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War Crimes Law for the Twenty-First Century

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ALTHOUGH THE DIPLOMATIC CONFERENCE IN ROME for the establishment of an international criminal court faces many problems, advocates and scholars of international humanitarian law have good cause for some heady feelings in looking back at the groundbreaking achievements of the last few years.¹

With more than twenty individuals in custody, the International Tribunal for Former Yugoslavia is no longer in danger of running out of defendants. Under international pressure, Croatia arranged for the surrender of about ten indicted Croatian nationals and Bosnian Croats to the Hague Tribunal. In addition, under the Stabilization Force (SFOR) and NATO umbrella, several indicted persons have been captured *manu militari* and brought to the Hague, and several others have surrendered to the Tribunal. Alas, most of the indicted Bosnian Serbs have yet to be arrested. The principal leaders responsible for the atrocities are thus still free, but they are forced to hide from international justice, and the possibility of their arrest remains alive.

The Hague tribunal has issued several important decisions that clarify and give judicial imprimatur to some rules of international humanitarian law. The International Tribunal for the prosecution of genocide and other violations of

international humanitarian law in Rwanda is functioning despite the problems that have plagued it during its first few years. Many of the principal indictees involved in the Rwandan genocide have been arrested and are in the Tribunal's custody. Like the Hague Tribunal, the Arusha Tribunal has rendered an important decision concerning its jurisdiction and the competence of the Security Council under Chapter VII of the United Nations Charter to establish the tribunal.² Furthermore, the Tribunal is trying several cases and should issue some judgments this year.

The work of both tribunals demonstrates that international investigations and prosecutions of persons responsible for serious violations of international humanitarian law are possible and credible. No less, the rules of procedure and evidence each has adopted now form the vital core of an international code of criminal procedure and evidence. Creating a positive environment for the creation of a standing international criminal court, which is likely to become a reality before the end of the twentieth century, these achievements have also given new vigor to universal jurisdiction and sparked the readiness of States to prosecute persons accused of serious violations of international humanitarian law.

Groundbreaking as these institutional developments are, the rapid growth of the normative principles of international humanitarian law equals them in significance. International humanitarian law has developed faster since the beginning of the atrocities in the former Yugoslavia than in the half-century since the Nuremberg tribunals and the adoption of the Geneva Conventions for the Protection of Victims of War of 12 August 1949. Appearing in 1964, Wolfgang Friedmann's important book *The Changing Structures of International Law* noted that international criminal law recognized as crimes only piracy *jure gentium* and war crimes.³ Despite the potential for a more expansive vision even in 1964,⁴ the criminal aspects of international humanitarian law remained limited and the prospects for their international enforcement poor as late as the eve of the atrocities committed in Yugoslavia.

There is of course a synergistic relationship between the statutes of the international criminal tribunals, the jurisprudence of the Hague Tribunal, the growth of customary law, its acceptance by States, and their readiness to prosecute offenders under the principle of universality of jurisdiction. The 1995 *Tadić* appeals decision of the Hague Tribunal no doubt helped in creating the environment that allowed the United States delegation to the Preparatory Committee on the Establishment of an International Criminal Court to issue, on 23 March 1998, the statement on non-international armed conflicts that I cite below.

The Statute for Yugoslavia confirms that crimes against humanity do not require a nexus with international wars, while the Statute for Rwanda extends this conclusion to peacetime situations and criminalizes serious violations of common Article 3 of the Geneva Conventions and Additional Protocol II. Following a position already made known in 1996, the United States Delegation to the Preparatory Committee on the Establishment of an International Criminal Court issued a statement on 23 March 1998, urging support for the no-nexus approach. In part, this statement declared that:

Contemporary international law makes it clear that no war nexus for crimes against humanity is required. The United States believes that crimes against humanity must be deterred in times of peace as well as in times of war and that the ICC Statute should reflect that principle.

The United States also announced robust positions—confirming its existing policy—concerning the criminalization of violations of common Article 3 for non-international armed conflicts, as well as some principles concerning the conduct of hostilities. The U.S. statement of March 23 thus pronounced that:

The United States strongly believes that serious violations of the elementary customary norms reflected in common Article 3 should be the centerpiece of the ICC's subject matter jurisdiction with regard to non-international armed conflicts. Finally, the United States urges that there should be a section . . . covering other rules regarding the conduct of hostilities in non-international armed conflicts. It is good international law, and good policy, to make serious violations of at least some fundamental rules pertaining to the conduct of hostilities in non-international armed conflicts a part of the ICC jurisdiction.

