RAPE, SEXUAL VIOLENCE, SEXUAL SLAVERY, DOMESTIC SLAVERY, AND OUTRAGES UPON PERSONAL DIGNITY AS WAR CRIMES AND CRIMES AGAINST HUMANITY UNDER INTERNATIONAL LAW

AMICUS CURIAE BRIEF OF THE WAR CRIMES RESEARCH OFFICE AND THE ACADEMY OF HUMAN RIGHTS AND INTERNATIONAL HUMANITARIAN LAW AT AMERICAN UNIVERSITY WASHINGTON COLLEGE OF LAW, AND INTERNATIONAL EXPERTS ON SEXUAL VIOLENCE UNDER INTERNATIONAL CRIMINAL LAW AND HUMAN RIGHTS LAW

A FILING BEFORE THE TRIBUNAL DE MAYOR RIESGO "GRUPO A"
IN GUATEMALA CITY, GUATEMALA

Case:	Esteelmer Francisco Reyes Girón and Heriberto Valdez Asij
Before:	Judge Yassmin Barrios Judge Patricia Bustamante Judge Gerbi Sical
Date:	February 23, 2016
Party Filing:	*Amicus Curiae* War Crimes Research Office and Academy of Human Rights and International Humanitarian Law, American University Washington College of Law, and International Experts on Sexual Violence Under International Criminal Law and Human Rights Law
Filing Language:	English, with unofficial Spanish translation attached

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I. INTRODUCTION

A. STATEMENT OF INTEREST

This brief is submitted by the War Crimes Research Office and the Academy of Human Rights and Humanitarian Law of the American University Washington College of Law, on behalf of a select group of leading academics, jurists, and practitioners specializing in the treatment of sexual violence under international criminal law and human rights law:[1]

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[1] The views expressed herein are those of individual *amici* and do not necessarily reflect the views of their respective institutions.

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Amici understand that the facts in the present case involve, *inter alia*, incidents of rape, sexual violence, sexual slavery, forced domestic labor, and inhumane treatment committed between 1982 and 1988 in the context of Guatemala's internal armed conflict. *Amici* also understand that the accused are charged under Article 378 of the Guatemalan Penal Code, which is entitled "Crimes against the Duties of Humanity" and makes reference to violations of international humanitarian law and certain acts taken against the "civilian population" but does not list the specific offenses that the accused are alleged to have committed, including: rape, sexual violence, sexual slavery, domestic slavery and outrages upon personal dignity.[2] In respectfully submitting this brief, *amici* seek to assist this Court in understanding the individual criminal violations that might fall within the scope of Article 378 of the Guatemalan Penal Code and, specifically, to share their professional understanding of whether the acts of sexual and gender-based violence charged were criminal under customary international law at the time of they were committed.

B. SUMMARY OF ARGUMENT

Article 378 of the Guatemalan Penal Code does not list the specific crimes with which the accused are charged, namely "crimes against the duties of humanity" in the forms of rape, sexual violence, sexual slavery, domestic slavery and outrages upon personal dignity. Nevertheless, First Instance Judge Miguel Ángel Gálvez permitted the case to go to trial against the accused on the basis of the specific crimes charged, reasoning, in part, that Article 378 is an open or "blank penal law," meaning that although it does not describe in detail the conduct proscribed, it makes reference to other sources of law and allows a court to define the proscribed conduct by reference to those other sources, in this case international law binding on Guatemala. Significantly, this approach was not only followed by Fourth Chamber of the Criminal Court of Appeals for Drug Trafficking and Environmental Crimes, which dismissed several challenges to the case by the accused Reyes Girón, but is also consistent with the decision of the First Instance Judge Court in the case against former president Efraín Ríos Mont. Thus, under Article 378 of the Guatemalan Penal Code, this court has jurisdiction to adjudicate acts constituting crimes under customary or conventional international law binding on Guatemala.

[2] In addition to these offenses, Reyes Girón has been charged with murder, while Valdez Asij faces additional charges of forced disappearance.

Conduct amounting to rape, sexual violence, sexual slavery, domestic slavery, and outrages upon personal dignity constituted war crimes and/or crimes against humanity under customary international law as of the early 1980s. In particular:

Rape

- Rape has been recognized as a war crime since countries began codifying rules mandating humane treatment in times of armed conflict, and acts of rape committed in non-international armed conflict have been prosecuted as torture and outrages upon personal dignity under Common Article 3 of the 1949 Geneva Conventions.
- Rape has been expressly identified as an enumerated act of crimes against humanity since 1946 and acts of rape have also been prosecuted as the crime against humanity of torture.

Sexual Violence

- Acts of sexual violence other than rape were first prosecuted as violations of the laws of war in the aftermath of World War II and have been prosecuted by modern international criminal tribunals as torture and outrages upon personal dignity in violation of Common Article 3.
- Sexual violence has long been prosecuted as the crime against humanity of "other inhumane acts," which is a residual category included in every definition of crimes against humanity that has been used to capture acts that bear the same level of gravity as other, enumerated crimes.

Sexual Slavery

- Slavery has long been a war crime in international criminal law. While historical examples demonstrating this fact do not involve *sexual* slavery, the widespread recognition that slavery amounts to a crime in armed conflict, combined with the long history of prosecuting acts of sexual violence committed in war time, establish that sexual slavery may also be prosecuted as a war crime. Indeed, the International Criminal Tribunal for the former Yugoslavia (ICTY) prosecuted acts carried out in the context of non-international armed conflict in the 1990s involving the enslavement and sexual exploitation of women and girls as, *inter alia*, the war crime of outrages upon personal dignity.
- Just as sexual slavery may be seen as a subset of the general prohibition against slavery in the context of armed conflict, the crime is encapsulated by the criminalization of enslavement as a crime against humanity, which has been recognized since World War II. Indeed, in the ICTY case referred to directly above, the accused were convicted not only of outrages as a war crime, but also enslavement as a crime against humanity based on their roles in unlawfully detaining women and girls in apartments for long periods of time, forcing them to perform household chores, and subjecting them to repeated sexual violence. The Special Court of Sierra Leone (SCSL) has also expressly recognized that sexual slavery may be prosecuted as a crime against humanity.

Domestic Slavery

- As mentioned above, slavery has long been viewed as a war crime, and forced labor is a well-established indicia of slavery. In fact, several of the individuals charged by the International Military Tribunal established after World War II were prosecuted for war crimes based on the use of female domestic workers who were sent to homes to relieve German women of their household duties. More recently, the ICTY has prosecuted acts of forced labor committed in non-international armed conflict as cruel treatment in violation of Common Article 3.
- Forced labor may also be prosecuted as the crime against humanity of enslavement, discussed above. Indeed, the accused in the ICTY case referred to above were convicted of enslavement based in part of their role in forcing women and girls to engage in domestic chores. Notably, the perpetrators in that case appealed on the ground that the victims in fact enjoyed freedom of movement and purportedly undertook the chores willingly. However, the Appeals Chamber rejected this argument, holding that: (i) lack of consent is not an element of enslavement; and (ii) in any event, circumstances such as the ones involved in the case before it may be such that genuine consent is impossible. "Domestic" forced labor was also prosecuted as enslavement by the SCSL.

Outrages upon Personal Dignity

- The final charge against the defendants in this case is outrages upon personal dignity. As mentioned above, such conduct is expressly prohibited under Common Article 3 to the Geneva Conventions and has been used to prosecute a wide array of acts inflicting serious humiliation or degradation or that otherwise constitute a serious attack on human dignity. The crime may therefore be an appropriate vehicle through which to convict the accused in this case of any conduct not more appropriately captured by any of the other charges, but that is of equal gravity and demands punishment.
- While "outrages upon personal dignity" is a term of art directly associated with Common Article 3, conduct committed in the context of armed conflict that is appropriately criminalized under that provision may also be prosecuted as the crime against humanity of other inhumane acts, assuming all relevant elements are satisfied.

