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ANNEX II
RAPE AND SEXUAL ASSAULT: A LEGAL STUDY

Under the Direction of:

Christine P.M. Cleiren
Member of the Commission of Experts
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Contributor:

Melanie E.M. Tijssen, Attorney and Assistant to
M. Kamminga, Professor of International Law,
Erasmus University, Rotterdam, The Netherlands

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I. INTRODUCTION 1/

1. The Statute 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 (ICTFY) grants jurisdiction to the International Tribunal on four grounds: "grave breaches" of the Geneva Conventions of 1949 (article 2), violations of the law and customs of war (article 3), "crimes against humanity" (article 4) and genocide (article 5). In the Statute, "rape" is listed as a crime against humanity.

2. Unlike the majority of codified penal law, "rape" is not precisely defined in international humanitarian law. As a consequence, there is, at present, every reason to interpret this concept broadly as encompassing other sexual assaults. In his commentary on article 5 of the Statute, the Secretary-General also seems to consider rape and other sexual assaults to be connected, as he states in relevant part: ". . . rape and other forms of sexual assault, including enforced prostitution". 2/ Rape is considered in this report to be a crime of violence of a sexual nature. This also applies to other sexual assaults, such as enforced prostitution and painful circumcision. Today these crimes are considered by medical doctors, psychiatrists, and psychologists to be very serious violent crimes of a sexual nature having a wide range of severe effects on the victim and her domestic environment. 3/ This study will therefore also encompass other sexual assaults. In the majority of the cases reported, women were the victims of the alleged rapes and other sexual assaults. However, men 4/ and children, 5/ when victims of rape or other sexual assaults, are also to be protected by international humanitarian law.

3. This paper considers the criteria for applying certain international humanitarian law instruments in this context. It deals, on the one hand, with the possibilities, and on the other, with the limitations of the law as applied to these specific crimes. The terminology used is "possibilities for application" and "conditions/limitations", respectively.

A. Universal jurisdiction and the "nulla poena . . ." principle

4. At present, international humanitarian law is in a process of development. As a result, it is flexible. However, the following discussion is restricted to an arrangement and study of generally accepted customary international law (nullum crimen sine lege).

5. Rape and other sexual assaults are prohibited in the penal law of all civilized nations. This applies in any case to the former Yugoslavia, which was a party to the conventions which are discussed here. 6/ Perpetrators of these crimes must have been aware of the fact that they committed an international crime for which they could be prosecuted. Moreover, the applicable law for the most part provides for universal jurisdiction. According to article 146 of the Fourth Geneva Convention, the "grave breaches" listed in article 147 and mentioned in article 85 of Additional Protocol I, constitute universal jurisdiction. If the 1948 Convention on the Prevention and Punishment of the Crime of Genocide is considered applicable, universal jurisdiction is provided for in article VI. "Crimes against humanity" constitute universal jurisdiction on the grounds of the Nuremberg Charter and Judgment, which is reaffirmed in, e.g., the Draft Code of Crimes against the Peace and Security of Mankind. If articles of the Fourth Geneva Convention, not constituting "grave breaches", and Additional Protocols II are accepted as customary international law, they might also provide for universal jurisdiction. 7/ As will be shown below, the crimes of rape and other sexual assaults are of such a nature that governments are obliged 8/ to

prevent the commission of international crimes and prosecute the perpetrators.

When this is not done, the international community has a right to interfere with the sovereignty of a state and take responsibility for prosecution. This is another factor in favour of the exercise of jurisdiction by the ICTFY, apart from the fact that this is bestowed upon the ICTFY by its Statute, in pursuance of paragraph 2 of Security Council resolution 808 (1993).

B. Some observations on criminal responsibility

6. As rape is a very personal crime, it is hardly possible to commit rape by mere instigation or omission. However, persons other than the physical perpetrators have personal criminal responsibility, as stated in article 7, paragraph 1, of the Statute. In the case of the other sexual assaults, persons other than the actual perpetrators can be said to have committed these assaults, but their responsibility should be determined first with reference to the other possibilities provided for in the above-mentioned article. 9/

7. With regard to the "responsibility of omission", the Statute states, in article 7, paragraph 3:

"The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility 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 measures to prevent such acts or to punish the perpetrators thereof."

