁷⁶ This means that respect for IHL by both sides in the conflict could be better ensured in the Deep South, and more protection given to victims of armed conflicts.⁷⁷ Nevertheless, this extension may not be a political option, and a nexus with international armed conflict would suffice for Thailand to comply with its international obligations.

A provision on command responsibility could also be included. Malaysia has these concepts in its laws, while Switzerland include command responsibility provisions in the same chapter of the penal code as those on grave breaches. Since command responsibility is an essential international criminal law doctrine,⁷⁸ including this concept in Thai law would permit more grave breaches prosecutions. Still, it is significant to note that the command responsibility doctrine, under current international law standards, would still require the prosecution to prove the accused guilty. Even if the command responsibility provision facilitated prosecuting superiors and high-ranking authorities, it would not reverse the presumption of innocence principle. Unlike cases in which criminal provisions attributing criminal liability to company directors for juristic person crimes were deemed unconstitutional by the Thai Constitutional Court,⁷⁹ the command responsibility provision would remain valid in this context.

More importantly, Thai courts must have universal jurisdiction over grave breaches. There should be no restriction on either personal or territorial scope for prosecuting grave breaches. “Whoever” commits grave breach offenses should be prosecuted, without regard for nationality or allegiance. Procedures to bring cases before the Court should also be unlimited, unlike the Malaysian example. Moreover, provisions within the new chapter on grave breach offenses should be listed in Section

⁷⁵ Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, *Dusko Tadić* (IT-94-1-AR72), Appeals Chamber, 2 October 1995, para 79–84; Mettraux, *International Crimes* (n 4) 54; Öberg, “Absorption” (n 45) 163.

⁷⁶ Paul Chambers, Srisompob Jitpiromsri, and Napisa Waitoolkiat, “Introduction: Conflict in the Deep South of Thailand: Never-ending Stalemate?” (2019) 20 *Asian International Studies Review* 1 <<https://doi.org/10.1163/2667078X-02001001>>.

⁷⁷ Benjamin Zawacki, “Politically Inconvenient, Legally Correct: A Non-international Armed Conflict in Southern Thailand” (2013) 18(1) *Journal of Conflict and Security Law* 151 <<https://doi.org/10.1093/jcsl/krso25>>.

⁷⁸ “Rule 153. Command Responsibility for Failure to Prevent, Repress or Report War Crimes” *IHL Database* <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule153>.

⁷⁹ Thai Constitutional Court Decision 12/2555, 28 March 2012; Thai Constitutional Court Decision 5/2556, 16 May 2013; Thai Constitutional Court Decision 10/2556, 10 July 2013; Thai Constitutional Court Decision 11/2556, 31 July 2556.

7 in the Thai Penal Code, insofar as Section 7 is already a general provision encompassing a list of crimes over which Thai courts have universal jurisdiction.

In addition, Thai law could also incorporate other concepts from international criminal law. For example, Section 95 of the Thai Penal Code could be amended to specifically remove the statute of limitations for grave breach offenses.⁸⁰ A provision prohibiting the defendant from pleading the superior orders defense could also be incorporated in the new chapter criminalizing grave breaches, similar to the Swiss approach. However, Thai legislators should be cautious about incorporating these doctrines into domestic law for two reasons: First, although these international doctrines permit more effective prosecution, they do so by decreasing procedural safeguards and reducing the proof required to convict the accused. This means that incorporating these doctrines in Thai law might conflict with due process. In this way, Thai legislators might implement reduced versions of these international doctrines to prevent implementation from being entirely found unconstitutional. Secondly, the lower procedural safeguard would open room for potential abuse; these provisions may be used as political instruments to prosecute government opponents. Therefore, caution is warranted in implementing these international criminal law principles, despite their benefits.

Finally, an organizational body should facilitate implementation of the new grave breaches regime. Naturally, the Council of State could play a prominent role in revising the grave breaches regime. However, according to international practice, national IHL committees would ideally carry out initiatives for this implementation, assisted by the Council of State.⁸¹ The task of national IHL committees is to promote and sustain dissemination of IHL. However, no organization deals exclusively with international humanitarian law in Thailand. Instead, in this case, the National Human Rights Commission (NHRC) would most resemble a national IHL committee in Thailand as a national commission established to address human right issues similar to IHL.⁸² However, the NHRC's main area of concern is human rights, a distinct but complementary subject from humanitarian law.⁸³ This means that although the NHRC has the power and duty to propose recommendations on revising human rights laws under Section 26(3) of its constitutive Act, it may be an inappropriate extension of the NHRC mandate to interpret Section 26(3) as including the power to propose amending

