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Rape and other sexual assaults in the armed conflict of the former Yugoslavia. Aspects of applicable law, criminal procedure and evidence

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RAPE AND OTHER FORMS OF SEXUAL ASSAULT IN THE ARMED CONFLICT IN THE FORMER YUGOSLAVIA:

LEGAL, PROCEDURAL, AND EVIDENTIARY ISSUES

Rape and other forms of sexual assault have always been a part of warfare,¹ but these crimes have never before received as much attention as in recent times, especially with regard to the atrocities alleged to have been committed in the war in the former Yugoslavia. A multitude of rape and sexual assault cases have been reported in this conflict. Several sources have published detailed information with regard to alleged atrocities and their estimated number.² The Final Report of the Commission of Experts established pursuant to Security Council Resolution 708 (1992)³ also provides extensive factual documentation of rape and sexual assault cases and the circumstances under which such crimes have allegedly been committed.⁴



This study is concerned with the question of whether, and under what circumstances, it will be possible to successfully prosecute and convict perpetrators of rape and other types of sexual assault. It is emphasized that this effort should take place in full compliance with due process requirements. For purposes of this study, we have chosen to focus on the jurisdiction of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, established by the Security Council in 1993.⁷

Both the Statute of the International Tribunal and the accompanying commentary by the UN Secretary-General, set out in the Report of the Secretary-General pursuant to Paragraph 2 of Security Council Resolution 808 (1993) ⁶ contemplate jurisdiction over rape and other sex crimes.

Article 5 of the Tribunal's Statute, in important respects following the Charter of the International Military Tribunal at Nuremberg, expressly confers jurisdiction over rape under the heading of 'crimes against humanity.'⁸ Jurisdiction, at least over cases of rape (if not also other forms of sexual assault), may be grounded as well in article 2 of the Statute as 'grave breaches of the Geneva Conventions of 1949';⁹ article 3 as 'violations of the laws or customs of war';⁹ and article 4 as 'genocide.'¹⁰ The Tribunal's jurisdiction under the Statute derives both from "international customary law which is not laid down in conventions" and from the "part of conventional international humanitarian law which has beyond doubt become part of international customary law."¹¹

The proceedings before the International Tribunal for the Former Yugoslavia offer a historic opportunity to set a precedent for the international prosecution of perpetrators of rape and other types of sexual assault in times of armed conflict - an opportunity which, in turn, may encourage bringing more resources to bear on violence of a sexual nature in everyday life. Such a breakthrough will not be realized easily. Moreover, in order to receive the support of the international community, this opportunity must be pursued with exemplary attention to due process. From this perspective, we survey a series of issues raised by the prosecution of sex crimes within the scope of the Statute of the Tribunal.¹² It should be kept in mind that, for purposes of this study, we are talking about civilian victims,¹³ who fall under the protection of the Fourth Geneva Convention.¹⁴ We also want to point out that this study is written from the continental perspective of a civil law-based culture.

SCOPE OF PROTECTION

CRIMES OF VIOLENCE OF A SEXUAL NATURE

We start our analysis from the legal point of view that rape and other types of sexual assault should not be regarded as specifically gender-based offenses but as crimes of violence of a sexual nature, although gender should not be disregarded when such crimes are committed against women. If violence is considered to be the determining element, then there is no ground to distinguish between male and female victims, or between adult and child victims. Until now, however, international law has not paid much attention to sexual assaults on men. This is hardly surprising since homosexuality is a topic not freely talked about in many cultures. But sexual assaults on men, both of a homosexual nature and a non-homosexual nature (such as mutilation of genitals), have been reported in the war in the former Yugoslavia. In general, it can be said that customary international humanitarian law does not discriminate on the ground of sex and that, therefore, the law relevant to sexual assaults on women should apply with equal force to men.¹⁵

Although we endorse the view that violence is the common and signal feature of these crimes, and in that regard they should be treated like other offenses within the competence of the Tribunal (such as murder or torture), the sexual element does distinguish them from other crimes of violence because, besides infringing upon the victim's sexual integrity¹⁶

RAPE VERSUS OTHER FORMS OF SEXUAL ASSAULT

Contrary to the trend in domestic penal codes, the offense of 'rape' is not precisely defined in international humanitarian law. We believe that this term may be broadly interpreted to encompass other forms of sexual assault. The Secretary-General's reference in his commentary on the Statute to "rape and other forms of sexual assault, including enforced prostitution,"¹⁷ lends support to this argument. Distinctions with regard to the severity of the crime committed can be reflected in sentencing.

VIOLENCE AGAINST WOMEN FROM A CHANGING SOCIAL AND LEGAL PERSPECTIVE

Developments in international law relating to the problem of violence against women reflect a slow but gradual improvement in the position of women in societies worldwide. At the same time, the evolution of international law, and for our purposes humanitarian law, has had a corresponding liberalizing effect on social attitudes. A quick historical look shows a parallel evolution in humanitarian law toward greater concern for the honour and safety of women, and in society away from the view - widespread until the second half of the eighteenth century - that sexual assaults on women were merely contraventions of family honour or even of the property interests of the relevant males.¹ Since that time, rape and other forms of sexual assault against women have tended increasingly to be treated as crimes prohibited per se. For example, nineteenth-century humanitarian law proscribed "(a)il wanton violence against persons in the invaded country all rape" (Lieber's Code of 1863) and demanded that "(f)amily honour and rights, the lives of individuals, as well as their religious convictions and practice, must be respected" (Oxford Manual of 1880).¹⁶

This century witnessed the first step in a process leading to the identification of rape as a crime under the international law, and specifically as a 'crime against humanity'

Crimes against humanity were first recognized in the Charter and Judgement of the Nuremberg Tribunal, as well in Law No 10 of the Control Council for Germany. Crimes against humanity are aimed at any civilian population and are prohibited regardless of whether they are committed in an armed conflict, international or internal in character¹⁹

ARTICLE 6(C) OF THE NUREMBERG CHARTER PROSCRIBED:

Crimes against humanity namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated²⁰

The enumeration of crimes in article 6(c) of the Nuremberg Charter should be considered exhaustive in form only, not in substance, since this provision incorporates the catchall phrase "and other inhumane acts"²¹ Law No 10 of the Control Council for Germany, which governed proceedings against less senior Axis war criminals who were tried in Germany (1946-1949) by national tribunals established by agreement among the four Allied powers (France, Britain, the United States and the Soviet Union), expressly defined rape as a crime against humanity

Crimes against Humanity Atrocities and offenses, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds whether or not in violation of the domestic laws of the country where perpetrated²²

Moreover, unlike the Nuremberg Charter, Control Council Law No 10 did not limit the category of crimes against humanity to offenses committed "in execution of or in connection with any (other) crime within the jurisdiction" of the tribunal. While it may be debated whether Control Council Law No 10 itself constitutes customary international law, it surely may be read in conjunction with the Nuremberg Charter in support of a liberal construction of article 6(c). The express inclusion of rape as a crime against humanity (and its delinkage from other crimes) in article 5 of the Statute of the International Tribunal for the Former Yugoslavia may be viewed as the culmination of this progressive tendency in international humanitarian law.

The social conditions behind the evolution of international humanitarian law in the latter part of this century have been generated in large part by the emergence of feminism and by the growing awareness among physicians, psychiatrists, and psychologists that sexual assault is a very serious crime of violence of a sexual nature, which causes a wide range of harmful effects for the victim, her family, and her community²³. The Vienna Declaration and Programme of Action, issued at the end of the 1993 UN World Conference on Human Rights, identified violence against women generally, and the specific abuses of sexual harassment and sexual exploitation, as practices incompatible with human dignity. Recommendation 38

asserted that violations of the human rights of women in situations of armed conflict, including murder, systematic rape, sexual slavery, and forced pregnancy, are “violations of the fundamental principles of international human rights and humanitarian law” and require a “particularly effective response.”²⁴ In endorsing the view that gender-based violence is a human rights violation, not a incident of war, the conference delegates took into account reports of the atrocities allegedly being committed in the former Yugoslavia.²⁵ This position reflects the growing tendency in international law to treat crimes against humanity as violations of fundamental human rights from which no derogation is allowed²⁶ and might therefore influence the Tribunal in its interpretation and application of the Statute.

ASPECTS OF PROSECUTION

The history of warfare reveals some rare examples of individuals charged with responsibility for the crime of rape perpetrated by soldiers under their command. One such instance is the Tokyo trials following World War II, which included the ‘Rape of Nanking’ trial and the trial of Admiral Toyoda. The latter was charged, among other things, with “(w)illfully and unlawfully disregarding and failing to discharge his duties by ordering, directing, inciting, causing, permitting, ratifying and failing to prevent Japanese Naval personnel of units and organizations under his command, control and supervision to abuse, mistreat, torture, rape, kill and commit other atrocities.”²⁷

In general, however, international lawyers have paid scant attention to rape and other types of sexual assault committed in armed conflict, leaving arrest and prosecution to the criminal justice system of the country in which such offenses have allegedly been committed. As a result, very few prosecutions have been undertaken - because the legal systems of states engaged in armed conflict generally function erratically, at best, or because the victorious party often grants amnesty to agents of the defeated state, either due generally to a lack of political will or due specifically to a belief that sexual offenses should be concealed from the public. This creates a bizarre situation: in most countries, drivers are routinely fined for parking cars in the wrong place, whilst perpetrators of violent crimes like rape committed in armed conflict escape sanctions of any sort.²⁸ The International Tribunal has the potential to begin to correct the traditional neglect of acts of violence of a sexual nature within the framework of international humanitarian law.