C. SUMMARY OF RELEVANT FACTS[3]

The offenses the accused are alleged to have committed took place in the early 1980s,

[3] *Amici* did not have access to all of the official filings and transcripts of the proceedings in the case against Reyes Girón and Valdez Asij. As such, *amici* relied on a limited number of official filings and transcripts as well as public summaries of the proceedings made available by, among other groups, the Guatemala Human Rights Commission, available at http://www.ghrc-usa.org/our-work/important-cases/sepur-zarco/#sepurzarcohistory, and the Open Society Justice Initiative's International Justice Monitor, available at http://www.ijmonitor.org/category/guatemala-trials/. *Amici* intend only to provide a general summary of the allegations and context in which these alleged offenses occurred for purposes of examining those offenses under Guatemalan and international law.

during the height of a 36-year conflict between the government of Guatemala and various leftist rebel groups supported primarily by ethnic Mayan indigenous people and Ladino peasants. The alleged acts took place at or near a military outpost in Sepur Zarco, located on the border between the townships of Panzós and El Estor, in the department of Izabal, in the eastern region of Guatemala.[4] In 1982, armed forces attacked the community of Sepur Zarco, killing or forcibly disappearing a number of male Mayan Q'eqchi' leaders who had sought to obtain legal title to the land where they had lived and worked for years.[5] Weeks later, the army attacked their families, burning down their houses, destroying their belongings, and raping their spouses.[6] While four women escaped and went into hiding in the mountains, the rest were forced to move right outside the military base.[7] For months during 1982 and 1983, these women were forced to take turns every few days washing, cooking, and cleaning for soldiers.[8] During their "shifts," women were repeatedly raped and/or subjected to various forms of sexual abuse.[9] Although the "shifts" eventually ended, the women were forced to continue to cook and wash for the soldiers for up to six years, and soldiers continued to rape the women in improvised huts where they were forced to live or when they went to wash clothes in the river.[10] At least one woman, who was repeatedly raped in front of her two young daughters, was subsequently killed along with her daughters.[11]

On September 30, 2011, Mujeres Transformando el Mundo (MTM) and Unión Nacional de Mujeres Guatemaltecas (UNAMG) – two organizations representing the female victims held at Sepur Zarco – initiated a process to bring the case to trial by filing a formal complaint with the Public Prosecutor's Office.[12] On June 14, 2014, two suspects – commander of the military base and retired colonel lieutenant, Esteelmer Francisco Reyes Girón, and former military commissioner and commander of the civil patrols in the area, Heriberto Valdez Asij, were arrested.[13] Reyes Girón was charged, *inter alia*, with crimes against the duties of humanity under Article 378 of the Guatemalan Penal Code in the form of sexual violence, sexual slavery, domestic slavery and outrages upon personal dignity.[14] Valdez Asij was charged, *inter alia*, with crimes against the duties of humanity under Article 378 of the Guatemalan Penal Code in the

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[4] Juzgado de Primera Instancia Penal, Narcoactividad y Delitos Contra El Ambiente por Procesos de Mayor Riesgo, Case No. 01076-2012-00021, Intermediary Phase, First Part (Transcript, Oct. 3, 2014, statement of Public Prosecutor).

[5] Sophie Beaudoin, *Guatemala Trials: Sepur Zarco Trial to Start in February*, International Justice Monitor (Nov. 17, 2015), http://www.ijmonitor.org/2015/11/sepur-zarco-trial-to-start-in-february/; Jo-Marie Burt, *Victim Witnesses Tell of Atrocities at Sepur Zarco*, International Justice Monitor (Feb. 9, 2016), http://www.ijmonitor.org/2016/02/victim-witnesses-tell-of-atrocities-at-sepur-zarco/.

[6] Transcript, Oct. 3, 2014, *supra* n. 4 (statement of Public Prosecutor).

[7] *Id*.

[8] *Id*.

[9] *Id*.

[10] *Id*. *See also* Mujeres Transformando el Mundo, Sepur Zarco Fact Sheet, http://www.ghrc-usa.org/wp-content/uploads/2015/04/MTM-SepurZarco.pdf.

[11] Transcript, Oct. 3, 2014, *supra* n. 4 (statement of Public Prosecutor); Grupo de Mujeres Ixchel, Nuestra Memoria Nuestra Verdad (Feb. 5, 2016), https://nuestramemorianuestraverdad.wordpress.com/2016/02/05/nunca-habia-sentido-ese-miedo-antes-sepur-zarco/#comments.

[12] *See* Guatemala Human Rights Commission, *supra* n. 1.

[13] *Id*.

[14] Juzgado Primero de Primera Instancia Penal, Narcoactividad y Delitos contra el Ambiente por Procesos de Mayor Riesgo, Expediente No. C-01076-2012-00021, Resolución de Fase Intermedia (Oct. 14, 2014).

form of sexual violence.[15] A number of challenges filed by the accused were subsequently dismissed[16] and the case was set for trial, which began February 1, 2016.

II. THIS COURT HAS JURISDICTION TO ADJUDICATE ACTS OF RAPE, SEXUAL VIOLENCE, SEXUAL SLAVERY, DOMESTIC SLAVERY, AND OUTRAGES UPON PERSONAL DIGNITY UNDER ARTICLE 378 OF THE GUATEMALAN PENAL CODE BECAUSE ARTICLE 378 INCORPORATES CONVENTIONAL AND CUSTOMARY INTERNATIONAL LAW BINDING ON GUATEMALA AT THE TIME THE ALLEGED ACTS WERE COMMITTED AND SUCH ACTS CONSTITUTED CRIMES UNDER CUSTOMARY INTERNATIONAL LAW AT THAT TIME

A. THIS COURT HAS JURISDICTION TO ADJUDICATE ACTS CONSTITUTING CRIMES UNDER CONVENTIONAL AND CUSTOMARY INTERNATIONAL LAW UNDER ARTICLE 378 OF THE GUATEMALAN PENAL CODE

Article 378 reads:

> Crimes against the Duties of Humanity: Whosoever violates or infringes humanitarian obligations, laws or covenants regarding prisoners or hostages of war or those wounded in battle, or whosoever commits any inhuman act against the civilian population or against hospitals or places designated for the wounded[,] will be sentenced from 20-30 years in prison.

Although Article 378 is entitled "Crimes against the Duties of Humanity" and makes reference to violations of international humanitarian law and certain acts taken against the "civilian population," it does not list the specific crimes with which the accused are charged. Nevertheless, as indicated above, the accused were charged with crimes against the duties of humanity in the specific forms of sexual violence, sexual slavery, domestic slavery, and outrages upon personal dignity.[17] Indeed, during the stage of proceedings intended to determine whether there is a basis for committing a person to trial, First Instance Judge Miguel Ángel Gálvez permitted the case to go to trial against the accused on the basis of these specific charges, reasoning, in part, that Article 378 is an open or "blank penal law,"[18] meaning that although it does not describe in detail the conduct proscribed, it makes reference to other sources of law and allows a court to define the proscribed conduct by reference to those other sources.[19] Judge Gálvez explained that the

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[15] *Id*.

[16] *See, e.g.*, Sala Cuarta de la Corte de Apelaciones del Ramo Penal, Narcoactividad y Delitos contra el Ambiente, Constituída en Tribunal de Amparo, Sentencia Referente a la Acción Constitucional de Amparo 607-2014, Expediente No. 01016-2014-00064, Guatemala (Feb. 26, 2015).