Statutes of both *ad hoc* tribunals criminalize rape as a crime against humanity. In its decisions, the Tribunal for the former Yugoslavia has already made a significant contribution to the elucidation of some general principles of criminal law, particularly duress and superior orders,⁵ and will no doubt further clarify the concept of command responsibility. Among these decisions, I would criticize the decisions on duress in the *Erdemovič* case. If, in fact, Erdemovič was faced with a situation of the absence of any moral choice (i.e., he would have been killed had he refused to participate in the mass executions, in circumstances in which they would have proceeded in any event, as the decision of 5 March 1998 confirmed), I find Judge Cassese's dissent arguing for acquittal, not just mitigation of penalty, quite compelling. Indeed, a number of judgments under Control Council No. 10 recognized, in principle, the plea of duress. These judgments in effect tempered the rigidity of the black letter law of the Nuremberg Charter.

Cassese's utilitarian argument in *Erdemovič* was that because the massacre would have proceeded in any event, the defendant's refusal would have benefitted no one and would have simply added one more victim. In such circumstances, Cassese argued, the law could not require Erdemovič to forfeit his life. Judges McDonald and Vohrah's absolutist argument rejected any balancing of harms and rested on a categorical prohibition. Of course, McDonald and Vohrah also emphasized the policy arguments for deterring future offenders. But under their absolutist doctrine, a Jew forced to assist in operating the crematoria in Treblinka would have been denied the defense of duress. Would that be just? Of course, a person's refusal could inspire others to resist orders to kill, but in Erdemovič's case such prospects appear utopian.

In the area of substantive humanitarian law, the Hague Tribunal has advanced the concept of the applicability of the Hague law to non-international armed conflicts and has made a significant contribution to an expansive reading of customary law.⁶ Even though the jurisprudence of the Tribunal on grave breaches of the Geneva Conventions has been rather disappointing, as I show below, pending appeals still offer some hope for a change.⁷

Not the entire jurisprudence of the Hague Tribunal is beyond criticism. I regret, particularly, the use of *Nicaragua's* imputability standard to classify the character of the conflict in the former Yugoslavia. Relying in this manner on *Nicaragua* was inappropriate because that case dealt with a wholly different question—whether or not the contras, for legal purposes, either constituted an organ of the United States Government or were acting on its behalf, in which case their acts could be attributed to the United States for purposes of State responsibility. As I show in greater detail elsewhere, the nexus between attribution and the character of the conflict found in *Tadič* was never present in the International Court of Justice *Nicaragua* discussion.⁸

Another difficulty arises from the Tribunal's interpretation of the grave breaches provisions. The Appeals Chamber's expansive interpretation that "laws or customs of war" in Article 3 of the Tribunal's Statute reach noninternational armed conflicts⁹ largely avoided the worst possible consequences. However, the chamber refused to use Article 3 of its Statute (laws and customs of war) as a conduit to bring in conduct comprising grave breaches of the Geneva Conventions as customary law (grave breaches are the subject of Article 2 of the Statute; these can be regarded as customary law whose content parallels the pertinent provisions of these Conventions).

The grave breaches are the principal crimes under the Conventions. Deprived of the core of international criminal law in cases deemed

non-international, the Tribunal could only raise the level of actionable violence to crimes against humanity, and perhaps in the future, genocide. Not only does this handicap the Tribunal's ability to carry out its mandate, but some commentators also criticize the resort to such heavy artillery against relatively minor offenders, however evil.

For those who do not agree that the conflict is an international armed conflict, another option, proposed by Judge Georges Abi-Saab in his Separate Opinion, would be for the Tribunal to include grave breaches within the customary law it recognizes as applicable even to non-international armed conflicts.¹⁰ In its amicus brief, the U.S. Government stated that persons covered by common Article 3 of the Geneva Conventions could be treated as persons protected by these Conventions.¹¹ The Tribunal's enlightened vision of the customary law pertinent to both international and noninternational armed conflicts certainly could have encompassed grave breaches of the Geneva Conventions. In addition, the authoritative Field Manual (FM) 27-10 of the U.S. Army has recognized these provisions as declaratory of customary law.¹²

The grave breaches provisions describe certain acts as criminal and subject the offenders to mandatory prosecution or extradition when committed against protected persons, defined in the Fourth Geneva Convention as those who find themselves in the hands of a party to the conflict of which they are not nationals. Enforcing this provision literally in the Yugoslav context, and in some other conflicts involving the disintegration of a State or political entity and the resulting struggle between peoples and ethnic groups, especially when leading to the establishment of new States, would be the height of legalism. Imagine, for example, that Israelis and Arabs in the area west of the Jordan River still had Palestinian (Mandate) nationality during the 1947-48 war. Denying those captured by an adversary in that conflict the status of protected persons under the Geneva Conventions, had they been in force, because of their shared nationality would be absurd. In many contemporary conflicts, the disintegration of States and the establishment of new ones make nationality too messy a concept on which to base the application of international humanitarian law.