NULLEM CRIMEN, NULLA POENA SINE LEGE

While the field of humanitarian law is still in the process of development, the principle of *nullum crimen, nulla poena sine lege* has traditionally been considered an inviolable requirement of international law.²⁹ It was on the basis of the *nullem crimen* principle that the Statute of the Tribunal was limited to customary law (including conventional law that is ‘beyond doubt’ part of customary law).³⁰ This raises the question whether the Statute correctly identifies the core humanitarian conventions that have passed unequivocally into customary law: “the Geneva Conventions of 12 August 1949 for the Protection of War Victims, the Hague Convention (IV) Respecting the Laws and Customs of War on Land and the Regulation annexed thereto of 18 October 1907, the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948, and the Charter of the International Military Tribunal of 8 August 1945”³¹

While some of the basic rights codified in the four Geneva Conventions³⁷ have clearly attained the status of *jus cogens*, Theodor Meron suggests that the conventions as a whole should not be regarded as customary international law. He argues that while all "contain a core of principles that express customary law," the "identification of the various provisions as customary or conventional law presents the greatest difficulties," particularly for the Fourth Geneva Convention (which is the most pertinent to this discussion). This means that the customary law status of each provision must be considered separately, although more recently Meron has conceded that "for the most part the Fourth Geneva Convention concerns customary law, and even peremptory norms"³⁸. There appears to be no such doubt about the Genocide Convention. In this landmark advisory opinion on the convention, the International Court of Justice recognized that the principles underlying the convention are declaratory of customary law³⁹. Nor is there any question about the customary law status of the Hague Convention (IV)⁴⁰ or the Nuremberg Charter⁴¹.

Additional Protocols I and II to the Geneva Conventions, which date to 1977,⁴² have not been applied very often since their ratification⁴³. While they are not yet deemed unequivocally to form part of customary international law,⁴⁴ some provisions nonetheless do codify customary international law and there seems to be growing support for the treatment of many of the remaining provisions as such⁴⁵. Therefore, we will discuss the application of these instruments (in so far as they appear to be declaratory of customary law) to the prosecution of rape and sexual assault.

An additional question may be raised here: must alleged perpetrators of the crime of rape, or other forms of sexual assault, in the former Yugoslavia (or similar armed conflicts) have been aware that they were committing a crime of a universal character, for which they could be prosecuted? We think not. These offenses are prohibited not only by international humanitarian law but also by the penal law of all civilized nations. The former Socialist Federal Republic of Yugoslavia was a party to the Geneva Conventions and actually went beyond these instruments in expressly criminalizing rape in domestic legislation enacted in fulfilment of its obligation under the conventions to sanction grave breaches⁴⁶. This state was also a party to the Genocide Convention and to Additional Protocols I and II to the Geneva Conventions⁴⁷. It is at least arguable that the new republics arising out of the former Yugoslavia are bound by these international obligations⁴⁸.

UNIVERSAL JURISDICTION

The International Tribunal was established by the Security Council as an exercise of its authority, under chapter VII of the UN charter, to maintain or restore international peace and security, and member states are required, in particular by articles 25 and 48 of the Charter, to cooperate with the Tribunal.⁴⁴ This duty is elaborated upon in Security Council Resolution 827 and the Statute of the Tribunal, which enjoin member states to cooperate in the investigation, arrest, and surrender of suspects and to render other forms of assistance.⁴⁵ Except for Serbia and Montenegro, the new republics of the former Yugoslavia have been admitted to membership in the United Nations and therefore are bound to comply with these obligations. It is nonetheless instructive to inquire whether the sources of humanitarian law that are incorporated into articles 2-5 of the Statute give independent grounds - namely, universal jurisdiction - to detain and surrender persons alleged to have committed the crimes over which the Tribunal has subject matter jurisdiction. A brief review generally suggests that this is so.

In the context of international armed conflict, universal jurisdiction undoubtedly attaches to grave breaches of the Geneva Conventions, and for our particular purpose the Fourth Geneva Convention,⁴⁶ grave breaches of Additional Protocol I,⁴⁷ acts in violation of the Genocide Convention,⁴⁸ and crimes against humanity.⁴⁹ The serious nature of these crimes obliges governments to prevent their commission and to prosecute alleged perpetrators thereof.⁵⁰ Failing appropriate domestic action, the international community may step in to prosecute offenders, notwithstanding considerations of state sovereignty.⁵¹ Moreover, assuming that the offenses of rape and other forms of sexual assault fell outside the scope of these conventional sources but nonetheless could be characterized as war crimes under customary law, universal jurisdiction would arise under the customary law applicable to international armed conflict.⁵²

The law relative to noninternational, or internal, armed conflict,⁵³ however, does not use the term 'war crime' and perhaps would not support prosecution as a matter of customary international law under the principle of universal jurisdiction.⁵⁴ The states that drafted and adopted Additional Protocol II to the Geneva Conventions were reluctant to recognize the existence of rules of customary international law that govern noninternational conflicts. States still consider such conflicts generally to be governed by national, rather than international, law. It may be that for the prosecution of alleged perpetrators of rape and other sexual assaults, committed in areas where the conflict is considered to be of an internal character, "unless the parties to (the) conflict agree otherwise, the only offenses for which universal jurisdiction (would) exist () are "crimes against humanity" and genocide, which apply irrespective to the conflicts' classification."⁵⁵ A similar exception arises where the internal armed conflict is deemed to have the status of a true civil war, or a belligerency.⁵⁶ That is, "common Article 2 of the Geneva Conventions along with all of the more general customary law of war" apply to an internal armed conflict if the combatant group meets accepted criteria for insurgent status. These include "(1) sustained use of force, (2) an armed force with a responsible command structure, (3) general control of significant territory, and (4) the semblance of a governmental structure, especially one negotiating at the international level."⁵⁶ In general, however, in an internal, rather than international, armed conflict, the legal bases to undertake an international prosecution may be narrower, though this area of law remains unsettled.⁵⁷

CRIMINAL RESPONSIBILITY

The Statute of the International Tribunal for the Former Yugoslavia is predicated on individual criminal responsibility for both the perpetrators of crimes within the Tribunal's competence and their superiors. Article 7(1) assigns individual criminal responsibility to persons who "planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution" of crimes within the competence of the Tribunal. Where "acts referred to in article 2 to 5 of the present Statute (were) committed by a subordinate," the perpetrator's superior will be personally criminally responsible "if he 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 thereof."⁸ These provisions, which permit liability to extend up the political and military command structure both for setting policy and for acts of omission, have their legal and historical antecedents in the trials of Axis leaders at Nuremberg and Tokyo following the second world war.⁹ This approach to criminal responsibility was subsequently reiterated and approved in a number of important multilateral initiatives.¹⁰

In the war in the former Yugoslavia, paramilitary activity is very common and very complex. Although under the Third Geneva Convention a resistance force or a guerilla organization cannot be considered an independent party to a conflict, participants in such groups are bound by the Geneva Conventions if their organization can be shown to be related to the state.¹¹ Given the recognition in international law of the responsibility of government, including political leaders, public officials, and even heads of state, for the prevention and punishment of grave breaches of the Geneva Conventions and Protocols, of war crimes under customary law, and of the offenses prosecuted at Nuremberg and Tokyo,¹² the Statute's express rejection of official immunity as a defense may make it possible (as at Nuremberg and Tokyo) to tie the criminal activities of paramilitary and irregular units to the top levels of government. Under article 7(2) of the Statute, "The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment." This provision is particularly important with regard to prosecuting sexual assault in the former Yugoslavia. The systematic manner in which rape and other crimes with a sexual component are alleged to have been committed tends to show that they were a means of implementing the policy of "ethnic cleansing."¹³

SOURCES OF LAW

GRAVE BREACHES OF THE GENEVA CONVENTIONS OF 1949

Article 2 of the Statute gives the Tribunal "the power to prosecute persons committing or ordering to be committed grave breaches of the Geneva Conventions of 12 August 1949."¹⁴ The grave breaches enumerated in article 2 that are relevant here are "(b) torture or inhumane treatment, including biological experiments, (c) willfully causing great suffering or serious injury to body or health."