[17] *See*, *supra* n. 14 *et seq*. and accompanying text.

[18] Juzgado Primero de Primera Instancia Penal, Resolución de Fase Intermedia, *supra* n. 14.

[19] *See* Francisco Muñoz Conde & Mercedes García Aran, DERECHO PENAL, Parte General, 4ªEd., 39 (2000), *cited in* Fernando Arturo López Antillón & María Martín Quintana, *Violencia de Género en Conflictos Armados Estrategias para la Persecución Penal* 51 (2007) ("nos encontramos ante una ley penal en blanco cuando parte de esta estructura (generalmente, la parte de la definición del supuesto de hecho) no se contiene en la propia ley penal sino que ésta se remite a una norma distinta"). The phrase "blank penal law" comes from the German word, *blankettstrafgeset*, which was first used by Karl Binding in his 1872 work, DIE NORMEN UND IHRE UBERTRETUNG, in which he defines the phrase as: "aquellas leyes incompletas, que se limitan a fijar una determinada sanción, dejando a otra norma jurídica la misión de completarla con la determinación del precepto, o sea, la descripción

Penal Code, which Guatemala adopted in 1976, created various offenses of international concern, among them Article 378, which "of course refers us to international conventions and especially the [1949] Geneva Conventions" ratified by Guatemala in 1952.[20] Noting that the provision had to be interpreted in light of developments in international law, Judge Gálvez went on to note that Article 378 was intended to refer not only to war crimes but also to crimes against humanity.[21] Significantly, this approach was not only followed by Fourth Chamber of the Criminal Court of Appeals for Drug Trafficking and Environmental Crimes, which dismissed several challenges to the case by the accused Reyes Girón,[22] but is also consistent with the decision of the First Instance Judge Court in the case against former president Efraín Ríos Mont.[23] Thus, under Article 378 of the Guatemalan Penal Code, this court has jurisdiction to adjudicate acts constituting crimes under customary or conventional international law binding on Guatemala.

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específica de la conducta punible." *Cited in* Impunity Watch, *Monitoreo de la Justicia Transicional en Guatemala, Tomo II: Derecho a la justicia para las víctimas del Conflicto Armado Interno* 16 (2014), http://www.impunitywatch.org/docs/Research_report_informe_monitoreo_IW_JUSTICIA_Dec_2014.pdf (internal citations omitted).

[20] Juzgado Primero de Primera Instancia Penal, Resolución de Fase Intermedia, *supra* n. 14.

[21] *Id*. Notably, this position is consistent with that of other experts. *See, e.g,* Impunity Watch, *supra* n. 19 ("En efecto, los crímenes de guerra, los crímenes de lesa humanidad, y el genocidio, que están categorizados como delitos internacionales, se encuentran previstos en el CP guatemalteco (*lex scripta*). Por razones técnicas se afirma que los crímenes de guerra y de lesa humanidad están amparados en el artículo 378, puesto que los elementos y sub-conductas tipo de tales delitos permiten su integración en una sola disposición legal, ya que para identificarlos necesariamente hay que recurrir a los tratados internacionales pertinentes ratificados por Guatemala. Además, tanto los delitos contra los deberes de humanidad como el genocidio forman parte del Capítulo IV (De los delitos de trascendencia internacional) que incluye los tipos penales que ofenden al mundo entero y responde a obligaciones internacionales adquiridas por el Estado."). It is also worth noting that the phrase "whosoever commits any inhuman act against the civilian population" that appears in Article 378 is similar to the language of Article 6(C)of the Charter of the International Military Tribunal for the Nuremberg Trial Proceedings and Article II(1)(c) of the Control Council Law No. 10 for the Punishment of Persons Guilty of War Crimes, Crimes against Peace and against Humanity in Germany, both of which define crimes against humanity as a series of acts committed against any civilian population. *See* Charter of the International Military Tribunal, annexed to Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, Art. 6, 8 August 1945, reprinted in 1 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 10-11 (1947) (defining crimes against humanity as " 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 perpetrated") (emphasis added) and Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, reprinted in 3 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS Art. II(1)(c) (William S. Hein & Co. 1997) (defining crimes against humanity as "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 perpetrated") (emphasis added).

[22] Sala Cuarta de la Corte de Apelaciones del Ramo Penal, *supra* n. 16, at 10.

[23] *See* Juzgado Primero de Primera Instancia Penal, Narcoactividad y Delitos Contra el Ambiente por Procesos de Mayor Riesgo (B), del Municipio y Departamento De Guatemala, Audiencia de Resolución de procedimiento intermedio, Expediente No. 01076-2011-00015 (Jan. 28, 2013) ("El artículo 378 es una norma penal en blanco…[q]ue por razones de técnica legislativa remite a normas internacionales convencionales o de carácter inderogable, o sea el *ius cogens*, de donde se hayan sus propuestos de hecho") (unofficial transcription from audio at 1:20:00).

B. ACTS OF RAPE, SEXUAL VIOLENCE, SEXUAL SLAVERY, DOMESTIC SLAVERY, AND OUTRAGES UPON PERSONAL DIGNITY QUALIFIED AS WAR CRIMES AND/OR CRIMES AGAINST HUMANITY UNDER CUSTOMARY INTERNATIONAL LAW AT THE TIME THEY WERE COMMITTED

1. International Crimes and Customary International

As noted above, while Article 378 clearly criminalizes violations of international humanitarian law and certain acts taken against the "civilian population," it does not completely enumerate the individual violations that fall within its scope. It is therefore necessary to look to conventional and customary international law as it existed in the early 1980s to determine if acts of rape, sexual violence, sexual slavery, domestic slavery, and outrages upon personal dignity, carried out in the context of a non-international armed conflict or as part of a widespread or systematic attack against a civilian population,[24] rose to the level of war crimes and/or crimes against humanity. Conventional international law consists of treaties, and therefore binds only those states which are parties to the treaty.[25] By contrast, customary international law, which is based on the elements of state practice and the belief that such practice is required as a matter of law,[26] binds the entire international community.[27]

2. Conduct Amounting to Rape, Sexual Violence, Sexual Slavery, Domestic Slavery, and Outrages upon Personal Dignity Constituted War Crimes and/or Crimes Against Humanity under Customary International Law as of the Early 1980s

a) Rape[28]

(1) Rape as a War Crime

Rape has been recognized as a violation of the laws of war since countries began codifying rules mandating humane treatment in times of armed conflict. Indeed, in the Lieber Code of 1863, which is generally considered the first attempt to legislate the laws of war,[29] the United States government explicitly listed rape as a war crime, and individuals who were found

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[24] Note that, because the focus of this brief is whether the prosecution of acts amounting to sexual violence, sexual slavery, forced labor, and inhumane treatment may be prosecuted as violations of international law, we do not undertake to analyze whether the specific acts at issue in the *Sepur Zarco* case were in fact committed in the context of a non-international armed conflict and had a nexus thereto or meet the threshold requirements of crimes against humanity, which must be undertaken as part of a widespread or systematic attack against a civilian population.

[25] Vienna Convention on the Law of Treaties, Art. 34 (Vienna, May 23, 1969) ("A treaty does not create either obligations or rights for a third State without its consent.").

[26] *See, e.g., The North Sea Continental Shelf Cases (Germany v. Denmark; Germany v. Netherlands),* 1969 I.C.J. 3, ¶ 77.

[27] Antonio Cassese, *Affirmation of the Principles of International Law recognized by the Charter of the Nürnberg Tribunal,* General Assembly resolution 95 (I) (Dec. 11, 1946), Introductory Note, http://legal.un.org/avl/ha/ga_95-I/ga_95-I.html.