In general, the principle of criminal responsibility for failing to act cannot be denied when a person in authority (a) knew or should have known that the crimes were regularly being committed; (b) had the power to interfere with the criminal practices; and (c) had special responsibility for the field in question. 10/

8. However, due to the chaos in the former Yugoslavia including many activities carried out by paramilitaries, it might be difficult to expose lines of command. In consequence, the responsibility of the Governments for the prevention and punishment of crimes will play a crucial part in the proceedings before the ICTFY. 11/

9. By applying this criterion of responsibility, the authorities can be held responsible for the climate which made it possible for these crimes to be committed. 12/ With regard to the war crimes constituting "grave breaches", this responsibility is elaborated in article 146 of the Fourth Geneva Convention 13/ and in article 86 (headed "Failure to act"), paragraph 1, of Additional Protocol I 14/ by making it an "active duty" on the government not only with regard to "grave breaches", but also to "all other acts contrary to the provisions of this Convention" 15/ and "all other breaches of the Conventions or of this Protocol", 16/ respectively. The Convention on the Prevention and Punishment of the Crime of Genocide 17/ provides for an active obligation on the part of the State parties. 18/ With regard to "crimes against humanity", an active obligation on the part of the Government is provided for in the draft code of crimes against the peace and security of mankind. 19/

C. The interpretation of what constitutes rape and other sexual assaults

10. Under international humanitarian law, rape and other sexual assaults are in most cases either expressly prohibited as such or can be categorized as

"torture or . . . other form of inhuman or degrading treatment", "wilfully causing great suffering" or other terms of such a nature. 20/

11. That rape and other sexual assaults may be considered to constitute these crimes can be deduced, inter alia, from the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which defines "torture" in article 1 as "any act by which severe pain or suffering, whether physical or mental, is intentionally 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" 21/

12. According to Amnesty International, rape and sexual abuse are forms of torture or cruel, inhuman or degrading treatment. 22/ An International Committee of the Red Cross (ICRC) aide-mémoire of 3 December 1992 stated that "wilfully causing great suffering or serious injury to body or health obviously covers rape." 23/

D. The present discussion

13. The ways in which the Statute provides scope for the prosecution of persons involved in the crime of rape or other sexual assaults will be considered below. For the purpose of this discussion, the victims are assumed to be civilians, i.e., persons protected by the Geneva Convention related to the Protection of Civilian Persons in Time of War and the corresponding sections of the Additional Protocols. 24/ The applicable law will be dealt with as per the Statute. For an evaluation of the scope, reference is made to the conclusion.

II. RAPE AND OTHER SEXUAL ASSAULTS CONSIDERED "GRAVE BREACHES" OF THE GENEVA CONVENTIONS OF 1949

14. In the case of rape and other sexual assaults, the Fourth Geneva Convention is applicable.

15. Rape and other sexual assaults constitute "grave breaches" as they can be considered to be a form of torture or inhuman treatment and wilfully causing great suffering or serious injury to body and health; 25/ these crimes, listed in article 147, constitute "grave breaches". Support for this argument can also be found in the fact that "inhuman treatment" is treatment contrary to article 27, which, inter alia, expressly prohibits rape and other sexual assaults. 26/ Also, the enumeration of the "grave breaches" should be considered exhaustive in form only, not in substance. The commentary to article 146, paragraph 3, states in relevant part: "article 147 defines grave breaches of this convention. However, under the terms of this paragraph, the contracting parties must also suppress all other acts contrary to the provisions of this convention . . . Other grave breaches of the same character as those listed in article 147 can be easily imagined. This was well understood when the Yugoslav Penal Code (article 125) was adopted, since the crime of forced prostitution was added to the list" 27/ The fact that at the Tokyo Trials rape was considered a violation of "the laws and customs of war" constitutes a very important argument. Although the Geneva Conventions were not yet existent, the charge indicates that rape is seen as a crime as serious as torture and killing. Today, such a crime would be considered a "grave breach". 28/

16. The possibilities of application are that a single act is sufficient to constitute a war crime 29/ and that it need not be policy instigated or

tolerated by the State, or politically, ethnically, racially, or religiously motivated.

17. However, it must be clear that the perpetrators are linked to one side of the armed conflict, acting against neutral citizens or citizens of a belligerent party. From war trials, such as the Essen Lynch Case, we can deduce that these links are so obvious that this is easily taken for granted, unless both parties to the conflict are of the same nationality or from countries which are on the same side of the conflict. 30/ Article 85 of Additional Protocol I to the Geneva Conventions also defines "grave breaches" and will be discussed in Section III, below.

III. RAPE AND OTHER SEXUAL ASSAULTS CONSIDERED VIOLATIONS OF THE LAWS AND CUSTOMS OF WAR

18. Although article 3 of the Statute refers only to The Hague Convention of 1907 concerning the Laws and Customs of War on Land and the Regulations annexed thereto (Convention No. IV), the following principles and instruments of humanitarian law form part of international customary law as well. The Statute does not consider the Additional Protocols to the Four Geneva Conventions to be customary international law. However, they are treated as such here, because they fall within the jurisdiction of the ICTFY in so far as they constitute customary international law. This will be the case in the parts relevant to the topic of rape and other sexual assaults, as they constitute fundamental principles of international law. 31/ The condition/limitation of application will consist of proving that the relevant parts of these Protocols constitute customary international law.