In light of the protective goals of the Geneva Conventions, I support an interpretation suggesting that in situations like the one in former Yugoslavia, where the fighting was pervasive and its history as a single State resulted in one nationality, the requirement of a different nationality should simply be construed as referring to persons in the hands of an adversary. Indeed, the International Committee of the Red Cross's *Commentary* to Article 4 of the

Fourth Convention states that the reason for excluding a country's own nationals from the definition of protected persons was to avoid interfering in a State's relations with its nationals,¹³ a concern obviously not relevant to the circumstances of the *Tadić* case, in which each ethnic group considered members of other ethnic groups as foreigners. In interpreting the law, our goal should be to avoid paralyzing the legal process as much as possible and, in the case of humanitarian conventions, to enable them to serve their protective goals.

Clarifying crimes against humanity is one of the Hague Tribunal's most important contributions. In the *Tadić* appeal, it confirmed that:

[i]t is by now a settled rule of customary international law that crimes against humanity do not require a connection to international armed conflict. Indeed, as the Prosecutor points out, customary international law may not require a connection between crimes against humanity and any conflict at all. Thus, by requiring that crimes against humanity be committed in either internal or international armed conflict, the Security Council may have defined the crime in Article 5 more narrowly than necessary under customary international law. There is no question, however, that the definition of crimes against humanity adopted by the Security Council in Article 5 [of the Statute] comports with the principle of *nullum crimen sine lege*.¹⁴

Interpreting the Statute's requirement that crimes against humanity be "directed against any civilian population," the Tribunal held that the crimes must involve a course of conduct and not one particular act alone.¹⁵ However, it subsequently explained that "as long as there is a link with the widespread or systematic attack against a civilian population, a single act could qualify as a crime against humanity"¹⁶ and that a person who commits a crime against a single victim or a small number of victims could be guilty of a crime against humanity.¹⁷

The *Tadić* judgment then reaffirmed that a "single act by a perpetrator taken within the context of a widespread or systematic attack against a civilian population entails individual criminal responsibility and an individual perpetrator need not commit numerous offences to be held liable."¹⁸ Although crimes against humanity can only be committed against a civilian population, the Tribunal construed the term "civilian population" broadly: "[T]he presence of those actively involved in the conflict should not prevent the characterization of a population as civilian and those actively involved in a resistance movement can qualify as victims of crimes against humanity."¹⁹ For example, civilians or resistance fighters who had laid down their arms were

considered victims of crimes against humanity in the *Vukovar Hospital Decision*.²⁰

Finally, interpreting the United Nations Secretary-General's report on Article 5 of the Statute disjunctively, the Tribunal held that the requirement that acts be directed against a civilian population can be fulfilled if the acts are *either* widespread or systematic.²¹ The United States proposal on the elements of crimes submitted to the Preparatory Committee on the Establishment of an International Criminal Court on 2 April 1998, takes the same approach.²²

Significantly, the Tribunal held that a policy to commit crimes against humanity need not be a formal one, and that it can be inferred from the manner of the crime. Thus, evidence that "the acts occur on a widespread or systematic basis that demonstrates a policy to commit those acts, whether formalized or not,"²³ is sufficient. Even more importantly, the Tribunal held that this policy to commit crimes against humanity need not be a State policy. Although crimes against humanity, as crimes of a collective nature, could be committed only by States during World War II, the Tribunal considered that customary international law has evolved "to take into account forces which, although not those of the legitimate government, have de facto control over, or are able to move freely within, defined territory,"²⁴ including terrorist groups or organizations.

However, I find less persuasive the Tribunal's holding that all crimes against humanity, not only persecution, require discriminatory intent.²⁵ The Tribunal recognized that it was departing from customary law, which did not impose such a discriminatory intent requirement. There was no reason for the Tribunal to regard the more restrictive report of the UN Secretary-General²⁶ as gospel. This decision unnecessarily limits the scope of crimes against humanity, and a decision to follow the Nuremberg jurisprudence would have been better. It is important to note that in the U.S. proposal on the elements of offenses for the International Criminal Court presented to the Preparatory Committee, the requirement of discrimination is limited to those crimes against humanity that involve persecution.²⁷ It would have been better, I believe, to regard inhumane acts against a civilian population, such as murder, extermination, enslavement, or deportation, as crimes against humanity and to require discrimination only for persecutions on political, racial, and religious grounds, as in Nuremberg. I hasten to add that although I criticize some decisions of the Hague Tribunal on this point and a few others, I believe that the Tribunal and its Judges, Prosecutors, and Registrars have been very successful overall. The solid foundation they have built will now allow the international community to proceed towards the establishment of a standing international criminal court.