Rape and other forms of sexual assault can be considered to fall into these categories. The International Committee of the Red Cross' (ICRC) commentary to articles 146 and 147 of the Fourth Geneva Convention states that inhuman treatment is treatment contrary to article 27 of the Fourth Geneva Convention, which expressly prohibits rape, that inhumane treatment should not be confined to physical injury or injury to health but includes measures that cause "grave injury" to human dignity, and that "(o)ther grave breaches of the same character as those listed in Article 147 can be easily imagined"⁶⁵ The commentary goes on to note that "(t)his was well understood when the Yugoslav Penal Code (Article 125) was adopted" by a law dated February 27, 1951, Yugoslavia provided sanctions against not only all the grave breaches set out in the 1949 Geneva Conventions but also, in the provision relating to war crimes against civilian populations, a 'considerably larger' list of punishable offenses that included forced prostitution.⁶⁶ Specifically under article 2(b) of the Tribunal's Statute, the 1984 United Nations Convention against Torture and Other Cruel, Inhumane, or Degrading Treatment or Punishment.⁶⁷ The convention defines torture, in relevant part, as any act by which pain or suffering, whether physical or mental, is inflicted on a person for such purposes as punishing him for an act that 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.⁶⁸

Support for prosecuting rape under article 2(c) of the Statute comes from ICRC Aide-Memoire of December 3, 1992, which asserts that the grave breach of "wilfully causing great suffering or serious injury to body or health" (article 147 of the Fourth Geneva Convention) covers rape.⁶⁹ In a recent report on Bosnia-Herzegovina, Amnesty International also considers "rape and sexual abuse forms of torture or cruel, inhuman or degrading treatment."⁷⁰

Assuming that sexual assault constitutes a grave breach and thus a war crime, it is sufficient for the prosecution to prove a single act, rather than a pattern of conduct.⁷¹ At the same time, it must also be proven that the alleged perpetrator is linked to one side of the armed conflict, acting against neutral citizens or citizens of a belligerent state. This burden may not be particularly significant. In the post-World War II Axis trials, it was established that the alleged perpetrator "need not necessarily be a soldier."⁷² However, the situation in the former Yugoslavia is less clear than in World War II, so it remains to be seen whether this requirement will be as readily fulfilled here. Moreover, in general with respect to prosecuting grave breaches, it is necessary to establish that the offenses in question have occurred in the context of an international armed conflict.⁷³ The Tribunal will therefore have to determine on a case-by-case basis whether the context in which the offenses allegedly occurred was international or internal in nature.⁷⁴

VIOLATIONS OF THE LAW OF CUSTOMS OF WAR

Article 3 of the Statute gives the Tribunal "the Power to prosecute persons violating the laws or customs of war" as set out in the 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land, and annexed regulations, and as "interpreted and applied" by the Nuremberg Tribunal.⁷⁵ For the most part, the offenses listed in the Statute relate to methods of waging war that are not directly

relevant here, such as use of "weapons calculated to cause unnecessary suffering" or attacks on undefended buildings or settlements. However, the enumeration in article 3 of such offenses is not exhaustive. "We believe that with regard to the crimes of rape and other forms of sexual assault, article 46 of the 1907 Hague Convention (IV), providing protection for "family honour and rights (and) the lives of persons," is one set of protections that can be read into article 3 of the Statute of the International Tribunal for the Former Yugoslavia." But we would suggest more broadly that article 3 of the Statute encompasses any violations of customary international law that can be considered war crimes. We believe that certain provisions of the Fourth Geneva Convention and of Additional Protocol I are declaratory of customary international law relating to war crimes and would permit the Tribunal to prosecute rape and other forms of sexual assault as such within the scope of article 3 of the Statute. With regard to sexual offenses, the relevant provisions include article 27 of the Fourth Geneva Convention, which is derived from article 46 of the Hague Convention (IV). Article 27 is widely held to codify customary international law.¹⁶ It expressly prohibits rape, enforced prostitution, and any form of incident assault in the context of an international armed conflict. Similarly, article 76(1) of Additional Protocol I expressly prohibits "rape, forced prostitution and other forms of indecent assault."¹⁷ This provision (like article 75 of Additional Protocol I) offers a catchall protection for persons not protected by any other provisions of the Geneva Conventions or Additional Protocol I.¹⁸

Additional Protocol I also identifies as grave breaches "inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination" that are "committed wilfully and in violation of the Conventions or the Protocol."¹⁹ Even if Additional Protocol I cannot in its entirety be considered to be part of customary international law, it is to be expected that this provision, article 85(4)(c) can in any event be applied with regard to violations of the 1949 Geneva Conventions and those parts of Protocol I that can be considered customary international law, including rape and other sexual assaults.²⁰ While the prosecution would have to prove the element of racial discrimination here, this provision, unlike the Genocide Convention,²¹ does not require a showing that the crime was committed with the discriminatory intent of destroying a group of persons. The prosecution must, however, establish that the crimes were committed wilfully in violation of the Geneva Conventions or Additional Protocol I.²² At the moment, it remains unclear as an evidentiary matter how to prove these elements.

Another rule of customary international law set out in Additional Protocol I concerns the necessity of distinguishing between civilians and combatants in armed conflict and of justifying attacks on the basis of military necessity.²³ This rule can surely be considered part of customary international law: it was first articulated in the Declaration of St. Petersburg of 1868 and has since been reaffirmed in many multilateral instruments, such as Resolution XXVIII, adopted at the Twentieth International Conference of the Red Cross, held in 1965 in Vienna, and General Assembly Resolution 2444 (XXIII).²⁴

REPRISALS

Additional Protocol I to the Geneva Conventions prohibits rape and other forms of sexual assault as reprisals against civilians.⁸⁷ Even if this instrument is not considered applicable under the Tribunal's Statute, reprisals are prohibited against protected persons under the Fourth Geneva Convention.⁸⁸ The application of these rules is subject to the customary international law of armed conflict.⁸⁹

NONINTERNATIONAL CONFLICT

To the extent that rape or other forms of sexual assault allegedly perpetrated in the region of the former Yugoslavia have been committed in circumstances that are not regarded as international armed conflict,⁹⁰ it is uncertain whether the Tribunal would have jurisdiction under the laws or customs of war as embodied in the Statute (if the crimes can be considered crimes against humanity or genocide, jurisdiction would attach even in the conflict were internal). Nonetheless, we believe there is great normative force behind the customary law applicable in noninternational armed conflict and offer a brief discussion.

Common article 3 of the Geneva Conventions of 1949 provides a list of fundamental protections applicable in armed conflict. Relevant here is the prohibition on "violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture" and "outrages upon personal dignity, in particular humiliating and degrading treatment."⁹¹ Although common article 3 states that it is applicable specifically to noninternational armed conflict, the International Court of Justice ruled in the Nicaragua case that these principles constitute "elementary considerations of humanity" and they cannot be breached in an armed conflict, regardless of whether it is international or national in character.⁹² The Secretary-General's Report cites this opinion with approval (although in a discussion of crimes against humanity).⁹³ The Final Report of the Commission of Experts takes much more limited view: "(V)iolations of the laws or customs of war referred to in article 3 of the statute of the International Tribunal are offenses when committed in international, but not in internal armed conflict."⁹⁴

Another possibility in cases of sexual assault committed in noninternational armed conflict is to look to Additional Protocol II. Article 4 identifies 'fundamental guarantees' and contains a prohibition on rape, enforced prostitution, and other forms of sexual assault. By its terms, Additional Protocol II applies only where the armed conflict takes "place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol."⁹⁵ According to the ICRC commentary on Additional Protocol II, this threshold for application "seems fairly high" but realistic since the insurgents must be in a position to implement the protocol.⁹⁶

Meron, however, criticizes "the proposition that beyond the express provisions of Protocol II, regulation of internal armed conflict is relegated to the domestic law of states"

Protocol II also contains a basic core of human rights. Some of these rights have already been recognized as customary in human rights instruments and should also be considered as such when stated in instruments of humanitarian law. This is confirmed by the recent ICRC commentary (cited above) ⁹⁷

THE ICRC COMMENTARY SUPPORTS MERON'S ARGUMENT:

Protocol II contains virtually all the irreducible rights of the Covenant on Civil and Political Rights. These rights are based on rules of universal validity to which States can be held, even in the absence of any treaty obligation or any explicit commitment on their part.

(Even if the combatants are not party to the protocol) this does not mean that anything is permitted. "The human person remains under the protection of the principles of humanity and the dictates of the public conscience". Since they reflect public conscience, the principles of humanity actually constitute a universal reference point and apply independently of the Protocol.