19. The principle of customary law distinguishing between civilians and combatants and limiting attacks of military necessity, 32/ was violated during the war in the former Yugoslavia.

20. The applicable law can be found in several treaties. In the Trial of Admiral Toyoda, rape was considered a violation of the laws and customs of war. Although at the time the Four Geneva Conventions of 1949 had not come into existence, the charge suggests that rape is regarded a crime as severe as torture and killing and would thus nowadays constitute a grave breach. However, if this argument will not be accepted, the conclusion ought to be that rape constitutes one of the other war crimes, constituting customary international law and creating universal jurisdiction. 33/

21. Rules applicable to armed conflicts of both an international and a non-international 34/ character can be found in article 3 common to the four Geneva Conventions, 35/ which provides a list of fundamental rules. Although this article states that it applies to a non-international armed conflict, these fundamental rules are also applicable in case of an international armed conflict. The International Court of Justice ruled, in the case *Nicaragua v. United States of America*, that these principles constitute "elementary considerations of humanity" and cannot be breached in an armed conflict, regardless of whether it is international or national in character". 36/ Relevant here is paragraph 1, which prohibits, *inter alia*, "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". 37/ Applicable rules can also be found in paragraph 1 of article 76 of Additional Protocol I to the Geneva Conventions, which expressly prohibits "rape, forced prostitution and any other form of indecent assault". This rule "applies both to women affected by armed conflict, and to others". 38/

22. Rules applicable in international armed conflict, are codified in the Fourth Geneva Convention. This can be derived, for instance, from the Nicaragua v. United States of America Case (Judgment of the International Court of Justice, 27 June 1980), wherein the Court rules that "the obligation to respect and ensure respect for the Geneva Conventions `does not only derive from the Conventions themselves, but from the general principles of humanitarian law to which the Conventions merely give specific expression'". 39/ Another argument for the applicability of the Geneva Conventions of 1949 can be concluded from the fact that the Socialist Federal Republic of Yugoslavia (SFRY) felt itself bound by the Geneva Conventions. The Republics following SFRY are probably bound by the general treaty obligations undertaken by SFRY. In any case, "in most part . . . the Fourth Geneva Convention concerns customary law, and, in many respects, even peremptory norms that cannot be excluded by agreements". 40/ Rape, enforced prostitution and any form of indecent assault are expressly prohibited in article 27, which is considered the core of the protection offered in the Fourth Geneva Convention, and can in particular be considered to codify customary international law. This can be concluded from the Commentary to the article which states in relevant part: "The Statement of these principles in an international convention gives them the character of legal obligations and marks an essential stage in the history of international law, in particular international humanitarian law . . . it codifies notions which date back to ancient times" The 1907 Hague Convention (IV) respecting the Laws and Customs of War on Land provides protection for family honour and rights in article 46. This article will not have to be considered as article 27 of the Fourth Geneva Convention now offers a more specialized protection. The general rule provides that "specialis" has preference over "generalis". (However, if article 27 cannot be accepted as constituting customary international law creating universal jurisdiction, the Hague Convention will have to be invoked and then the criteria for war crimes will apply). 41/ Article 85, paragraph 4, of Additional Protocol I to the Geneva Conventions states, *inter alia*, that "inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination" constitute a "grave breach" when "committed wilfully and in violation of the Conventions and of this Protocol". 42/
23. Conditions/limitations with regard to Protocol I are that it has to be proven that the crimes were based on racial discrimination and that they were "committed wilfully and in violation of the Conventions and of this Protocol".
24. Rules applicable in a non-international armed conflict can be found in Additional Protocol II to the Geneva Conventions, where prohibition of rape, enforced prostitution and other sexual assaults is found in paragraph 2 of article 4, headed "Fundamental guarantees".
25. A condition/limitation of prosecution, based on the article mentioned in paragraph 24, might be that this Protocol can only be evoked when the armed conflict takes
- "place in the territory of a High Contracting Party between its armed forces and dissident 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." 43/
26. Rules applicable when the area is considered to be occupied territory are stated in article 47 of the Fourth Geneva Convention, which prohibits protected persons in occupied territory in any case or in any matter whatsoever from being deprived of the benefits of the Convention. 44/

27. For a further discussion on possibilities of application and conditions/limitations with regard to the application of this type of law, except for the special items already dealt with in this section, see Section II. 45/

IV. RAPE AND OTHER SEXUAL ASSAULTS CONSIDERED
"CRIMES AGAINST HUMANITY"

28. In article 5 of the Statute "crimes against humanity" are described as "the following crimes when committed in armed conflict, whether international or national in character, and directed against any civilian population . . . (g) rape".