⁸⁰ Thai Criminal Code B.E. 2499 (n 60) art 95

⁸¹ "Table of National Committees and Other National Bodies on International Humanitarian Law" *International Committee of the Red Cross* (26 April 2022) <<https://www.icrc.org/en/document/table-national-committees-and-other-national-bodies-international-humanitarian-law>>; Cristina Pellandini, "Ensuring National Compliance with IHL: The Role and Impact of National IHL Committees" (2014) 96 *International Review of the Red Cross* 1043, 1044 <<https://doi.org/10.1017/S1816383115000454>>.

⁸² พระราชบัญญัติประกอบรัฐธรรมนูญว่าด้วยคณะกรรมการสิทธิมนุษยชนแห่งชาติ พ.ศ. 2560, ราชกิจจานุเบกษา เล่ม 134 ตอนที่ 123/ก หน้า 1 (12 ธันวาคม 2560), มาตรา 26(3) [Organic Act on National Human Rights Commission Act B.E. 2560, Government Gazette vol 134 ch 123/gor, p 1 (12 December 2017) s 26(3)] (Thai).

⁸³ "IHL and Human Rights Law" *International Committee of the Red Cross* (26 October 2010) <<https://www.icrc.org/en/document/ihl-human-rights-law>>.

a humanitarian law regime. Nevertheless, creating a new, independent national IHL committee may require excessive political and logistical efforts. A parliamentary Act constituting the national IHL body would need to be legislated through the parliamentary process before the grave breaches regime could be thoroughly studied. A compromise between doctrinal correctness and efficiency could take the form of an amendment to the NHRC constitutive Act or an interpretation issued by the Council of State, extending the NHRC mandate to cover humanitarian laws. This extension of the NHRC mandate would lead to a well-informed legislative effort and ensure more complete compliance by Thailand with international obligations to criminalize grave breaches.

V. CONCLUSION

The four Geneva Conventions impose obligations upon state parties to effectively penalize commission of grave breaches. Since Thailand is a party to all four Geneva Conventions, the Kingdom is also under this obligation which it has yet to fulfill.

The current grave breaches regime, as provided in Section 48 of the Military Penal Code of Thailand and Prisoners of War Act, is doctrinally insufficient to comply with Thailand's obligation under the Geneva Conventions. The grave breaches provisions in Thai law lack clarity, and texts of such provisions are detached from international definitions. The lack of precise alignment of domestic criminal elements with international law requirements makes it possible that Thai courts could not effectively prosecute what might be considered a grave breach violation under international standards. Moreover, Thai courts lack universal jurisdiction over grave breach offenses under the current law. Accessory doctrines of international criminal law, such as command responsibility and removal of the statute of limitations, do not exist. Therefore, it is unlikely that the Thai legal regime can achieve effective prosecution of grave breaches.

Solutions inspired by analyzing grave breaches regimes in other jurisdictions may be summarized as follows: 1) compiling grave breaches provisions in one legal instrument is ideal, preferably within a single chapter of the civilian criminal code specific to grave breaches regime; 2) both the Prisoners of War Act and Section 48 of the Military Penal Code of Thailand should be amended to alter the grave breaches regime in a doctrinally coherent way; 3) within grave breaches provisions, direct references should be made to the Geneva Conventions and its text while leaving room for domestic texts to define specific elements of criminal offenses; 4) grave breach offenses should be accorded different sanction levels based on gravity, with a general provision penalizing IHL breaches; 5) a nexus with international armed conflict, or if possible, with armed conflict, should be provided for grave breaches; 6) the chapter criminalizing grave breaches should include a provision establishing command responsibility; 7) Thai courts should have jurisdiction over grave breaches crime through the amendment to Section 7 of the Thai Penal Code, placing no unnecessary

restriction on the scope for grave breaches prosecution; 8) other international criminal law concepts which would make the grave breaches regime more effective should be considered; and 9) a clarification of the National Human Rights Commission's mandate should be issued to allow the commission to conduct research and initiate legislative change on the current grave breaches regime.

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* **Indexing Thai names.** "Although family names are used in Thailand, Thais are normally known by their given names, which come first, as in English names. The name is often alphabetized under the first name, but practice varies." *The Chicago Manual of Style* (17th edn, University of Chicago Press 2017) §16.85.