(Moreover,) the existence of customary norms in internal armed conflicts should not be totally denied. An example that might be given is the respect for and protection of the wounded. Irrespective of the qualification of the conflict as an internal or international conflict, the codes of conduct are not fundamentally different ⁹⁸

GENOCIDE

Article 4 of the Statute is modeled closely on the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. The Statute defines the offense as follows: "Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such"⁹⁹ In enumerating the acts that constitute genocide (where the requisite intent is present), the Statute also conforms to the Genocide Convention:

- (a) killing members of the group
- (b) causing serious bodily or mental harm to members of the group
- (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part
- (d) imposing measures intended to prevent births within the group
- (e) forcibly transferring children of the group to another group ¹⁰⁰

For our purposes, the relevant acts are enumerated in article 4(2)(b)-(d)

In alleging genocide, the prosecution has an advantage in that a conviction may be had not only for any of the above acts but also for "conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide, and complicity in genocide"¹⁰¹ Furthermore, genocide is not restricted to situations involving armed conflict (international or internal) but may be committed in times of peace. On the other hand, it is not yet clear what level of proof will satisfy the intent requirement. This will depend in part on whether ethnic cleansing can be proven as the aim, or at least an aspect, of the war in former Yugoslavia. Moreover, although a single act from the above list (for example, castration) performed by a private individual apparently can constitute genocide,¹⁰² it remains to be seen under what conditions such an individual deed will be considered genocide by the International Tribunal.

CRIMES AGAINST HUMANITY

Article 5 of the Statute creates jurisdiction over crimes against humanity. As noted earlier, the Statute expressly includes rape in this provision, and we construe this reference to "rape" to include other forms of sexual assault.¹⁰³

Specifically, article 5 confers on the Tribunal "the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population." This provision lists the following acts as crimes against humanity

- (a) murder,
- (b) extermination,
- (c) enslavement,
- (d) deportation
- (e) imprisonment,
- (f) torture,
- (g) rape,
- (h) persecutions on political, racial and religious grounds,
- (i) other inhumane acts

THE SECRETARY-GENERAL'S REPORT OFFERS THIS DEFINITION OF CRIMES AGAINST HUMANITY:

inhumane acts of a very serious nature, such as wilful killing, torture or rape, committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds. In the conflict in the territory of the former Yugoslavia, such inhumane acts have taken the form of so-called 'ethnic cleansing' and widespread and systematic rape and other forms of sexual assault, including enforced prostitution.¹⁰⁴

In his commentary to the Statute, the Secretary-General takes the position that this category of offense is applicable only to armed conflict.¹⁰⁵ We disagree. We would suggest that since Nuremberg the law of crimes against humanity has evolved to the point that it is immaterial whether they are committed in armed conflict or not. This is the position taken by the Draft Code of Crimes against the Peace and Security of Mankind in the provision modeled on article 6(c) of the Nuremberg Charter and also by many international law experts.¹⁰⁶

As quoted above, the Secretary-General's Report specifies that such crimes must be perpetrated as part of a "widespread or systematic attack" against a civilian population. The reference to civilian 'population' indicates that the category of crimes against humanity excludes isolated incidents. Similarly, 'widespread' refers to the commission of such crimes on a large scale or to a pattern of abuse. Reports and other available information relating to the former Yugoslavia point to a pattern in which an area is conquered, the women are taken away and raped while in detention, or rapes are committed on the spot in the presence of the victim's family. 'Systematic' refers to a pattern of abuse of which rape is one element; in other words, rape is used as a tool of war, given its potential to cause great distress to the victim, her family, and her community. Reports also tend to point to such a systematic use of rape. It has been alleged that when an area is conquered, the inhabitants are subjected both to rape and other types of sexual assault and to murder, particularly in and around detention camps. This review suggests that

article 5 does not contemplate jurisdiction for inhumane acts that do not appear to form part of a larger attack.¹⁰⁷ As elaborated in the Secretary-General's Report, article 5 also incorporates an intent element: the commentary refers to inhumane acts committed on "national, political, ethnic, racial or religious" grounds. This element should be easier to prove than the intent requirement in the crime of genocide (under article 4) because it is necessary only to show that the alleged perpetrators knew or should have known that his conduct could contribute to the destruction of the group in question.¹⁰⁸

Finally, the prosecution will have to prove state involvement to make out a case of crimes against humanity. This element may not be too difficult to satisfy because it will suffice to show that the government, which is responsible for prevention and suppression, instigated or at least tolerated such crimes.¹⁰⁹

In sum, the distinguishing features of crimes against humanity are their serious nature and the context in which they take place. Such crimes can be committed by anybody: it is not necessary to establish that the perpetrator was a belligerent.¹¹⁰

PRACTICAL APPLICATION OF THE LAW

The possible sources of law upon which the prosecution might rely in cases of rape and other types of sexual assault are described above. We have tried to stress that, on the one hand, the Tribunal's prosecution of such crimes in the former Yugoslavia fits within the natural development of international humanitarian law, on the other hand, it will be difficult for the prosecution to prove that a specific offense falls under one or more of the articles that set out the subject-matter jurisdiction of the Tribunal. As in a domestic prosecution, each element of the alleged crime will have to be proven and will require a great deal of case preparation. Here we focus on some evidentiary issues.

Every developed legal system has rules of evidence that guide the process of gathering and assessing data to support a factually and legally sound result. The Commission of Experts established under Security Council Resolution 780 was directed by the Council to conduct an inquiry with a view to providing the Secretary-General with its conclusions on evidence of grave breaches of the Geneva Conventions and other violations of international humanitarian law in the territory of the former Yugoslavia. However, when the Commission started work in 1992, there were no rules of procedure and evidence related to possible future trials to guide it. In addition, the Commission had no authority to develop policy with regard to future prosecutions. Until the Tribunal itself was constituted and later adopted evidentiary rules,¹¹¹ the Commission remained uncertain about the importance and status of any evidence it collected and on the manner in which the anticipated rules of procedure and evidence could or should influence its investigations. Due to this lack of guidance, the Commission had to chart its own course with respect to seeking out and evaluating data. Especially in relation to the investigation of rape and sexual assault, the nature of the Commission's mandate, combined with the lack of direction on evidentiary matters (not to mention the practical constraints on fact-finding while an armed conflict is in progress), complicated its task. As an initial point, it should be noted that questions of evidence relate very directly both to the law of evidence and to the applicable substantive law. We have already seen that rape and sexual assault might be prosecuted under several articles of the Tribunal's Statute, each with its own evidentiary requirements. Given the variety among domestic legal systems in the proof of

rape cases - whether for example proof of force and penetration is required, whether prior sexual history is admissible, whether corroboration is required, and so forth - it was very difficult to determine what evidence to collect. For example, from a prosecutorial perspective in a legal system that requires corroboration (as most legal systems do), it hardly seems to make sense to collect statements of victims of rape if no corroboration can be found. While this concern calls into question the prosecutorial value of examining statements by individual rape victims, the Commission's mandate was not focused on prosecution, and it could therefore rely on such statements as part of the process of compiling evidence of violations of international humanitarian law. In particular, given the possibility of prosecuting rape as a crime against humanity, lack of corroboration was not an insurmountable obstacle - more important was to collect evidence that such crimes were being committed in a systematic way or were encouraged by policy.

Rule 96 of the Tribunal's Rules of Procedure and Evidence sets out the following requirements in "cases of sexual assault"

- (i) no corroboration of the victim's testimony shall be required
- (ii) consent shall not be allowed as a defence if the victim
 - (a) has been subjected to or threatened with or has had reason to fear violence, duress, detention or psychological oppression, or
 - (b) reasonably believed that if she did not submit, another might be so subjected, threatened or put in fear
- (iii) before evidence of the victim's consent is admitted, the accused shall satisfy the Trial Chamber *in camera* that the evidence is relevant and credible
- (iv) prior sexual conduct of the victim shall not be admitted in evidence.¹²

Rule 96(i) resolves the problem of corroboration noted above, easing the prosecution's burden. However, the due process function that corroboration is claimed to serve must be met by other procedural protections, in particular, cross-examination, and it is not clear whether rule 96(ii) as written poses an unacceptable risk of harassment of victims who testify. Rule 96(iii), which was added in January 1995,¹³ as well as the establishment of the victim and witness unit at the International Tribunal, may decrease this risk.

A final concern relates to lack of familiarity on the part of defendants and witnesses from a civil law tradition with the largely common law-oriented proceedings before the Tribunal. The potential for misunderstanding, errors, and other problems must not be underestimated even with representation provided by counsel. In the future, this problem might be alleviated by the establishment of a permanent tribunal with a well-developed and broadly disseminated set of rules of procedure and evidence.

The situation in the former Yugoslavia cried out for a response from the international community. The United Nations took up this challenge by giving the crimes of and sexual assault a place in the Statute of the International Tribunal. The enumeration of rape as one of the modes of committing a crime against humanity in article 5 represents a watershed in the history of international law: this is the first time that rape has been so characterized in an instrument of this statute. If the Tribunal succeeds in prosecuting the planners and perpetrators of these crimes, we may anticipate a deterrent effect in the future armed conflicts and, possibly, more serious attention to sexual assault in domestic legal systems.

NOTEN

Editor's note: research for this article was updated through December 31, 1994. As this article went to press for the Criminal Law Forum, revisions reflecting a few of the amendments made in January 1995 to the Tribunal's Rules of Procedure and Evidence were added. For recent developments in this discussion on rape in warfare and the latest developments in the procedure of the Tribunal the reader is referred to the other articles on the subject in this book.