29. There are several reasons why rape and other sexual assaults can constitute a "crime against humanity". Rape is listed among the "crimes against humanity" in article 5 of the Statute. 46/ The possibility that rape and other sexual assaults already constituted "crimes against humanity" under the Charter of the International Military Tribunal of 1945. Rape and other sexual assaults are not explicitly mentioned in the Nuremberg Charter under article 6, paragraph C, which defines the "crimes against humanity". However, rape and other sexual assaults are considered to come within the scope of this paragraph, as this was compassed in the words ". . . and other inhumane acts". "The wide scope of this term indicates that the enumeration . . . is exhaustive in form only, not in substance". Apart from this, Law No. 10 of the Control Council for Germany defined rape as a "crime against humanity". Although it can be discussed whether this Law constitutes customary international law, it does make clear that the Four Powers considered rape a "crime against humanity".47/ The scope of this term has only been widened since the Second World War cannot be excluded. 48/ Apart from this, "crimes against humanity" are to be considered violations of fundamental human rights, 49/ in this case: the prohibition of "torture or other cruel, inhuman or degrading treatment" 50/ and the prohibition of "enslavement". 51/

30. The possibilities of application are that "crimes against humanity" are applicable in times of peace as well as in times of armed conflict, whether national or international, 52/ and that they can be committed by anybody. 53/

31. Conditions/limitations might occur insofar as it is necessary to prove that the alleged rapes and other sexual assaults are "directed against any civilian population", i.e., "single or isolated acts" fall outside the scope 54/ because it has to be proven that these crimes have been committed as part of a widespread or systematic attack against the population.

32. "Widespread" refers to the large scale on which the crimes are committed 55/ or to a pattern of abuse. 56/ This pattern might be apparent from the cases reported which show that the rapes are often perpetrated in the same manner, e.g., it starts when an area is conquered, the women are taken away and detained, or raped in front of the family. "Systematic" refers to a pattern of abuses of which rape is an element; here rape is used as one of the tools of war, which is possible due to the severe (mental) effects on the victim and her environment. Reports tend to show a pattern of abuse, e.g., it starts when an area is conquered and occurs concurrently with torture and murder. It occurs predominantly around the camps, after which the population flees before the area is occupied.

33. It also has to be proven that the crimes are based 57/ on national, political, ethnic, racial or religious grounds and that the state is involved.

This can be concluded from state tolerance. 58/

V. RAPE AND OTHER SEXUAL ASSAULTS CONSIDERED TO BE GENOCIDE

34. Article 4 of the Statute refers to the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, which defines genocide in article II as:

"any of the following acts committed with the intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such . . . (b) causing serious bodily or mental harm to members of the group; 59/ (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; 60/ (d) imposing measures intended to prevent births within the group". 61/

35. The possibilities of application are that genocide is a crime under international law, in times of peace and in times of armed conflict, whether this is deemed international or non-international, 62/ and that only one of the acts enumerated in article II of the Convention has to be proven. The fact that there is no need to demonstrate that the perpetrator was acting on behalf of the state is also very important. 63/

36. A condition/limitation of this Convention will be the requirement of proving that the acts described above were "committed with the intent 64/ to destroy, in whole or in part, a national, ethnic, racial or religious group".

VI. CONCLUSION

A. Applicable whether the conflict is deemed international or non-international

37. Violations of the laws and customs of war: applicable rules can be found in article 3 common to the Four Geneva Conventions, which provides a list of fundamental rules, and article 76 of Additional Protocol I to the Four Geneva Conventions, which expressly prohibits rape and other sexual assaults.

38. A single act suffices to constitute a war crime; 65/ the conditions/limitations will be that it has to be proven that the perpetrators are linked to one side of the conflict, acting against neutral citizens or citizens of a belligerent State. With regard to Protocol I and, to a lesser extent, common article 3, it also has to be proven that these articles constitute customary international law giving rise to universal jurisdiction.

39. "crimes against humanity" can be committed by anybody and come with universal jurisdiction; the conditions/limitations arising are that it has to be proved that there is evidence of State involvement, at least in terms of tolerance, that the alleged facts form a part of a widespread 66/ or systematic⁶⁷ attack against any civilian population, and that the crimes are based on national, political, ethnic or religious grounds.

40. Genocide: rape and other sexual assaults may come under the definition contained in the Convention on the Prevention and Punishment of the Crimes of Genocide, 68/ that it is not necessary to prove that the perpetrator was acting on behalf of the State and that genocide comes under universal jurisdiction. However, it is necessary to prove that the acts were committed with the intent to destroy, in whole or in part, a national, ethnic, racial or

religious group.

B. Applicable when the conflict is deemed international

41. "Grave breaches" of the Fourth Geneva Convention (enumerated in article 147), rape, and other sexual assaults constitute "torture or inhuman treatment" and/or "wilfully causing great suffering or serious injury to body or health".

42. Article 27 of the Fourth Geneva Convention explicitly prohibits rape.

43. "Grave breaches" of Additional Protocol I to the Four Geneva Conventions, article 85, paragraph 4, prohibits "inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination".