[28] We recognize that rape is not officially charged in this case, but we address it here because allegations in this case clearly involve acts of rape and rape clearly triggered criminal responsibility under customary international law at the time the alleged acts were committed.

[29] *See, e.g.,* Paul Finkelman, *Francis Lieber and the Modern Law of War*, 80 U. Chi. L. Rev. 2071, 2075-76 (2013) (describing the Lieber Code as "the first serious attempt to provide a practical code for the law of war").

guilty were subject to the death penalty.[30] Additionally, Article 37 of the Lieber Code imposed an affirmative duty on combatants to safeguard "persons of the inhabitants, especially those of women[;] and the sacredness of domestic relations."[31] Although the Lieber Code was not an international document, it is considered a foundation of customary international law because it greatly influenced how other countries drafted future war manuals.[32] Rape was also recognized as a war crime, albeit only implicitly, with the adoption of the Hague Convention of 1907.[33] In particular, Article 46 of the Hague Convention stated that, in times of war, "[f]amily honour and rights… must be respected."[34] According to historian Susan Bownmiller, who has traced the origins of international law addressing rape, "[f]amily honour" was a term used euphemistically at the time to describe incidents of rape and other sexual violence.[35]

The first attempt to prosecute perpetrators of war crimes before an international criminal body occurred in the wake of World War I. Specifically, the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties (CAWE), formed by the Allied governments in 1919, called for the establishment of a tribunal that would try "[a]ll persons belonging to enemy countries… who have been guilty of offences against the laws and customs of war or the laws of humanity."[36] Notably, in a report presented to the Preliminary Peace Conference in March 1919, the Commission, which consisted of representatives of the United States, the British Empire, France, Italy, and Japan,[37] found that, "[i]n spite of the explicit regulations, of established customs, and of the clear dictates of humanity, Germany and her allies have piled outrage upon outrage," including rape.[38] Indeed, rape was listed fifth among the thirty-two enumerated charges proposed by the Commission.[39] Although the envisioned tribunal never came into existence due to a lack of political will on the part of the Allies,[40] the proposed prosecution of rape reflects the view that the international community understood rape to be a war crime as early as 1919.

This view was indisputable by the end of World War II, as demonstrated by a number of developments. First, the United Nations War Crime Commission (UNWCC), which assisted

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[30] *See* United States General Orders No. 100, Art. 44, 24 April 1863 (prohibiting "all rape, wounding, maiming, or killing... under penalty of death").
[31] *See id.* Art. 37.
[32] *See* Kelly Dawn Askin, WAR CRIMES AGAINST WOMEN: PROSECUTION IN INTERNATIONAL WAR CRIMES TRIBUNALS 36 (1997).
[33] *See id.* at 39.
[34] *See id.*
[35] *See* Susan Brownmiller, AGAINST OUR WILL: MEN, WOMEN AND RAPE 42 (1975). In support of her theory, Brownmiller cites, *inter alia*, J.H. Morgan, a British professor of constitutional law who investigated statements by women who claimed they were raped during World War I in the immediate aftermath of that conflict and who used the term "outrages upon… honour" to describe the violations, which he concluded would be considered illegal in any court at the time. *Id.*
[36] *See Report of the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties*, 29 March 1919, *reprinted in* 14 Am. J. Int'l L. 95, 117 (1920).
[37] *Id.* at 95.
[38] *Id.* at 113.
[39] *Id.* at 114-15.
[40] *See* Patricia Viseur Sellers, *The Context of Sexual Violence: Sexual Violence as Violations of International Humanitarian Law*, *in* 1 SUBSTANTIVE AND PROCEDURAL ASPECTS OF INTERNATIONAL CRIMINAL LAW: THE EXPERIENCE OF INTERNATIONAL AND NATIONAL COURTS 263, 276 (2000).

national governments trying suspected war criminals in the wake of World War II,[41] adopted the CAWE's definition of war crimes, again explicitly defining rape as a war crime.[42] Acting with the support of the UNWCC, the United States, Australia, and several European countries brought charges against suspected war criminals for rape as a war crime.[43] One particularly notable case was the 1946 *Yamashita* case, in which an American military tribunal tried a Japanese general for failing to prevent the commission of crimes, including rape, carried out by his subordinates in the Philippines.[44] In its judgment, the tribunal expressly held that, "[w]here murder and rape and vicious, revengeful actions are widespread offences, and there is no effective attempt by a commander to discover and control the criminal acts, such a commander may be held responsible."[45]

Although neither the London Charter establishing the International Military Tribunal (IMT) at Nuremberg nor the Tokyo Charter establishing the International Military Tribunal for the Far East (IMTFE) expressly referred to rape as a war crime, "substantial evidence of sexual abuse," including rapes, was tendered as part of the prosecution's case-in-chief in the trial before the IMT.[46] The indictment did not include an explicit reference to sexual violence, but it did expressly state that the allegations set out therein were "by way of example only, [were] not exclusive of other particular cases, and [were] stated without prejudice to the right of the Prosecution to adduce evidence of other cases."[47] Furthermore, for purposes of the charges of both war crimes and crimes against humanity, the indictment referred broadly to "murders and ill-treatment… carried out by divers[e] means, including… brutality and torture of all kinds,"[48] which likely encompassed crimes of sexual violence, including rape. Given that evidence of rape was adduced, it is difficult to imagine why evidence of such crimes would have been put forward at trial *unless* it was in support of the charges in the indictment.[49] Indeed, as international criminal law expert Patricia Viseur Sellers has explained, "[t]he conviction of at least four of the

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[41] *See* Dan Plesch, Susana SáCouto & Chante Lasco, *The Relevance of the United Nations War Crimes Commission to the Prosecution of Sexual and Gender-Based Crimes Today*, 25 Crim. L. F. 349, 350 (2014).
[42] *See id.* at 351.
[43] *See id.* at 359-60 ("The Australians prosecuted Yoshio Yaki for the rape and related torture of a woman named Betty Woo and there were no other charges besides these two counts. Other cases in which only rape was charged include a Greek case against Bulgarian national Boris Tsernosemski, 'president of the Community of Siderohorion Kavalla', who was charged with raping two women; two US cases against unnamed Japanese soldiers, one for rape and one for assault with intent to commit rape on an American nurse; a Yugoslavian case against Italian Lieutenant Rondoninin for rape as a violation of the Yugoslavian Penal Code and of article 46 of The Hague Convention of 1907; and a Danish case against a German policeman for rape as a violation of the Danish penal code, among others. Just as important, the records also indicate that prosecutors not only charged but, in many instances, won convictions for rape.").
[44] Courtney Whitney, *The Case of General Yamashita, A Memorandum*, Colonel Howard S. Levie Collection, at 4-9, https://www.loc.gov/rr/frd/Military_Law/pdf/Yamashita.pdf (noting that the underlying incidents included "sordid orgies of rape," "raping or attempting to rape large numbers of civilian women," "raping two female civilians," and "[m]istreating about 400 women and children, repeatedly raping and attempting to rape about 76 women and girls").
[45] *See id.* at 37 (quoting the UNWCC findings on the case).
[46] Sellers, *supra* n. 40, at 282.
[47] IMT Indictment, *reprinted in* 1 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 27, 44 (1947).
[48] *Id.* at 43 (relating to "Count Three—War Crimes"). *See also id.* at 66 (alleging, in relation to "Count Four—Crimes against Humanity," that civilians were "murdered and ill-treated by divers[e] means, including those set out in Count Three above").
[49] *See* Sellers, *supra* n. 40, at 283.

accused of war crimes and crimes against humanity arguably relied on submissions about sexual violence that was inflicted during invasions, military occupation and within the German concentration camps."[50]

Rape featured even more explicitly in the IMTFE trial, as the Tokyo indictment incorporated several acts of rape into the counts contained in "Group Three," which included three counts charging "conventional War Crimes and Crimes against Humanity…."[51] Although the counts listed under "Group Three" of the indictment make no express reference to rape, the indictment included an appendix entitled "Incorporated in Group Three," which laid out several particulars encompassed in the war crimes and crimes against humanity charges in Counts 53, 54, and 55 of the indictment.[52] Among these particulars were the following charges:

> prisoners of war and civilian internees were murdered, beaten, tortured and otherwise ill-treated, *and female prisoners were raped* by members of the Japanese forces;[53]
>
> female nurses were *raped*, murdered and ill-treated;[54] and
>
> [l]arge numbers of the inhabitants of such territories were murdered, tortured, *raped* and otherwise ill-treated, arrested and interned without justification, sent to forced labour, and their property destroyed or confiscated.[55]

The fact that these charges were incorporated into the indictment, coupled with the fact that evidence was presented in support of these charges during the Tokyo trial,[56] provides substantial support for the notion that rape unquestionably constituted a war crime at the outbreak of World War II, if not earlier.