1. For general information on rape and other forms of sexual assault in times of armed conflict see Susan Brownmiller, *Against Our Will: Men, Women, and Rape* (1975); Theodor Meron, *Henry's Wars and Shakespeare's Laws: Perspectives on the Law of War in the Later Middle Ages* (1993).
2. E.g., CSCE Rapporteurs (Corell, Turk, Thune), *Moscow Human Dimension Mechanism to Bosnia, Herzegovina, and Croatia: Proposal for an International War Crimes Tribunal for the Former Yugoslavia* (1993); Letter from the Permanent Representatives of Sweden to the Secretary General, Feb. 18, 1993, U.N. Doc. S/2530/(1993), annexing a summary of this report and the text of a decision by CSCE Participating States on the report; Amnesty International, *Bosnia, Herzegovina, Rape and Sexual Abuse by Armed Forces* (1993); Helsinki Watch, *War Crimes in Bosnia, Herzegovina* (1992); Theodor Meron, Editorial Comment, *Rape as a Crime under International Humanitarian Law*, 8/Am. J. Int'l L. 425 & n. 6 (1993).
3. Letter from the Secretary General to the President of the Security Council, May 24, 1994, U.N. Doc. S/1994/674 (1994), transmitting Final Report of the Commission of Experts Established pursuant to Security Council Resolution 780 (1992), available in U.N. Gopher/Current Information/Secretary General's Report (hereinafter *Final Report*).
4. The Commission of Experts was set up by S.C. Res. 780, U.N. SCOR 47th Year, 1992, S.C. Res. & Dec. at 36, U.N. Doc. S/INF/48 (1992), reprinted in appendix A of this issue of *Criminal Law Forum*.
5. The Security Council set up the International Tribunal through S.C. Res. 808, U.N. SCOR 48th Year, 31/5th mtg. at 1, U.N. Doc. S/RES/808 (1993), reprinted in appendix A of this issue of *Criminal Law Forum* and available in U.N. Gopher/Documents/Security Council Resolutions, S.C. Res. 827, U.N. SCOR 48th Year, 32/17th mtg. at 1, U.N. Doc. S/RES/827 (1993), reprinted in appendix A of this issue of *Criminal Law Forum* and in 32 ILM 1203. In this connection, see Report of the Secretary General pursuant to Paragraph 2 of Security Council Resolution 808 (1993), U.N. Doc. S/25704 & Add. I (1993), reprinted in appendix B of this issue of *Criminal Law Forum*, in 32 ILM 1163 (hereinafter *Secretary General's Report*). The Statute of the International Tribunal is set out as an annex to Secretary General's Report, supra, and is reprinted in appendix B of this issue of *Criminal Law Forum* and in 32 ILM 1192 (Hereinafter *Statute*). For background, see Peter Burns, *The International Criminal Tribunal: The Difficult Union of Principle and Politics*, in this issue of *Criminal Law Forum*.
6. Secretary General's Report, supra note 5, ¶ 11, 48. Statute, supra note 5, art. 5.
7. On the Tribunal's jurisdiction over such crimes, see infra section entitled *Crimes against Humanity*. On the relevant provision of the Nuremberg Charter, see infra text accompanying note 20.
8. On the Tribunal's jurisdiction over such crimes, see infra section entitled *Grave Breaches of the Geneva Conventions of 1949*.
9. On the Tribunal's jurisdiction over such crimes, see infra section entitled *Violations of the Laws or Customs of War*.
10. On the Tribunal's jurisdiction over such crimes, see infra section entitled *Genocide*.
11. Secretary General's Report, supra note 5, ¶ 33-35; see section infra entitled *Violations of the Laws or Customs of War*.
12. For a more technical discussion, see *Final Report*, supra note 3, annex II.
13. While victims of rape and other forms of sexual assault can, of course, be prisoners of war or belligerents, we have chosen to focus on the law concerning civilians, as this category embraces the majority of sexual assault victims in the region of the former Yugoslavia.
14. Geneva Convention on Relative to the Protection of Civilian Persons in Time of War, adopted Aug. 12, 1949, 75 U.N.T.S. 287 (hereinafter *Geneva Convention IV*).
15. See R.J. Cook, *Accountability in International Law for Violations of Women's Rights by Non-state Actors*, in *Reconciling Reality: Women and International Law* 93-104, 05 (American Society of International Law Studies in Transnational Legal Policy No. 25, Dorinda G. Dallmeyer, ed. 1993).

16 See Vikki Bell, *Beyond the "Thorny Question" Feminism, Foucault, and the Desexualisation of Rape*, 19 *Int'l J. Soc. L.* 83 (1991), Hannecke Acker & Marijke Rawie, *Seksueel geweld tegen vrouwen en meisjes* 16 (Ned. Ministerie van Sociale Zaken en Werkgelegenheid 1982), *Seksueel geweld iedere vrouw en ieder meisje kan er mee te maken krijgen* 7 (Heleen de Boer et al. eds., 1988)

17 Secretary-General's Report, *supra* note 5, 48

18 Lieber's Code, a comprehensive set of principles governing the conduct of belligerents in enemy territory, was drafted for the Union forces in the US Civil War. This was the first attempt to codify the customary law of warfare, and Lieber's Code became the basis for later efforts at codification on the international level. Francis Lieber, *Instructions for the Government of Armies of the United States in the Field*, promulgated Apr. 24, 1863, art. 44, reprinted in *The Laws of Armed Conflicts* 3 (Dietrich Schindler & Jiri Toman eds. 1988). The Oxford Manual was drafted by Gustave Moynier under the auspices of the Institute of International Law as a model for domestic legislation of the laws and customs of war. *Laws of War on Land (Oxford Manual)*, adopted Sept. 9, 1880, art. 49, reprinted in *The Laws of Armed Conflicts*, *supra*, at 35. A similar provision appears in the Declaration of Brussels, an early draft codification of the laws of war at the international level. *Final Protocol and Project of an International Declaration Concerning the Laws and Customs of War*, Aug. 27, 1874, art. 38 reprinted in *The Laws of Armed Conflicts*, *supra*, at 25 (demanding respect for "(f)amily honour and rights, and the lives and property of persons, as well as their religious convictions and their practice")

All these documents were influential in the preparation of both Hague Convention (II) with Respect to the Laws and Customs of War on Land, with Annexed Regulations, July 29, 1899, and Hague Convention (IV) Respecting the Laws and Customs of War on Land, with Annexed Regulations, Oct. 18, 1907 (hereinafter Hague Convention of War on Land, with Annexed Regulations, Oct. 18, 1907 (hereinafter Hague Convention IV), reprinted in parallel columns in *The Laws of Armed Conflicts*, *supra* at 63.

19 Secretary-General's Report, *supra* note 5, * 47 (citations omitted)

20 The International Military Tribunal at Nuremberg was established pursuant to Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 82 U.N.T.S. 279. The Charter of the International Military Tribunal at Nuremberg is set out in *id.* at 279 (hereinafter Nuremberg Charter). The proceedings are reported in the multivolume *Trial of the Major War Criminals before the International Military Tribunals, Nuremberg, 14 October 1945-1 October 1946 (1947-1949)*. For the judgment, see 22 *id.* at 411 (hereinafter Nuremberg Judgment).

The International Military Tribunal for the Far East was established in Tokyo pursuant to Special Proclamation by the Supreme Commander for the Allied Powers, Establishment of an International Tribunal for the Far East, Jan. 19, 1946, 4 *Bevans* 20, reprinted in Benjamin Ferencz, *Defining International Aggression* 522 (1975). It operated pursuant to Charter of the International Military Tribunal for the Far East, Jan. 19, 1946 (as amended Apr. 26, 1946), 4 *Bevans* 21, reprinted in Benjamin Ferencz, *supra*, at 523.

The proceedings are available on microfilm. *Record of the Proceedings of the International Military Tribunal for the Far East, Tokyo, Japan (1946-1948)* (hereinafter IMTFE Record of Proceedings). Majority and dissenting opinions have been collected in *The Tokyo Judgment: The International Military Tribunal for the Far East, 29 April 1946-12 November 1948* (Bert V.A. Roling & Christiaan Frederik Ruter eds., 1977) (hereinafter Tokyo Judgment). For additional sources, see *infra* note 27.

21 See Egon Schwelb, *Crimes against Humanity*, 23 *Brit. Y.B. Int'l L.* 178, 191 (1946)

22 Allied Control Council Law No. 10 Def. 20, 1945, art. 11(1)(c), in *Control Council for Germany, Official Gazette*, Jan. 31, 1946, at 50, reprinted in *Documents on Prisoners of War* 304 (Naval War College International Law Studies Vol. 60 Howard S. Levie ed. 1979) (including "rape" under the heading of crimes against humanity as one of the "atrocities and offences"). On the nexus between this law and the Nuremberg Charter, see Frank C. Newman, *United Nations Human Rights Covenants and the United States Government: Diluted Promises, Foreseeable Futures*, 42 *DePaul L. Rev.* 1241, 1250-51 (1993); Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 *Yale L.J.* 2537, 2587-90 (1991).