44. The possibilities of application are that a single act suffices to constitute a war crime and that the "grave breaches" come under universal jurisdiction. The conditions/limitations will be that it has to be proven that the perpetrators are linked to one side of the conflict, acting against neutral citizens or citizens of a belligerent state. With regard to Protocol I and, to a lesser extent, article 27, it also has to be proven that these articles constitute customary international law coming under universal jurisdiction and, also with regard to Protocol I, that the crimes were based on racial discrimination and were "committed wilfully and in violation of the Conventions and of this Protocol".

C. Applicable when the conflict is deemed non-international

45. A prohibition of rape, forced prostitution, and other sexual assaults is found in article 4, paragraph 2, of Additional Protocol II to the Four Geneva Conventions. A single act suffices to constitute a war crime, provided it is proved that the armed conflict takes

"place in the territory of a High Contracting Party between its armed forces and dissident 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", 69/

and that it constitutes a breach of customary international law, coming under universal jurisdiction.

D. Applicable when no armed conflict takes place

46. Both "crimes against humanity" and genocide are applicable outside of armed conflict. 70/ In criminal law each case has to be considered on its own merits; for the prosecution of rape and other sexual assaults, this also means that in each case it has to be decided which of the above-mentioned fields of law is applicable, depending on the conditions and circumstances of the case and the facts that can be proven.

Notes

1/ Many thanks to Mr. R. van Elst, Erasmus University, Rotterdam.

2/ Report of the Secretary-General pursuant to paragraph 2 of Security Council resolution 808 (1993), U.N. Doc. S/25704, at 13 (3 May 1993).

3/ See, e.g., Burgess A. Wolbert & Lytle L. Holmstrom, Rape: Victims of Crisis (1975); Robert J. Brady, Rape Trauma Syndrome (in particular chapter 3); Shana Swiss & Joan E. Giller: "Rape as a Crime of War: A Medical Perspective", 270 JAMA 612 (1993); Anne E. Goldfeld et al., "The Physical and Psychological Sequelae of Torture: Symptomatology and Diagnosis", 259 JAMA 2725 (1988).

4/ Violent crimes of a homosexual nature are not explicitly mentioned in international humanitarian law. However, this is understandable as the topic of homosexuality, even today, is not discussed freely. That international humanitarian law, insofar as it provides protection against rape and other sexual assaults, is applicable to men as well is beyond any doubt as the international human right not to be discriminated against (in this case on the basis of sex) does not allow derogation.

5/ International law also provides for the protection of children, e.g. the 1990 United Nations Convention on the Rights of the Child and the World Declaration on the Survival, Protection and Development of Children and the Plan of Action for its implementation.

6/ The Federal Republic of Yugoslavia (FRY) was party to the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. It was also a party to the Geneva Conventions of 1949. FRY was also party to the Additional Protocols to the Geneva Conventions. The former Republics of FRY are probably bound by the general treaty obligations undertaken by FRY itself.

7/ See Section V.

8/ In countries where the principle of expediency is a part of penal law, the State is obliged to prosecute when social obligations necessitate.

9/ Article III of the Convention on the Prevention and Punishment of the Crime of Genocide also provides for a wide range of punishable acts.

10/ The responsibility for omission, as applied at the trials after the Second World War (e.g., the Yamashita Case, the Hostage Case, the Pohl Trial, and the Einsatztruppen Trial), was, like the other principles of individual criminal responsibility, reaffirmed in, e.g., the General Assembly Resolution 95 (I) of 1946, the Convention on the Prevention and Punishment of the Crime of Genocide, the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity.

The Charters of Nuremberg and Tokyo recognized this responsibility for Governments and even heads of State. Bernard V.A. Röling, "Aspects of the Criminal Proceedings for Violations of the Laws of War", in The New Humanitarian Law of Armed Conflict 199-220 (A. Cassese ed., 1979); Frits Kalshoven, Constraints on the Waging of War 18-19 (International Committee of the Red Cross, 2nd ed. 1991).

Notes (continued)

11/ Even if a resistance movement or a guerilla organization cannot be considered an independent party to the armed conflict, the combatants of these groups can be bound by the provisions of the Fourth Geneva Conventions if their organization is related to a State. Third Geneva Convention, article 4, paragraph 2.

12/ Bernard V.A. Röling, "Aspects of the Criminal Proceedings for Violations of the Laws of War", in The New Humanitarian Law of Armed Conflict 199, 204, 219 (A. Cassese ed., 1979). Röling considers this climate to be mainly the "climate of opinion", responsible for mass-scale "system criminality", which he considers to be "criminality which has been officially promoted or tolerated, or which is an expression of the prevailing spiritual climate".

13/ See Section II.

14/ See Section III.