While the forgoing examples of countries' recognition of rape as a war crime dealt with *international* armed conflict, the adoption of the 1949 Geneva Conventions made clear that certain acts amount to violations of international humanitarian law if committed in *non-international* armed conflict. Specifically, Common Article 3 to the 1949 Conventions prohibits, *inter alia*, torture and outrages upon personal dignity under such circumstances.[57] These prohibitions have been understood not only to outlaw acts of rape in war time, but have also served as the basis for holding individuals *criminally responsible* for such acts based on conduct committed as early as 1975. For instance, the Extraordinary Chambers in the Courts of Cambodia (ECCC) has determined that it may prosecute acts of rape committed in Cambodia

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[50] *Id.* at 285.
[51] R. John Pritchard & Sonia Magbanua Zaide, 2 THE TOKYO MAJOR WAR CRIMES TRIAL, Annex A-5 (1998), Annex A-6 ("Indictment").
[52] *Id.* at Annex A-6D ("Appendix D: Incorporated in Group Three").
[53] *Id.* at Annex A-6D, 111 (emphasis added).
[54] *Id.* at Annex A-6D, 113 (emphasis added).
[55] *Id.* at Annex A-6D, 117 (emphasis added).
[56] Sellers, *supra* n. 40, at 287-89.
[57] *See, e.g.*, Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention), Aug. 12, 1949, 75 UNTS 135, Art. 3.

between 1975 and 1979 as the war crime of torture.[58] Similarly, the International Tribunal for the Former Yugoslavia has prosecuted rape carried out in non-international armed conflict that occurred in the early 1990s as the war crime of torture under Common Article 3,[59] and has also prosecuted acts of rape as outrages upon personal dignity.[60]

(2) Rape as a Crime Against Humanity

As with rape as a war crime, rape has been considered part of the definition of crimes against humanity since countries began legislating against such crimes. For instance, as mentioned above, the CAWE convened in the wake of World War I to prosecute crimes committed during that conflict considered rape to be an offense against the laws of war as well as an offense against "the laws of humanity."[61] Furthermore, the evidence put forth in the trials conducted by the IMT and IMTFE after World War II can be understood to have supported the war crimes charges as well the crimes against humanity charges, given the way the charges in those cases were framed.[62]

The notion that rape constituted a crime against humanity at least as of World War II is most directly supported by the fact that it was expressly listed as an enumerated act under the definition of crimes against humanity in Control Council Law No. 10 (CCL No. 10). Specifically, CCL No. 10, which was the law promulgated by the Allies in 1945 to try Axis war criminals other than the twenty-two major war criminals tried by the IMT,[63] provided the tribunals set up under its auspices with jurisdiction over:

> 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 perpetrated.[64]

The next codification of rape as a crime against humanity in international criminal law came with the adoption of the statute for the ICTY in 1993[65] and, one year later, the statute of the

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[58] *See* Case 002, Decision on Appeals by Nuon Chea and Ieng Thirith, 002/19-09-2007-ECCC/OCIJ, ¶ 151 (ECCC Pre-Trial Chamber, Feb. 15, 2011).
[59] *See, e.g., Prosecutor v. Kunarac, et al.*, Appeals Judgment, Case No. IT-96-23 & IT-96-23/1-A, ¶¶ 150-51 (ICTY Appeals Chamber, June 12, 2002); *Prosecutor v. Furundžija*, Judgment, Case No. IT-95-17/1-T, ¶¶ 168-69 (ICTY Trial Chamber, Dec. 10, 1998); *Prosecutor v. Kvočka, et al.*, Judgment, Case No. IT-98-30/1, ¶¶ 145, 172-74 (ICTY Trial Chamber, Nov. 2, 2001).
[60] *See, e.g., Prosecutor v. Mucic, et al.*, Case No. IT-96-21, ¶¶ 494-96 (ICTY Trial Chamber, Nov. 16, 1998).
[61] Report of the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, *supra* n. 36, at 117.
[62] *See supra* n. 48 *et seq.* and accompanying text.
[63] *See* M. Cherif Bassiouni, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW 33 (1999). The law, officially termed "Punishment of Persons Guilty of War Crimes, Crimes against Peace and against Humanity," was signed by the four military commanders of the occupation zones on 20 December 1945. *See* Control Council Law No. 10, *supra* n. 21, Art. II(1)(c).
[64] *Id.* (emphasis added).
[65] Statute of the International Criminal Tribunal for the Former Yugoslavia, S.C. Res. 827, U.N. SCOR, 3217th mtg., U.N. Doc. S/RES/827 (1993), Art. 5(g).

International Criminal Tribunals for Rwanda (ICTR).[66] Importantly, although these instruments were each developed in the early 1990s, the crimes enumerated in the statutes were based on an understanding of customary international law *prior to* the adoption of those statutes. Indeed, in his 1993 report to the United Nations (UN) General Assembly on the establishment of the ICTY, the UN Secretary-General acknowledged that the ICTY should "only apply rules of international humanitarian law which are beyond a doubt part of customary law."[67] He went on to expressly confirm his view that the provision relating to crimes against humanity met this requirement, noting that "[c]rimes against humanity were first recognized in the Charter and Judgement of the Nürnberg Tribunal, as well as in Law No. 10 of the Control Council for Germany."[68] Although neither the ICTY nor the ICTR has identified the precise point at which rape as a crime against humanity crystallized in customary international law, it presumably occurred in the immediate wake of World War II, at the latest, as there does not seem to have been any significant conventional or jurisprudential developments related to the crime against humanity of rape in the years between 1945 and 1993.[69]

Finally, even if it is considered that there is some ambiguity as to whether rape constituted a stand-alone crime against humanity as of the early 1980s, it is well-established that acts of rape often fulfill the requirements of the crime of torture,[70] which in turn has been expressly recognized as a crime against humanity since the adoption of the London and Tokyo Charters.[71] Thus, for example, while the Supreme Court Chamber for the ECCC refused to find

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[66] Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg., Annex, U.N. Doc. S/RES/955 (1994), Art. 3(g).

[67] Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), Presented 3 May 1993, ¶ 34 (S/25704) (finding that "[t]his would appear to be particularly important in the context of an international tribunal prosecuting persons responsible for serious violations of international humanitarian law").