The proceedings under control council law No. 10 are reported in the multivolume *Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10, Nuremberg, October 1946-April 1949 (1949-1953)* (hereinafter *Trials of War Criminals*). As with Control Council Law No. 10, the International Military Tribunal for the Far East considered rape a war crime. 2 *Tokyo Judgment*, *supra* note 20, at 965, 971-72, 988-89, 1 *id.* at 385. For a discussion, see Meiron, *supra* note 2, at 425-26. See generally *infra* section entitled 'Aspects of Prosecution.'

23 See e.g. Ann Wolbert Burgess & Lynda Lytle Holmstrom, *Rape Victims of Crises* (1974), Anne E. Goldfeld et al., *The Physical and Psychological Sequelae of Torture: Symptomatology and Diagnosis*, 259 JAMA 2725 (1988), Shana Swiss & Joan E. Giller, *Rape as a Crime of War: A Medical Perspective*, 270 JAMA 612 (1993).

24 Vienna Declaration and Programme of Action, U.N. Doc. A/CONF. 157/24 (pt. I), at 20 (1993) reprinted in 32 ILM 1661.

25 See Donna J. Sullivan, Current Developments, Women's Human Rights and the 1993 World Conference on Human Rights, 88 Am. J. Int'l L. 152, 155-56 (1994).

26 Rape and other forms of sexual assault can be caught by both conventional and customary law prohibitions on torture or other cruel, inhuman, or degrading treatment and on forced labor or enslavement, - offenses that come within Nuremberg Charter, supra note 20, art. 6(c), Draft Code of Crimes against the Peace and Security of Mankind art. 21, in Report of the International Law Commission on Its Forty-third Session, U.N. GAOR 46th Sess., Supp. No. 10, at 238, U.N. Doc. A/46/10 (1991) (hereinafter Draft Code). A selective set of references follows.

With regard to torture, see Universal Declaration of Human Rights art. 5, G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948), Geneva Convention IV, supra note 14, arts. 3, 27, 32, International Covenant on Civil and Political Rights, adopted Dec. 19, 1966, art. 7, 999 U.N.T.S. 171, Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. GAOR, 39th Sess., Supp. No. 51 at 197, U.N. Doc. A/39/51 (1984) (hereinafter Torture Convention), see also European Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature No. 4, 1950, art. 3, Europ. T.S. 5, European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, done Nov. 26, 1987, Europ. T.S. 126.

With regard to forced labor, see ILO Convention (No. 29) Concerning Forced or Compulsory Labour, adopted June 28, 1930, 39 U.N.T.S. 55 (as amended 1946), ILO Convention (No. 105) Concerning the Abolition of Forced Labour, adopted June 25, 1956, 320 U.N.T.S. 291, International Covenant on Civil and Political Rights, supra art. 8.

With regard to slavery, see Slavery Convention, Sept. 25, 1926, L.N.T.S. 253, Protocol Amending the Slavery Convention of September 25, 1926, opened for signature Dec. 7, 1953, 212 U.N.T.S. 17, Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices similar to Slavery, adopted Sept. 7, 1956, 266 U.N.T.S. 3, Universal Declaration of Human Rights, supra art. 4, International Covenant on Civil and Political Rights, supra art. 8. For background, see Theodor Meron, Human Rights and Humanitarian Norms as Customary Law (1989) (hereinafter Meron, Human Rights); Theodor Meron, Editorial Comment, War Crimes in Yugoslavia and the Development of International Law, 88 Am. J. Int'l L. 78 (1994) (hereinafter Meron, War Crimes in Yugoslavia); Sydney L. Goldenberg, Crimes against Humanity, 1945-1970: A Study in the Making and Unmaking of International Criminal Law, 10 W. Ont. L. Rev. 1 (1971).

27 William H. Parks, Command Responsibility for War Crimes, 62 Mil. L. Rev. 1, 69-70 (1973), see also Brownmiller, supra note 1, at 56-62. For the official transcript of the proceedings, in *United States v. Soema Toyoda*, see IMTIE Record of Proceedings, supra note 20. The Rape of Nanjing trial is reported in 4 UN War Crimes Comm'n Law Reports of Trials of War Criminals 87 (1947). On the International Military Tribunal for the Far East, see Richard H. Minear, *Victors' Justice: The Tokyo War Crimes Trial* (1971), Bert V.A. Roling & Antonio Cassese, *The Tokyo Trial and Beyond* (1993), see also sources cited supra note 20.

28 See Brownmiller, supra note 1, ch. 3.

29 Secretary-General's Report, supra note 5, ¶ 34.

30 *Id.* ¶¶ 34-35.

31 *Id.* ¶ 35, these are codified in Statute, supra note 5, arts. 2-5.

32 Geneva Convention IV, supra note 14, Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, adopted Aug. 12, 1949, 75 U.N.T.S. 31 (hereinafter Geneva Convention I), Geneva Convention for the Amelioration of the Condition of Wounded, Sick, Shipwrecked Members of Armed Forces at Sea, adopted Aug. 12, 1949, U.N.T.S. 85 (hereinafter Geneva Convention II), Geneva Convention Relative to the Treatment of Prisoners of War, adopted Aug. 12, 1949, 75 U.N.T.S. 135 (hereinafter Geneva Convention III).

- 33 Compare Meron, Human Rights, *supra* note 26, at 46, with Theodor Meron, *The Case for War Crimes Trials in Yugoslavia* Foreign Aff. Summer 1993, at 122, 129 (hereinafter Meron, War Crimes Trials), and Jordan J. Paust, *Applicability of International Criminal Laws to Events in the Former Yugoslavia*, 9 Am. U.J. Int'l L. & Pol'y 449-512 n.43 (1994) ("The nature of most portions of the Geneva Conventions are now viewed as customary law") See generally Meron, Human Rights, *supra*, at 41-62, Theodor Meron, *The Geneva Conventions as Customary Law* 81 Am. J. Int'l L. 348 (1987) 34. Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, 1951 I.C.J. 15-23 (May 28) (considering Convention on the Prevention and Punishment of the Crime of Genocide, adopted Dec. 9, 1948, 78 U.N.T.S. 277 (hereinafter Genocide Convention)) Meron, Human Rights, *supra* note 26, at 20, agrees that Genocide Convention, *supra*, embodies customary law.
- 35 Hague Convention IV, *supra* note 18, Nuremberg Judgment, *supra* note 20, at 414. Secretary-General's Report, *supra* note 5, ¶ 42.
- 36 See Affirmation of the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal, G.A. Res. 95 (I), U.N. doc. A/64/Add.1, at 188 (1946) (hereinafter Affirmation of Nuremberg Principles).
- 37 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, adopted June 8, 1977, 1125 U.N.T.S. 3 (entered into force Dec. 7, 1978) (hereinafter Additional Protocol I), Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, adopted June 8, 1977, 1125 U.N.T.S. 609 (entered into force Dec. 7, 1978) (hereinafter Additional Protocol II).
- 38 According to Meron, Human Rights, *supra* note 26, at 76 & nn.209-210, in the Iran-Iraq conflict both the International Committee of the Red Cross and the parties invoked Additional Protocol I, *supra* note 37.
- 39 "While the conventions are now unquestionably part of customary international law and therefore binding on nonparties, the status of the protocols is less secure and it is likely that only states that have affirmatively agreed to be bound by them are in fact so bound." Timothy L.H. McCormack & Gerry J. Simpson, *The International Law Commission's Draft Code of Crimes against the Peace and Security of Mankind: An Appraisal of the Substantive Provisions*, 5 Crim. L.F. 1, 37 (1994).
- 40 See Nico Keijzer, *Internationale berechting van oorlogsmisdrijven in het voormalige Joegoslavië*, Militair Rechterlijk Tijdschrift, Nov.-Dec. 1993, at 62-66, Meron, Human Rights, *supra* note 26 at 62-78, Howard S. Levie, *The 1977 Protocol I and the United States*, 38 St. Louis Univ. L.J. 469 (1994).
- 41 ¶ 4. The Geneva Conventions of 12 August 1949. Commentary 590 n.1, 594 (Jean S. Pictet gen. ed., 1958) (citing Yugoslav Penal Code art. 125, which went beyond Geneva convention IV, *supra* note 14, art. 147, in criminalizing the following offenses in fulfillment of the obligation under art. 146 to enact domestic legislation to punish grave breaches: forced change of nationality, forced conversion to another religion, forced prostitution, intimidation and terrorization, collective punishments, illegal detention in a concentration camp, and starving of the population) (hereinafter Geneva Conventions Commentary). See *infra* note 66 and accompanying text.
- 42 Office of Public Information, United Nations, *The Crime of Genocide: A United Nations Convention Aimed at Preventing Destruction of Groups and at Punishing Those Responsible* 4 (1973) (hereinafter *Crime of Genocide*), Jiri Toman, *Index of the Geneva Conventions for the Protection of War Victims of 12 August 1949*, at 194 (1973).