The Preparatory Committee on the Establishment of the International Criminal Court²⁸ has also made significant contributions that confirm and further accelerate the radical changes taking place in international humanitarian law. It has given unprecedented attention to the clarification and drafting of general principles of criminal law, including non-retroactivity, age of responsibility, statute of limitations, *actus reus*, *mens rea*, mistake of fact or law, and various grounds for excluding criminal responsibility.

Although considerable uncertainty about the final language defining the crimes within the jurisdiction of the Court still remains, the evolving texts suggest that apart from the crime of aggression, the inclusion of which in the statute is still unclear, the Court will have inherent jurisdiction over genocide, crimes against humanity, and war crimes, including grave breaches of the Geneva Conventions. The definition of the crime of genocide tracks the definitions contained in the Convention on the Prevention and Punishment of the Crime of Genocide. The section on war crimes will probably include a significant catalogue of Hague law-type provisions, and rape will probably be criminalized as a serious violation of International Humanitarian Law or grave breach, rather than only as a crime against humanity, which has a higher burden of proof.²⁹

For non-international armed conflicts, the statute of the International Criminal Court is likely not only to confirm the criminalization of norms stated in common Article 3 but also to penalize some significant violations of Hague law-type provisions and rape.³⁰ However, there is still some opposition from a small number of States to the applicability of such crimes to non-international armed conflicts. Finally, crimes against humanity will probably encompass the the pertinent crimes in the Nuremberg Charter and possibly some forms of arbitrary detention. One of the proposals would include in crimes against humanity the causing of disappearances.

The scope of crimes under international humanitarian law now emerging from the work of the Preparatory Committee has three striking aspects. First, most governments appear ready to accept an expansive conception of customary international law without much supporting practice. Second, there is an increasing readiness to recognize that some rules of international humanitarian law once considered to involve only the responsibility of States may also be a basis for individual criminal responsibility. There are lessons to be learned here about the impact of public opinion on the formation of *opinio juris* and customary law. These developments will be further reinforced by the ICRC's study of customary rules of international humanitarian law, now in progress. It remains to be seen, however, whether the greater openness to customary law apparent during the various meetings of the Preparatory

Committee will also be present when the treaty establishing the future international criminal court is open for signature and ratification. Third, because of the probable inclusion in the Statute of Common Article 3 and crimes against humanity, the latter divorced from a war method, we are witnessing a certain blurring of international humanitarian law with human rights law, and thus a progressive criminalization of serious violations of human rights.

Another important development is the growing recognition that the elevation of many rules of international humanitarian law from the normative to the criminalized dimension creates a real need for the crimes within the jurisdiction of the International Criminal Court to be defined with the clarity, precision, and specificity required for criminal law in accordance with the principle of legality (*nullum crimen sine lege*). The U.S. proposal on the elements of offenses is a step in that direction.

These developments could not have taken place without the creation of a powerful new coalition of civil society driving further criminalization of international humanitarian law. Much like the earlier coalition that stimulated the development of both a corpus of international human rights law and the mechanisms involved in its enforcement, this new coalition includes scholars who promote and develop legal concepts and give them theoretical credibility, NGO's that provide public and political support and means of pressure, and a number of enlightened governments that spearhead law-making efforts in the United Nations.

These institutional and normative developments will, no doubt, generate further growth of universal jurisdiction. Although the offenses subject to the jurisdiction of international criminal tribunals should not be conflated with international offenses subject to national jurisdiction under the universality of jurisdiction principle, there is a clear synergy between the two, which I have already mentioned. The broader list of crimes now emerging from the Preparatory Committee will inevitably impact national laws governing crimes subject to universal jurisdiction. For this reason, the broader significance of the International Criminal Court's Statute exceeds its immediate goals.

Notes

*This essay draws on my Editorial Comments, *Classification of Armed Conflict in the Former Yugoslavia*, 92 AM. J. INT'L L. 236 (1998), and *War Crimes Law Comes of Age*, 92 AM. J. INT'L L. __ (1998).