[68] *Id.* ¶ 47. The ICTY Appeals Chamber later affirmed that the Statute's definition of crimes against humanity was consistent with customary law and may in fact have been defined "more narrowly than necessary." *Prosecutor v. Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1, ¶ 141 (ICTY Appeals Chamber, Oct. 2, 1995). Consequently, it found "no question… that the definition of crimes against humanity adopted by the Security Council… comports with the principle of *nullum crimen sine lege*." *Id.*

[69] Note that the International Law Commission did produce three versions of its Draft Code of Offenses against the Peace and Security of Mankind between 1951 and 1991, none of which expressly enumerated rape as a crime against humanity. *See Yearbook of the International Law Commission*, 1951, vol. II, Document A/1858, at 43-69; *Yearbook of the International Law Commission*, 1954, vol. II, Document A/2693, at 149-52; *Yearbook of the International Law Commission*, 1991, vol. II (Part Two), Document A/CN.4/SER.A/1991/Add.1, at 79. However, none of these drafts was ever adopted by the United Nations, and the fact that rape was included as an enumerated crime against humanity in the ICTY Statute adopted by the UN Security Council in 1993 strongly suggests that the drafts were not considered to be definitive reflections of customary international law. Furthermore, the ILC did include rape as an enumerated crime against humanity in its 1996 version of the Draft Code of Crimes against the Peace and Security of Mankind. *See Draft Code of Offences against the Peace and Security of Mankind, 1996*, 51 UN GAOR Supp. (No. 10) at 14, U.N. Doc. A/CN.4/L.532, corr.1, corr.3 (1996), Art. 18.

[70] *See, e.g., Kunarac, et al.* Appeals Judgment, *supra* n. 59, ¶¶ 149-51 ("[S]ome acts establish per se the suffering of those upon whom they were inflicted. Rape is… such an act…. Sexual violence necessarily gives rise to severe pain or suffering, whether physical or mental, and in this way justifies its characterisation as an act of torture. Severe pain or suffering, as required by the definition of the crime of torture, can thus be said to be established once rape has been proved, since the act of rape necessarily implies such pain or suffering."); *Kvočka, et al.*, Trial Judgment, *supra* n. 59, ¶ 145 ("[R]ape may constitute severe pain and suffering amounting to torture, provided that the other elements of torture, such as a prohibited purpose, are met.").

[71] London Charter, *supra* n. 21, Art. 6(c); Amended Charter of the International Military Tribunal for the Far East, *reprinted in* R. John Pritchard & Sonia Magbanua Zaide, 2 THE TOKYO MAJOR WAR CRIMES TRIAL (1998), Art.

that rape was an enumerated act of crimes against humanity as of 1975 based on the fact that it was not expressly contained in the London or Tokyo Charters, it held that acts of rape committed during the Khmer Rouge regime could be prosecuted as the crime against humanity of torture.[72]

b) Sexual Violence

(1) Sexual Violence as a War Crime

Unlike rape, "sexual violence" was not expressly codified as a stand-alone war crime until the adoption of the Rome Statute establishing the International Criminal Court in 1998.[73] Nevertheless, acts of sexual violence other than rape have been prosecuted as violations of the laws of war for decades. For instance, as Sellers has documented, "[s]ubmissions of rape, *sexual abductions, intentional injuries to genitalia, etc*., of prisoners of war, interred civilians and inhabitants of occupied territories entered the record [in the IMT trial], ostensibly to substantiate the allegations contained in the indictment."[74] Similarly, the allegations contained in Group Three of the IMTFE indictment, described above, included references to both rape and other "ill-treatment" of female nurses.[75] The *Yamashita* case, also described above, involved evidence that soldiers subordinate to the Japanese general on trial attempted "to have carnal intercourse with the body of a dead female civilian."[76]

Furthermore, Article 4(2)(e) of the 1977 Additional Protocol II (AP II) to the Geneva Conventions, to which Guatemala is a party[77] and which applies in non-international armed conflicts,[78] provides that "outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault" shall be prohibited at any time and in any place.[79]

Finally, acts of sexual violence other than rape have been prosecuted as the war crimes of outrages upon personal dignity and torture by international criminal tribunals applying customary international law as it existed as of the 1990s. For instance, in *Kvočka*, the ICTY held the accused responsible for outrages upon personal dignity as a war crime based, in part, on his role in forcing prisoners to "endur[e] the constant fear of being subjected to physical, mental, or sexual violence" in camps.[80] The ICTR reached the same conclusion in *Akayesu*, holding that

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6(c).

[72] Case No. 001, Appeal Judgment, Case File/Dossier No. 001/18-07-2007-ECCC/SC, ¶ 207 (ECCC Supreme Court, Feb. 3, 2012).

[73] *See* Rome Statute of the International Criminal Court, 2187 U.N.T.S. 90, *entered into force* July 1, 2002, Art. 8(2)(b)(xxii); *id.* Art. 8(2)(e)(vi).

[74] Sellers, *supra* n. 40, at 283.

[75] *See supra* n. 54 and accompanying text.

[76] *See* Whitney, *supra* n. 44, at 7.

[77] *See* International Committee of the Red Cross, List of States Parties to Additional Protocol II, https://www.icrc.org/applic/ihl/ihl.nsf/vwTreatiesByCountrySelected.xsp?xp_countrySelected=GT&nv=4. Guatemala signed AP II in 1977 and ratified the treaty in 1987. *Id.*

[78] *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, Art. 1.

[79] *Id.* Art. 4(2)(e).

[80] *Kvočka, et al.*, Trial Judgment, *supra* n. 59, ¶ 173.

"[s]exual violence falls within the scope of… 'outrages upon personal dignity'" as a war crime.[81] Meanwhile, in *Kunarac, et al.*, the ICTY explained that "[s]exual violence necessarily gives rise to severe pain or suffering, whether physical or mental, and in this way justifies its characterisation as an act of torture."[82]

(2) Sexual Violence as a Crime Against Humanity

As with sexual violence as a war crime, the term was not included as an expressly enumerated act of crimes against humanity until the adoption of the Rome Statute.[83] However, since its earliest codifications, the definition of crimes against humanity has included a reference to "other inhumane acts,"[84] which has been used to capture acts that are "sufficiently similar in gravity to the other enumerated crimes,"[85] including sexual violence. For instance, pursuant to CCL No. 10, individuals were prosecuted for acts involving forced sterilization and experimentation with reproductive functions as the crime against humanity of "other inhumane acts."[86] Forced sterilization was considered sexual violence because it involved non-consensual interaction with sex organs, and it was deemed an inhumane act amounting to a crime against humanity because of the great suffering and mental anguish that resulted.[87]

The modern international criminal tribunals have also prosecuted acts of sexual violence constituting the crime against humanity of other inhumane acts. For instance, in the first case tried before the ICTY, the *Tadić* case, the tribunal convicted the accused of other inhumane acts as a crime against humanity for, *inter alia*, forcing one prisoner to sexually mutilate another prisoner.[88] The ICTR took a similar approach in its first case, the *Akayesu* case, in the accused was charged with the crime for forcing female victims to undress and sometimes perform gymnastics while nude.[89] Likewise, in the *Niyitgeka* case, the ICTR found that the intentional mutilation, or intentional injury of the genitals, constituted sexual violence amounting to other inhumane acts as a crime against humanity.[90] Referencing these and other cases, the Special Court for Sierra Leone explained the crime against humanity of other inhumane acts, and how it may be used in prosecuting acts of sexual violence, as follows:

> The jurisprudence of the international tribunals shows that a wide range of criminal acts, including sexual crimes, have been recognised as "Other Inhumane