43 See Vienna Convention on Succession of States in Respect of Treaties, opened for signature Aug 23, 1978, arts 34-35, U.N. Doc A/CONF 8031/Corr 2 (1978), reprinted in 17 ILM 1488 Paust, *supra* note 33, at 499-504, concludes that the new states in the region are bound by Yugoslavia's treaty obligations under the UN Charter, the Geneva Conventions, additional Protocols I and II, the Genocide Convention, the Torture Convention, and other international humanitarian law instruments. To similar effect, see Meron, War Crimes Trials, *supra* note 33, at 129 ("The case for applying the grave breaches provisions to the Yugoslav conflict is strengthened by the fact that all states involved have agreed to honor the obligations of the former Yugoslavia under the Geneva conventions. All (these) states have also accepted the 'Statement of Principles' approved by the London Conference on Yugoslavia (in 1992), concerning compliance with international humanitarian law.")

44 See Secretary-General's Report, *supra* note 5, ¶¶ 125-126

45 In S.C. Res 827, *supra* note 5, ¶ 4, the Security Council (d)ecide(d) that all States shall cooperate fully with the International Tribunal and its organs in accordance with the present resolution and the Statute of the International Tribunal and that consequently all States shall take any measures necessary under their domestic law to implement the provisions of the present resolution and the Statute, including the obligation of States to comply with requests for assistance or orders issued by a Trial Chamber under Article 29 of the Statute()"

Statute, *supra* note 5, art 29, reiterates the obligation on states to cooperate and sets out a non-exhaustive list of areas in which assistance must be rendered

1. States shall cooperate with the International Tribunal in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law

2. States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including, but not limited to

a) the identification and location of persons, b) the taking of testimony and the production of evidence, c) the service of documents, d) the arrest or detention of persons, e) the surrender or the transfer of the accused to the International Tribunal

46 Grave breaches are listed in Geneva Convention I, *supra* note 32, art 50, Geneva Convention II, *supra* note 32, art 51, Geneva Convention III, *supra* note 32, art 130, Geneva Convention IV, *supra* note 14, art 147. The obligations on states with respect to punishing grave breaches are set out in Geneva Convention I, *supra*, art 49, Geneva Convention II, *supra*, art 50, Geneva Convention III, *supra*, art 129, Geneva Convention IV, *supra*, art 146

On the universality of jurisdiction over grave breaches of the Geneva Conventions, see 4 Geneva Conventions Commentary, *supra* note 41, at 587, Claude Pilloud et al. International Comm. of the Red Cross, Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, at 975 (Yves Sandoz et al. eds., 1987). For a detailed discussion asserting universal jurisdiction over grave breaches of the Geneva Conventions, war crimes and crimes against humanity, genocide and certain other infractions of international law, see Kenneth C. Randall, Universal Jurisdiction under International Law, 66, *Te L. Rev.* 785, 800-37 (1988)

47 Additional Protocol I, *supra* note 37, art 85. Pilloud et al., *supra* note 46, at 973, notes that Additional Protocol I, *supra* arts 85-91, "supplements the articles of the Convention relating to the repression of breaches, while extending the application of that system of repression to breaches of the Protocol." In particular, Additional Protocol I supplements the list of grave breaches set out in the Geneva Conventions, and "acts described as grave breaches in the conventions are grave breaches of the Protocol if they are committed against new categories of persons and objects protected under the Protocol." Pilloud et al., *supra*, at 977. Moreover, "grave breaches of the Conventions and the Protocol are qualified as war crimes." *id.*

48 Genocide Convention, *supra* note 34, art 6 (contemplating the possibility of trial by "such an international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction" or by "a competent Tribunal of the State in the Territory of which the act was committed"), Crime of Genocide, *supra* 42, at 4. Noting that the convention contemplates the possibility of an international tribunal but does not actually set up such a body, Roger S. Clark, The Influence of the Nuremberg Trial on the Development of International Law, in *The Nuremberg Trial and International Law* 249, 255-256 (Georg Ginsburgs & V.N. Kudriavtsev eds., 1990), suggests, to the contrary, that the convention seems to "point in the direction of a denial of universality to be exercised by individual states."

49 Nuremberg Charter, *supra* note 20, art 6(c), Draft Code, *supra* note 26 art 21. The recognition of crimes against humanity as an international crime "signifies that specific mass violations of human rights do not belong any longer to the sphere of domestic jurisdiction. The international community is now legally entitled to intervene in such cases." Roling & Cassese, *supra* note 27, at 56

- 50 In practical terms, this means, for example, that if rape and other sexual offenses constitute a grave breach under the Geneva Conventions, states are required to enact legislation providing for effective penal sanctions and to search out and punish (or extradite) suspected perpetrators. See supra note 16, Bert V A Roling, *Aspects of the Criminal Responsibility for Violations of the Laws of War*, in *The New Humanitarian Law of Armed Conflict* 199, 211 (Antonio Cassese ed., 1979). With regard to infractions of the Geneva Conventions and Protocols that are not grave breaches, states are required to take measures for their suppression but no duty arises to provide for punishment. Geneva Convention IV, supra note 14, art. 146, Additional Protocol I, supra note 37, art. 86(1).
- 51 See e.g. 4 Geneva Conventions Commentary, supra note 41, at 593 (discussing Geneva Convention IV, supra note 14, art. 146(2)).
- 52 See Roling, supra note 50, at 212. For a discussion of Hague Convention IV supra note 18, see infra section entitled 'Violations of the Laws or Customs of War'.
- 53 Geneva Conventions I-VI, supra note 14, 32, common art. 3, Additional Protocol II, supra note 37.
- 54 See generally Howard S. Levie, *The Law of Non-international Armed Conflict: Protocol II to the 1949 Geneva Conventions* (1987).
- 55 Final Report, supra note 3, ¶ 42.
- 56 Paust, supra note 33, at 507, 506 (citations omitted).
See infra notes 96-98 and accompanying text.
- 57 See Meron, *War Crimes Trials*, supra note 33, at 128; Theodor Meron, *Draft Model Declaration on Internal Strife*, *Int'l Rev. Red Cross*, Jan.-Feb. 1988, at 59; Denise Plattner, *The Penal Repression of Violations of International Humanitarian Law Applicable in Non-international Armed Conflicts*, *Int'l Rev. Red Cross*, Sept.-Oct. 1990, at 409, 414. For further discussion, see infra section entitled 'Noninternational Conflict'.
- 58 Statute, supra note 5, art. 7(3).
- 59 Liability for acts of omission figured, for example, in the following World War II war crimes prosecutions: *United States v. Pohl*, in 5 *Trials of War Criminals*, supra note 22, Case No. 4, *United States v. Ohlendorf (Einsatzgruppen Case)*, in 4 *Trials of War Criminals*, supra note 22, Case No. 9, *United States v. Soema Toyoda*, discussed in Parks, supra note 27, at 69-73; *United States v. Yamashita* (1945), in 4 UN War Crimes Comm'n, supra note 27, at 1, 34, *aff'd*, 327 U.S. 1 (1946); see also Richard L. Lael, *The Yamashita Precedent: War Crimes and Command Responsibility* (1982).
- 60 Affirmation of Nuremberg Principles supra note 36; Genocide Convention, supra note 34, art. 4; Convention on the Non-applicability of Statutory Limitations to War Crimes and Crimes against Humanity art. 2, G.A. Res. 2391 (XXIII), U.N. GAOR, 23d Sess., Supp. No. 18, at 40 U.N. Doc. A/7218 (1968); Additional Protocol I supra note 37, art. 86(2); Frits Kalshoven, *International Comm. of the Red Cross, Constraints on the Waging of War 18-19* (1991); IA Lediakh, *The Application of the Nuremberg Principles by Other Military Tribunals and National Courts*, in *The Nuremberg Trial and International Law*, supra note 48, at 263, 266-67.
- 61 Geneva Convention III, supra note 32, art. 4(A)(2); see also Additional Protocol I, supra note 37, arts. 43, 50; Pilloud et al., supra note 46, at 517.
- 62 E.g., Geneva Convention IV, supra note 14, art. 146; Genocide Convention, supra note 34, art. 4; Additional Protocol I, supra note 37, art. 86(2); Draft Code, supra note 26, arts. 21-22. For a discussion, see 4 Geneva Conventions Commentary, supra note 41, at 589-96; Cook, supra note 15, at 98-99; Kalshoven, supra note 60, at 18-19; Roling, supra note 50, at 220-27.
- 63 Defined as "rendering an area ethnically homogeneous by using force or intimidation to remove persons of given groups from the area." Final Report, supra note 3, ¶ 129 (quoting Interim Report infra ¶ 55); see also id. ¶¶ 128, 237. Letter from the Secretary-General to the President of the Security Council Feb. 9, 1993, U.N. Doc. S/25274 (1993), transmitting Interim Report of the Commission of Experts Established pursuant to Security Council Resolution 780 (1992).
- 64 Each of the conventions identifies a set of "particularly serious violations that qualify as 'grave breaches' or war crimes"; Secretary-General's Report supra note 5, ¶ 38. See supra note 46.
- 65 4 Geneva Conventions Commentary, supra note 41, at 598, 594.
- 66 Id. at 594, 590 n.1. See supra note 41.
- 67 Torture convention, supra note 26.
- 68 Id. art. 1.
- 69 Meron, supra note 2, at 462 (citing ICRC Aide-Mémoire).
- 70 Amnesty International, supra note 2, at 2.