15/ "The obligation on the High Contracting Parties to search for persons accused to have committed grave breaches imposes an active duty on them. As soon as a Contracting Party realizes that there is on its territory a person who has committed such a breach, its duty is to ensure that the person concerned is arrested and prosecuted with all speed. The necessary police action should be taken spontaneously, therefore, not merely in pursuance of a request from another state". IV Geneva Convention relative to the Protection of Civilian persons in Time of War, Commentary, International Committee of the Red Cross 593-94 (J.S. Picet ed., 1958).

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

17/ See Section V.

18/ Article I of the Convention declares in relevant part: "The Contracting Parties confirm that genocide . . . is a crime under international law which they undertake to prevent and to punish". Article V states: "The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention, and in particular, to provide effective penalties for persons guilty of genocide or of any of the other acts enumerated in article III". Article VI states: "Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction".

19/ Article 22 of this draft Code states that "systematic or mass violations of human rights" are Crimes against the Peace and Security of Mankind. The article states in relevant part: "An individual who commits or orders the commission of any of the following violations of human rights . . . torture, establishing or maintaining over persons a status of slavery, servitude or forced labour in a systematic manner or on a mass scale . . ." Article 5, headed "responsibility of states", states: "prosecution of

Notes (continued)

an individual for a Crime against the Peace and Security of Mankind does not relieve a state of any responsibility under international law for an act or omission attributable to it". Paragraph 1 of article 6 states: "A state in whose territory an individual alleged to have committed a Crime against the Peace and Security of Mankind is present shall either try or extradite him".

20/ Older documents refer to "family honour", "honour of women", etc. Seen in the context of that time, rape and other sexual assaults would surely violate such "honour".

21/ There is no doubt that rape and other sexual assaults inflict severe pain and suffering on the victim, which can be inflicted for several reasons. For example, in the majority of the cases reported, the alleged perpetrators were of a different ethnic origin from the victims, which points to discrimination.

22/ Amnesty International, Bosnia and Herzegovina, Rape and Sexual Abuses by Armed Forces (January 1993).

23/ As cited in Theodor Meron, "Rape as a Crime under International Humanitarian Law", 3 American Journal of International Law 424, 426 (1993).

24/ For a definition, see articles 4 and 13 of the Fourth Geneva Convention. If the victims of rape and other sexual assaults are considered to have prisoner of war status, reference can be made to the Geneva Convention relative to the Treatment of Prisoners of War, articles 13, 16, 45, 87, paragraph 3, 130 and common article 3, paragraph 1 and the relative articles of additional Protocol II.

25/ See the discussion on interpretation under Section I, paragraph 2.

26/ For the interpretation of "inhuman treatment" the commentary to article 147 refers to article 27, which, inter alia, expressly prohibits rape and other sexual assaults. It also states: "That leads to the conclusion that by 'inhuman treatment' the Convention does not mean only physical injury or injury to health". IV Geneva Convention relative to the Protection of Civilian persons in Time of War, Commentary, International Committee of the Red Cross, 598 (J.S. Pictet ed., 1958).

27/ IV Geneva Convention relative to the Protection of Civilian persons in Time of War, Commentary, International Committee of the Red Cross, 593-94 (J.S. Pictet ed., 1958).

28/ In the Trial of Admiral Toyoda, specification 1 of the charge states as follows: "wilfully 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 from abusing, mistreating, torturing, raping, killing and committing other atrocities." W.H. Parks, "Command Responsibility for War Crimes", 1 Military Law Review 69, 69-70 (1993).

29/ Rhonda Copelon, "Surfacing Gender: Reconceptualizing Crimes against Women in Time of War", in Alexandra Stiglmayer, Mass Rape 4 (1994) (forthcoming).

Notes (continued)

30/ It can be argued that perpetrators are supposed to be "acting as organs of state". See E.A. Daes, New Types of War Crimes and Crimes against Humanity: Violations of International Humanitarian Law and Human Rights Law 55-78. However, "the Nuremberg jurisprudence makes clear" that the perpetrator "need not necessarily be a soldier". Theodor Meron, "Rape as a Crime under International Humanitarian Law", 3 American Journal of International Law 424, 426 (1993).

31/ The fact that SFRY ratified these Protocols is also important. N. Keijzer, "Internationale berechting van oorlogsmisdrijven, begaan in het voormalige Joegoslavië," 10 Militair Rechterlijk Tijdschrift 66, 66-68 (1993). Protection from rape and other sexual assaults as a topic under customary international law applicable in armed conflict can be deduced from the history of international law, e.g.: Lieber Code ("rape"), Oxford Manuel ("female honour"), The Declaration of Brussels ("honour and rights of the family"), and the above-mentioned 1907 Hague Convention.