1. The following articles demonstrate these developments: Theodor Meron, *The Case for War Crimes Trials in Yugoslavia*, 72 FOREIGN AFF. 122 (Summer 1993); Meron, *From Nuremberg*

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to the Hague, 149 MIL. L. REV. 107 (1996); Meron, *Rape as a Crime Under International Humanitarian Law*, 87 AM. J. INT'L L. 424 (1993); Meron, *The Normative Impact of the International Tribunal for Former Yugoslavia*, 1994 ISRAEL Y.B. ON HUMAN RIGHTS 163; Meron, *International Criminalization of Internal Atrocities*, 89 AM. J. INT'L L. 554 (1995); Meron, *The Continuing Role of Custom in the Formation of International Humanitarian Law*, 90 AM. J. INT'L L. 238 (1996); Meron, *Answering for War Crimes: Lessons from the Balkans*, 76 FOREIGN AFF. 2 (Jan.–Feb. 1997).

2. Prosecutor v. Kanyabashi, Decision on Jurisdiction, Case No. ICTR-96-15-T (June 18, 1997), summarized by Virginia Morris in 92 AM. J. INT'L L. 66 (1998).

3. WOLFGANG FRIEDMANN, *THE CHANGING STRUCTURE OF INTERNATIONAL LAW* 168 (1964).

4. See generally, Theodor Meron, *Is International Law Moving Towards Criminalization?*, 9 EUR. J. INT'L L. 18 (1998).

5. Prosecutor v. Drazen Erdemović, Case No. IT-96-22-A, Appeals Judgment (Oct. 7, 1997).

6. Prosecutor v. Duško Tadić, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Oct. 2, 1995) [hereinafter Interlocutory Appeal], reprinted in 35 I.L.M. 32 (1996); Meron, *Continuing Role*, *supra* note 1.

7. See Theodor Meron, *Classification of Armed Conflict in the Former Yugoslavia: Nicaragua's Fallout*, 92 AM. J. INT'L L. 236 (1998).

8. *Id.* at 241.

9. Meron, *Continuing Role*, *supra* note 1.

10. Prosecutor v. Tadić, Separate Opinion of Judge Abi-Saab on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-AR72, at 5–6 (Oct. 2, 1995).

11. Amicus Curiae Brief Presented by the Government of the United States at 35–36, Motion Hearing, Prosecutor v. Tadić, Case IT-94-1-T (July 25, 1995) [hereinafter Amicus Brief].

12. U.S. DEPT OF THE ARMY, *THE LAW OF LAND WARFARE*, para. 506(b) (Field Manual 27–10, 1956).

13. INTERNATIONAL COMMITTEE OF THE RED CROSS, *GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR: COMMENTARY* 46 (Oscar M. Uhler & Henri Coursier eds., 1958).

14. Interlocutory Appeal, *supra* note 6, para. 141.

15. Prosecutor v. Duško Tadić, Case No. IT-94-1-T, Decision on the Defence Motion on the Form of the Indictment, para. 11 (Nov. 14, 1995).

16. The Prosecutor v. Mile Mrksić, Miroslav Radić and Veselin Šljivančanin, Decision of Trial Chamber I—Review of Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, Case IT-95-13-R61, para. 30 (April 3, 1996) [hereinafter Vukovar Hospital Decision].

17. *Id.*

18. Prosecutor v. Duško Tadić, Case No. IT-94-1-T, para. 649 (May 7, 1997) [hereinafter Tadić].

19. *Id.*, at para. 643.

20. *Id.*, citing Vukovar Hospital Decision, *supra* note 16, para. 32.

21. Tadić, *supra* note 18, para. 646. See U.N. Doc. S/25704 (1993) para. 48.

22. A/Ac.249/1998/DP.11.

23. Tadić, *supra* note 18, para. 653.

24. *Id.*, para. 654.

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25. *Id.*, paras. 650, 652.
26. U.N. Doc. S/25704, para. 48.
27. A/AC.249/1998/DP.11 at 7.
28. See Christopher Keith Hall, *The First Two Sessions of the UN Preparatory Committee on the Establishment of an International Criminal Court*, 91 AM. J. INT'L L. 177 (1997); Christopher Keith Hall, *The Third and Fourth Sessions of the UN Preparatory Committee on the Establishment of an International Criminal Court*, 92 AM. J. INT'L L. 124 (1998); Christopher Keith Hall, *The Fifth Session of the UN Preparatory Committee on the Establishment of an International Criminal Court*, 92 AM. J. INT'L L. __ (1998); *Report of the Intersessional Meeting from 19 to 30 January 1998 in Zutphen, The Netherlands*, Preparatory Committee on the Establishment of an International Criminal Court, U.N. Doc. A/AC.249/1998/L.13, Feb. 1998.
29. Theodor Meron, *Rape*, *supra* note 1.
30. See Theodor Meron, *International Criminalization*, *supra* note 1.