71 Rhonda Copelon, *Surfacing Gender: Reconceptualizing Crimes against Women in Time of War*, in *Mass Rape: The War against Women in Bosnia Herzegovina 4* (Alexandra Stiglmayer ed., 1994). As noted supra notes 46-47, grave breaches are identified, inter alia, in Geneva Convention IV, supra note 14, art. 147, and Additional Protocol I, supra note 37, art. 85. The sole criterion that makes an offense a grave breach is that it must be "committed against persons or property protected by the Conventions." Pilloud et al., supra note 46, at 976. Meron, *War Crimes Trials*, supra note 33, at 131 (emphasis added), lists a number of offenses and states that they "would all be covered by war crimes under customary international law and by the grave breaches provisions of the Geneva Conventions. When committed on a mass scale such violations would also give rise to charges of crimes against humanity and of genocide." The italicized statement implies that crimes do not need to be committed on a mass scale to constitute grave breaches and other war crimes.

72 See Meron, supra note 2, at 426 n.19.

73 "The Geneva Conventions constitute rules of international humanitarian law and provide the core of the customary law applicable in international armed conflicts. These Conventions regulate the conduct of war from the humanitarian perspective.", Secretary-General's Report, supra note 5, ¶ 37 (emphasis added).

74 Final Report, supra note 3, ¶¶ 42-44.

75 Secretary-General's Report, supra note 5, ¶ 44.

76 "Such violations shall include, but not be limited to..." Statute, supra note 5, art. 3 (emphasis added).

77 Hague Convention IV, supra note 18, art. 46 (annex); Meron, supra note 2, at 425. See supra section entitled 'Violence against Women from a Changing Social and Legal Perspective'.

78 See e.g. 4 Geneva Conventions Commentary, supra note 41, at 199-201; Meron, *Human Rights*, supra note 26, at 47.

79 Additional Protocol I, supra note 37, art. 76(1) (singling out women as the 'object of special respect').

80 Pilloud et al., supra note 46, at 892-93. The United States takes the position that Additional Protocol I, supra note 37, art. 75, embodies customary international law, although it has not ratified this instrument. For a detailed discussion of the U.S. position, see Levie, supra note 40; Meron, *Human Rights*, supra note 26, at 62-70. Levie, supra, at 470 n.4, lists all the articles the United States believes are declaratory of customary law.

81 Additional Protocol I, supra note 37, art. 85(1)(c).

82 See Meron, supra note 2; Meron, *War Crimes Trials*, supra note 33, at 129; Meron, *War Crimes in Yugoslavia*, supra note 26, at 84. According to Paust, supra note 33, at 518, rape used as a tactic for purposes of ethnic cleansing is covered by customary laws of war' (citing, e.g. Geneva Convention IV, supra note 32, arts. 3, 16, 27, 31-33, 147; Additional Protocol I, supra note 37, arts. 51, 75, 76; Additional Protocol II, supra note 37, arts. 4, 13). See generally supra section entitled 'Crimes of Violence of a Sexual Nature', supra text accompanying notes 32-33, 37-40, 65-70.

83 Genocide Convention, supra note 34, art. 2.

84 Pilloud et al., supra note 46, at 1001-02; Kalshoven, supra note 60, at 22.

85 In particular, see Additional Protocol I, supra note 37, arts. 48, 51, 85(3)(a)-(b). Violation of this rule is a grave breach. *Id.* art. 85(3).

86 St. Petersburg Declaration Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grammes' Weight, Dec. 11, 1868, 138 Consol. T.S. 297, reprinted in *Documents on the Laws of War 30* (Adam Roberts & Richard Guelff eds., 2d ed. 1989); *Protection of Civilian Populations against the Dangers of Indiscriminate Warfare*, ICRC Res. XXVIII, in *The Laws of Armed Conflicts*, supra note 18, at 259; G.A. Res. 2444 ((XXIII), U.N. GAOR, 23d Sess., Supp. No. 18, at 50, U.N. Doc. A/7218 (1968) (affirming ICRC Res. XXVIII). The United States takes the position that this General Assembly resolution embodies customary international law. See Meron, *Human Rights*, supra note 26, at 69-70.

87 Additional Protocol I, supra note 37, arts. 51(6), 76(1).

88 Geneva Convention IV, supra note 14, art. 33 ("No protected person may be punished for an offence he or she has not personally committed.") *Id.* art. 4 defines protected persons as follows: "Persons protected by the Convention are those who, at a given moment and in any manner whatsoever find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals."

- 89 Final Report, supra note 3, ¶ 63-66, Meron, Human Rights, supra note 26, at 47, identifies the prohibition on collective punishment and reprisal set out in Geneva Convention IV, supra note 14, art. 33, as embodying customary law
- 90 See supra text accompanying notes 53-57
- 91 Geneva Conventions I-IV, supra notes 14, 32, common art. 3(1)(a), (c)
- 92 Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 4, 114 (June 27) (citation omitted)
- 93 See Secretary-General's Report, supra note 5, ¶ 47 n.9
- 94 Final Report, supra note 3, ¶ 54. But see infra note 98
- 95 Additional Protocol II, supra note 37, art. 1(1)
- 96 Pilloud et al., supra note 46, at 1353-54 (discussing Additional Protocol II, supra note 37, art. 1)
- 97 Meron, Human Rights, supra note 26, at 73 (citing Pilloud et al., supra note 46, at 1340)
- 98 Id. at 1340-42 (citations omitted) (emphasis added), see also Remarks by Madeleine Albright, Representative of the United States, U.N. SCOR, 48th Year, 3217th mtg. at 15 U.N. Doc. S/PV.3217 (1973) (it is understood that the 'laws or customs of war' referred to in article 3 (of the Tribunal's Statute) include all obligations under humanitarian law agreements in force in the territory of the former Yugoslavia at the time the acts were committed, including common article 3 of the 1949 Geneva Conventions, and the 1977 Additional Protocols to these Conventions")
- 99 Statute supra note 5, art. 4(2) (following Genocide Convention, supra note 34, art. 2)
- 100 Id. (following Genocide Convention, supra note 34, art. 2)
- 101 Id. art. 4(3)
- 102 Meron, War Crimes Trials, supra note 33, at 130
- 103 Id. art. 5(g). See supra notes 19-22 and accompanying text
- 104 Secretary-General's Report, supra note 5, ¶ 48
- 105 Id. ¶ 47 ("Crimes against humanity are aimed at any civilian population and are prohibited regardless of whether they are committed in an armed conflict, international or internal in character") (citation omitted) (emphasis added), see also id. n.9
- 106 Draft Code, supra note 26, art. 21, McCormack & Simpson, supra note 39, at 15. See generally M. Cherif Bassiouni, *Crimes against Humanity in International Criminal Law* 248 (1992), Yוגindra Khushalani, *Dignity and Honour of Women as Basic and Fundamental Human Rights* 32 (1982), Christiaan Frederik Ruter, *Enkele aspecten van de strafrechtelijke reactie op oorlogsmisdrijven en misdrijven tegen de menselijkheid* 37-38 (1973)
- See supra note 26 and accompanying text
- 107 For further discussion, see Final Report, supra note 3, ¶ 77, Copelon, supra note 71, at 7, Goldenberg, supra note 26, at 48-49, Schwelb, supra note 21, at 191
- 108 Secretary General's Report, supra note 5, ¶ 48, see 2 Pieter Nicolaas Drost, *The Crime of State: Penal Protection for Fundamental Freedoms of Persons and Peoples* 33, 81-84 (1959)
- 109 The most recent amendments of the Tribunal's Rules of Procedure and Evidence in January 1995 added a provision that will support a finding of state involvement where the government in question has not been recognized by the international community "State: A State Member or non-Member of the United Nations or a self-proclaimed entity de facto exercising governmental functions, whether recognised as a State or not" International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, Rules of Procedure and Evidence R.2(A), U.N. Doc. IT/32/Rev.2 (1994), U.N. Doc. IT/Rev.3 (1995), reprinted in appendix C of this issue of Criminal Law Forum
- 110 See Ruter, supra note 106, at 37-38, Goldenberg, supra note 26, at 19, at 48-49
- 111 See generally M. Cherif Bassiouni, The Commission of Experts Established pursuant to Security Council Resolution 780 (1992) Investigating Violation of International Humanitarian Law in the former Yugoslavia. In this issue of Criminal Law Forum, Burns, supra note 5
- 112 The Tribunal Finalized Rules of Procedure and Evidence in early 1994 but amended them several times since then. See supra note 109. Rule 96(III) was added in January 1995 in U.N. Doc. IT/Rev.3 (1995), supra note 109
- 113 See supra notes 109, 112