32/ The Declaration of St. Petersburg of 1868 already states "that the only legitimate object which states should endeavour to accomplish during war is to weaken the military forces of the enemy. This rule . . . constitutes one of the foundations of international humanitarian law applicable in armed conflict". International Committee of the Red Cross, Draft Additional Protocols to the Geneva Conventions of 12 August 1949, Commentary 53 (1973). Since then, these principles have been reaffirmed in many legal instruments, e.g.: Resolution XXVIII, adopted at the XXnd International Conference of the Red Cross held in 1965 in Vienna, the GA Resolution 2444 (XXIII). Frits Kalshoven, Constraints on the Waging of War 22 (International Committee of the Red Cross, 2nd ed. 1991) and Additional Protocol I to the Four Geneva Conventions (article 48 and article 85, paragraph 3, sub A, declaring violation a "grave breach").

33/ See note 25.

34/ Rules for non-international armed conflicts are "not applicable to situations of internal disturbances and tensions, such as riots, isolate and sporadic acts of violence and other acts of similar nature, as not being armed conflict". Additional Protocol I, article 1, paragraph 2.

35/ Apart from the fact that this article constitutes customary international law, an extra argument for application can be found in the fact that Representatives of the Republic of Croatia, the SFRY and the Republic of Serbia entered into a Memorandum of Understanding on 27 November 1991, pursuant to common article 3 of the Geneva Conventions. Two agreements have also been concluded between representatives of the Republic of Bosnia-Herzegovina and representatives of the Serbian Democratic Party, The Party of Democratic Action, and the Croatian Democratic Community pursuant to common article 3 of the Geneva Conventions.

36/ Judgment of 27 June 1986, International Court of Justice Reports 1986, at 14. (as cited in: Report of the Secretary-General pursuant to paragraph 2 of Security Council resolution 808 (1993), U.N. Doc. S/25704, at 35 (3 May 1993).

37/ See Section I.C.

Notes (continued)

38/ C. Pilloud et al., Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949 892 (Y. Sandoz et al. eds., 1987). As article 75 offers a general protection for persons not protected by any other provisions of the Four Geneva Conventions or Additional Protocol I, it is sometimes stated that this also applies to article 76.

39/ 25 International Legal Materials 1023 (1986).

40/ Theodor Meron, "The Case for War Crimes Trials in Yugoslavia", Foreign Affairs Summer 1993, at 122-35.

41/ IV Geneva Convention relative to the Protection of Civilian persons in Time of War, Commentary, International Committee of the Red Cross, 200 (J.S. Pictet ed., 1958).

42/ For the interpretation of these terms I refer to the discussion under Section I.C, above. Support for the argument that rape constitutes a "grave breach" under this protocol can also be found in a discussion among the drafters of the Protocol in 1976. Universal jurisdiction was "restricted to 'grave breaches' in order to enhance the probability of the observance of the law". In addition, it was felt that a precise standard was needed to avoid the risk that any soldier, without intending violation of the protocol, would run the risk of being charged with a war crime. Y. van Dongen, The Protection of the Civilian Population in Time of Armed Conflict 12 (1991). It might be concluded that the "spirit" of the crime is the criterion for determining whether a "grave breach" has occurred. For the argument that rape and other sexual assaults have all the characteristics of a "grave breach", see the discussion under Section I, Introduction, above. This protocol can be said to fall within the jurisdiction of the Tribunal, in so far as it constitutes customary international law; the "fundamental guarantees" stated in Chapter II, Article 4, ought to be regarded as such.

43/ Article 1, paragraph 1.

44/ Article 64 of the Fourth Geneva Convention provides that the laws of the occupied area shall remain in force and that the tribunals shall continue. A logical consequence seems to be that perpetrators of rape and other sexual assaults should be prosecuted, also in occupied territory. Articles 76, paragraph 4, and 126 contain specific rules on the treatment of female detainees in occupied territory.

45/ Violations of the "grave breaches" and violations of international customary law applicable in armed conflict both constitute war crimes.

46/ Reference can be made to the relevant part of the ruling of the International Military Tribunal in the Justice Case: "The Charter makes . . . a crime; and it is, therefore, not strictly necessary to consider whether and to what extent . . . was a crime before the execution of the London Agreement" (cited in Y. Khushalani, Dignity and Honour of Women as Basic and Fundamental Rights 25 (1982)).

47/ E. Schwelb, "Crimes against Humanity", 23 BYIL 178, 191 (1946). That "crimes against humanity" were interpreted broadly during the Nuremberg Trials can also be deduced from the opinion of F. de Menthon, the French prosecutor at Nuremberg who regarded "crimes against humanity" as "crimes

Notes (continued)

against the human status", which he defined in relevant part as "all those faculties, the exercising and developing of which rightly constitute the meaning of human life" (cited in S. Goldenberg, "Crimes against Humanity, A Study in the Making and Unmaking of International Criminal Law", U.W.O. Law Review 1, 14).