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[81] *Prosecutor v. Akayesu*, Judgment, ¶ 688 (ICTR Trial Chamber, Sept. 2, 1998).
[82] *Kunarac, et al.* Appeals Judgment, *supra* n. 59, ¶¶ 149-51.
[83] Rome Statute, *supra* n. 73, Art. 7(1)(g).
[84] *See* London Charter, *supra* n. 21, Art. 6(c); Tokyo Charter, *supra* n. 71, Art. 6(c); Control Council Law No. 10, *supra* n. 21, Art. 2(1)(c); ICTY Statute, *supra* n. 65, Art. 5(i); ICTR Statute, *supra* n. 66, Art. 3(i); Rome Statute, *supra* n. 73, Art. 7(1)(k); UN Security Council, Statute of the Special Court for Sierra Leone, Jan. 16, 2002, Art. 2(i).
[85] *Prosecutor v. Naletilić & Martinović,* Judgment, Case No. IT-98-34, ¶ 247 (ICTY Trial Chamber, Mar. 31, 2003).
[86] *See U.S. v. Brandt et al.*, Judgment, 19 August 1946, *reprinted in* 2 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 13 (1949).
[87] *Id.*
[88] *Prosecutor v. Tadić,* Judgment, Case No. IT-94-1-T, ¶¶ 198, 670, 692, 726, 730 (ICTY Trial Chamber, May 7, 1997).
[89] *See Akayesu* Trial Judgment, *supra* n. 81, ¶ 688.
[90] *Prosecutor v. Niyitegeka*, Judgement and Sentence, ICTR-96-14-T, ¶¶ 462-67, 480 (ICTR Trial Chamber, May 16, 2003).

> Acts." These include… sexual and physical violence perpetrated upon dead human bodies,… forced undressing of women and marching them in public, forcing women to perform exercised naked, and… sexual violence [against prisoners]. Case law at these tribunals further demonstrates that this category has been used to punish a series of violent acts that may vary depending upon the context. In effect, the determination of whether an alleged act qualifies as an "Other Inhumane Act" must be made on a case-by-case basis taking into account the nature of the alleged act or omission, the context in which it took place, the personal circumstances of the victims including age, sex, health, and the physical, mental and moral effects of the perpetrator's conduct upon the victims.[91]

The Special Court concluded this analysis by warning against the adoption of an overly restrictive interpretation of "other inhumane acts," noting that it is intended as a "residual provision" and quoting a passage from an ICTY judgment in which the Tribunal observed: "[h]oewver much care [was] taken in establishing a list of all the various forms of infliction, one would never be able to catch up with the imagination of future torturers who wish to satisfy their bestial instincts…"[92]

c) Sexual Slavery

(1) Sexual Slavery as a War Crime

Slavery has long been recognized as a war crime in international criminal law. For example, Article 23 of the Lieber Code of 1863 stated that "[p]rivate citizens are no longer murdered, *enslaved*, or carried off to distant parts, and the inoffensive individual is as little disturbed in his private relations as the commander of the hostile troops can afford to grant in the overruling demands of a vigorous war."[93] Subsequently, the 1907 Hague Convention prohibited an occupying army from demanding in-kind services from municipalities or inhabitants in the absence of payment,[94] which may be understood as a prohibition on forced labor without payment in the context of armed conflict. Furthermore, individuals were held criminally responsible for using slave labor in wartime in the wake of World War II.[95] More recently, slavery was expressly recognized as a war crime in non-international armed conflict with the adoption of Article 4(2)(f) of Additional Protocol II.[96] Notably, the International Committee of

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[91] *Prosecutor v. Brima, et al.,* Appeals Judgment, Case No. SCSL-2004-16-A, ¶ 184 (SCSL Appeals Judgment, Feb. 22, 2008).
[92] *Id.* ¶¶ 185-86.
[93] *See* Lieber Code, *supra* n. 30, Art. 23 (emphasis added).
[94] International Conferences (The Hague), Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land, Oct. 18, 1907, Art. 52.
[95] *See, e.g.*, IMT Judgment, *reprinted in* TRIAL OF MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, 14 November 1945 – 1 October 1946, Vol 1, at 281-82, 289-93, 295-98, 300-01, 305-07, 320-22, 324-35, 329-33, 339-41 (1947); IMTFE Indictment, *supra* n. 51, at 12-14 (in particular, "Group Three: Conventional War Crimes and Crimes against Humanity" (Counts 53-55), charged individuals for their involvement in labor camps); *US v. Milch*, *reprinted in* 2 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 360 (1997); *US v. Pohl and Others*, *reprinted in* 5 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO 10, at 958, 968 (1997).
[96] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of

the Red Cross' commentary to that provision explains that the inclusion of the prohibition was a reaffirmation of a universally-recognized norm, as evidenced by the absence of discussion amongst the drafters of the Protocol in regards to the inclusion of the crime.[97]

While none of the forgoing examples involves *sexual* slavery, the widespread recognition that slavery amounts to a crime in armed conflict, combined with the long history of prosecuting acts of sexual violence committed in war time as outrages upon personal dignity and/or torture,[98] establish that sexual slavery may also be prosecuted as a war crime. Outrages upon personal dignity has been defined as requiring: "(i) that the accused intentionally committed or participated in an act or an omission which would be generally considered to cause serious humiliation, degradation or otherwise be a serious attack on human dignity, and (ii) that he knew that the act or omission could have that effect."[99] The level of humiliation caused "must be so intense that any reasonable person would be outraged,"[100] but need not be "lasting."[101] The elements of torture under Common Article 3 are: "(i) [t]he infliction, by act or omission, of severe pain or suffering, whether physical or mental[;] (ii) [t]he act or omission must be intentional[;] [and] (iii) [t]he act or omission must aim at obtaining information or a confession, or at punishing, intimidating or coercing the victim or a third person, or at discriminating, on any ground, against the victim or a third person."[102] As with the level of humiliation under outrages upon personal dignity, the pain and suffering required for torture must be objectively severe, albeit with reference to subjective factors such as the age, sex, and health of the victim,[103] and need not be permanent.[104]

There can be no doubt that the acts alleged in this case as amounting to sexual slavery, if established beyond a reasonable doubt, would fulfill the elements of either of these crimes. Indeed, in the *Kunarac, et al.* case tried before the ICTY, Radomir Kovać was convicted of, *inter alia*, outrages upon personal dignity as a war crime for his role in unlawfully detaining women and girls in an apartment for long periods of time, forcing them to perform household chores, and subjecting them to repeated sexual violence.[105] Importantly, Kovać was charged with outrages upon personal dignity as a war crime *and* rape as a war crime, as the Prosecutor recognized that the enslavement and sexual exploitation aspects of the accused's conduct would not be captured by the rape charge alone.[106] In determining that it could convict the accused on both charges, the Trial Chamber quoted from the Prosecutor's Final Brief in the case, in which she argued:

Non-International Armed Conflicts (Protocol II), June 8, 1977, Art. 4(2)(f) ("Without prejudice to the generality of the foregoing, the following acts against the persons referred to in paragraph 1 are and shall remain prohibited at any time and in any place whatsoever… slavery and the slave trade in all their forms…").

[97] *See* COMMENTARY TO THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, ¶ 4541 (1987).

[98] *See supra* n. 73 *et seq.* and accompanying text.

[99] *Kunarac, et al.* Appeals Judgment, *supra* n. 59, ¶ 161.

[100] *Id.* ¶ 162.

[101] *Prosecutor v. Kunarac, et al.*, Judgment, Case No. IT-96-23 & IT-96-23/1-T, ¶ 501 (ICTY Trial Chamber, Feb. 22, 2001).

[102] *Kunarac, et al.* Appeals Judgment, *supra* n. 59, ¶ 142.

[103] *Id.* ¶¶ 142-43.

[104] *Id.* ¶ 148.

[105] *Kunarac, et al.* Trial Judgment, *supra* n. 101, ¶¶ 746-82.

[106] *Id.* ¶¶ 553-54.