48/ At the International Conference on Human Rights in 1968 apartheid was condemned as a "crime against humanity". S. Goldenberg, "Crimes against Humanity, A Study in the Making and Unmaking of International Criminal Law", U.W.O. Law Review 1, 47.

49/ D.J. Harris, Cases and Materials on International Law 122 (3rd ed. 1983). For the United Nations, the protection of human rights seems to be the main point of interest with respect to armed conflicts. Frits Kalshoven, Constraints on the Waging of War 20 (International Committee of the Red Cross, 2nd ed. 1991).

50/ See Section I.C, above.

51/ In the Draft Code of Crimes against the Peace and Security of Mankind slavery and servitude, when committed in a systematic manner or on a mass scale, are considered systematic or mass violations of human rights, constituting Crimes against the Peace and Security of Mankind, (article 22). In 1949, the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others replaced for the contracting parties all foregoing conventions on Slavery. ECOSOC resolution 731 E, 1959, in: R.J. Taubenfeld & H.J. Taubenfeld, Sex-based Discrimination, Binder 2, at 16 (1979). In article 1 it is stated that the parties agree to punish: "any person who, to gratify the passions of another (1) procures, entices or leads away, for purposes of prostitution, another person, even with the consent of that person, (2) exploits the prostitution of another person, even with the consent of that person". It can be concluded that enforced prostitution constitutes enslavement, and that it is irrelevant whether the victim is male or female.

52/ Although article 5 of the Statute states that "crimes against humanity" must be committed in armed conflict, due to legal developments since the Charter of the IMT, it might be considered as "crimes against humanity" can also be committed in time of peace. M. Cherif Bassiouni, Crimes against Humanity in International Law 248 (1992). This has been formulated, e.g., in the Draft Code of Offenses against Peace and Security of Mankind (first version reported to the U.N. G.A. in 1954). Y. Khushalani, Dignity and Honour of Women as Basic and Fundamental Rights 32 (1982). C.F. Rüter, Enkele Aspecten van de Strafrechtelijke Reactie op Oorlogsmisdrijven en Misdrijven Tegen de Menselijkheid (1973).

53/ S. Goldenberg, "Crimes against Humanity, A Study in the Making and Unmaking of International Criminal Law", U.W.O. Law Review 1, 19.

54/ E. Schwelb, "Crimes against Humanity", 23 BYIL 178, 191 (1946).

55/ S. Goldenberg, "Crimes against Humanity, A Study in the Making and Unmaking of International Criminal Law", U.W.O. Law Review 1, 48.

Notes (continued)

56/ Rhonda Copelon, "Surfacing Gender: Reconceptualizing Crimes against Women in Time of War", in Alexandra Stiglmeier, Mass Rape 7 (1994) (forthcoming).

57/ Here there is no need to prove intent, as is the case with the crime of genocide. See Section V. As a consequence, it will be easier to meet this requirement.

58/ For the constitution of a "crime against humanity", it is necessary for the government, which is responsible for prevention and repression, to have instigated or, at least, tolerated the crimes. C.F. Rüter, Enkele Aspecten van de Strafrechtelijke Reactie op Oorlogsmisdrijven en Misdrijven tegen de Menselijkheid 37-38 (1973).

59/ See Section I.C.

60/ Not only does rape have a serious effect on the victim, bodily as well as mentally, it also has a serious effect on her family environment. Families are reported to have fled their communities for fear of rape. Probably rape and other sexual assaults have even more severe effects in Muslim communities as victims are allegedly regarded as dishonoured.

61/ This can be effected in several ways, e.g.: it is reported that women are raped in captivity by men of another ethnic group and only released when pregnancy was well advanced; at this point, it is not possible to bear children of the same ethnic origin as the women. The alleged mutilation of men's genitals prevents these men from procreating. In the above-mentioned examples, ethnic procreation will be achieved by the alleged perpetrators.

62/ Article I of the Convention states in relevant part: "The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law"

63/ Theodore Meron, "The Case for War Crimes Trials in Yugoslavia", Foreign Affairs Summer 1993, at 130-131. Article IV of the Convention states: "Persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals".

64/ Jurisprudence and literature have not yet defined the proof (in substance and amount) necessary to satisfy this requirement.

65/ A possibility of application with respect to article 76 of Protocol I might be that it is sometimes stated that this article applies when the victims are not protected by other articles of the Four Geneva Conventions or Additional Protocol I.

66/ "Widespread" refers to a large scale or a pattern of abuse.

67/ "Systemtic" refers to rape being used as one of the tools of war in a pattern of abuses.

68/ Several of the acts, each constituting the crime of genocide, might be applicable here. See article 2 of the Genocide Convention.

Notes (continued)

69/ Article 1, paragraph 1.

70/ A discussion on the possibilities of application and the conditions/limitations can be found above.