> The main characteristic of the enslavement exercised by the accused… was the sexual exploitation of the girls and women. All the controls exerted served that purpose. Repeated violations of the victim's sexual integrity, through rape and other sexual violence, were some of the *most obvious exercises of the powers of ownership by the accused*.[107]

The Prosecutor did not additionally charge the acts amounting to sexual slavery as torture,[108] although she did also charge, and two accused were convicted of, enslavement as a crime against humanity, as discussed immediately below.

(2) Sexual Slavery as a Crime Against Humanity

Just as sexual slavery may be seen as a subset of the general prohibition against slavery in the context of armed conflict, the crime is encapsulated by the criminalization of enslavement as a crime against humanity, which has been recognized since the adoption of the London Charter after World War II.[109] Indeed, as mentioned directly above, two of the accused in the *Kunarac, et al.* case tried before the ICTY were convicted of enslavement as a crime against humanity based on their roles in unlawfully detaining women and girls in apartments for long periods of time, forcing them to perform household chores, and subjecting them to repeated sexual violence.[110] Notably, as with the outrages upon personal dignity charge, the Tribunal in that case held that "enslavement, even if based on sexual exploitation, is a distinct offence from that of rape."[111]

Sexual slavery was also prosecuted as a crime against humanity before the Special Court of Sierra Leone, whose statute was modeled, in part, on the Rome Statute, and thus expressly referred to "sexual slavery" as an enumerated act of crimes against humanity.[112] In analyzing the relevant charges in the first case to be tried before the SCSL, the Trial Chamber noted that the indictments before the Special Court were the first to "specifically indict persons with the crime of sexual slavery."[113] However, it went on to explain that it was not suggesting that the offense was a new one.[114] The Chamber continued:

> It is the Chamber's view that sexual slavery is a particularised form of slavery or enslavement and acts which could be classified as sexual slavery have been prosecuted as enslavement in the past…. [*T]he prohibition of the more particular offences such as sexual slavery and sexual violence criminalises actions that were already criminal*. The Chamber considers that the specific offences are designed to draw attention to serious crimes that have been historically overlooked and to recognise the particular nature of sexual violence that has been used, often with impunity, as a tactic of war to humiliate, dominate and instill fear in victims, their

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[107] *Id.* (emphasis added).
[108] Acts of rape were charged as the war crime of torture, but these charges did not encompass the ownership and exploitation aspects of the perpetrators' conduct in this case. *See generally id.* ¶¶ 552-57.
[109] *See* London Charter, *supra* n. 21, Art. 6(c).
[110] *Kunarac, et al.*, Trial Judgment, *supra* n. 101, ¶¶ 583-92.
[111] *Kunarac, et al.* Appeals Judgment, *supra* n. 59, ¶ 186.
[112] *See* SCSL Statute, *supra* n. 84, Art. 2(g).
[113] *See Prosecutor v. Sesay, et al.*, Judgment, Case No. SCSL-04-15-T, ¶ 154 (SCSL Trial Chamber, Mar. 2, 2009).
[114] *Id.* ¶ 155.

families and communities during armed conflict.[115]

The Chamber thus concluded that "the offence of enslavement is prohibited at customary international law and entails individual criminal responsibility" and that "this would equally apply to the offence of sexual slavery which is 'an international crime and a violation of *jus cogens* norms in the exact same manner as slavery.'"[116]

d) Domestic Slavery

(1) Domestic Slavery as a War Crime

As already discussed, acts of slavery and forced labor have been viewed as a war crime since the adoption of the Lieber Code in 1863 and individuals have been prosecuted for such acts for decades.[117] Of particular relevance here is the fact that several of the charges brought before defendants tried by the IMT established after World War II related to the use of female domestic workers who were sent to homes to relieve German women of their household duties.[118]

In terms of individual criminal responsibility under Common Article 3, the acts amounting to domestic slavery at issue in this case would most appropriately fit within the prohibition of outrages upon personal dignity, discussed at length above,[119] or cruel treatment. Cruel treatment in the context of non-international armed conflict has been prosecuted as a war crime where the relevant conduct "constitutes an intentional act or omission which causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity."[120] Importantly, "the degree of physical or mental suffering required to prove cruel treatment is lower than the one required for torture, though it must be at the same level as 'wilfully causing great suffering or serious injury to body or health.'"[121] Thus, for example, the ICTY Appeals Chamber held in the *Blaškić* case that an individual can be held criminally liable for forced labor in a non-international armed conflict where "the treatment of noncombatant detainees may be considered cruel where, together with the other requisite elements, that treatment causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity."[122]

(2) Domestic Slavery as a Crime Against Humanity

As noted above, enslavement has been expressly contained in the definition of crimes

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[115] *Id.* ¶¶ 155-56 (emphasis added).
[116] *Id.* ¶ 157 (quoting the Update to Final report submitted by Ms. Gay J. McDougall, Special Rapporteur, Contemporary Forms of Slavery: Systematic rape, sexual slavery and slavery-like practices during armed conflict, Economic and Social Council, Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, E/CN.4/Sub.2/2000/21, 6 June 2000, para. 51).
[117] *See supra* n. 93 *et seq.* and accompanying text.
[118] *See* IMT Judgment, *supra* n. 95, at 451 (Sauckel, Himmler, and Bormann were specifically convicted of war crimes for the transfer of 500,000 female domestic workers from the eastern occupied territories to Germany).
[119] *See supra* n. 98 *et seq.* and accompanying text.
[120] *Prosecutor v. Blaškić*, Judgment, ¶ 186 (ICTY Trial Chamber, Mar. 3, 2000).
[121] *Kvočka, et al.*, Trial Judgment, *supra* n. 59, ¶ 161.
[122] *See Prosecutor v. Blaškić*, Appeals Judgment, Case No. IT-95-14-A, ¶ 597 (ICTY Trial Chamber, July 29, 2004).

against humanity since the adoption of the London Charter in 1945.[123] Importantly, several of the prosecutions for forced labor conducted in the wake of World War II resulted in convictions for both war crimes and crimes against humanity,[124] suggesting forced labor was equated with enslavement as a crime against humanity. Indeed, while the IMT and IMTFE judgments are often vague as to the precise crime of which individual defendants are convicted, at least one IMT defendant charged with acts of forced labor, Von Schirach, was convicted only of crimes against humanity, presumably based on the enumerated act of enslavement.[125]

The notion that forcing women to engage in domestic chores, such as washing, cooking, laundering and cleaning,[126] amounts to the crime against humanity of enslavement is expressly affirmed in the *Kunarac, et al*. case tried before the ICTY, which is discussed above.[127] While the Trial Chamber in that case did not separate out acts of detention, sexual exploitation, and forced labor in its findings on enslavement, it repeatedly stressed the fact that the women and girls held captive by the accused were made to perform household chores.[128] On appeal, the defense challenged the enslavement convictions, in part, based on a claim that the victims enjoyed freedom of movement and "were not forced to do household chores but undertook them willingly."[129] However, the Appeals Chamber rejected this argument. It began by explaining, as a general matter, that "the question whether a particular phenomenon is a form of enslavement" will depend on a number of "factors or indicia of enslavement," including: "control of someone's movement, control of physical environment, psychological control, measures taken to prevent or deter escape, force, threat of force or coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality and forced labour."[130] The Appeals Chamber also noted that "it is not possible exhaustively to enumerate all of the contemporary forms of slavery which are comprehended in the expansion of the original idea."[131] Turning to the particular challenge raised by the defense, the Appeals Chamber rejected the "contention that lack of resistance or the absence of a clear and constant lack of consent during the entire time of the detention can be interpreted as a sign of consent."[132] It continued:

> Indeed, the Appeals Chamber does not accept the premise that lack of consent is an element of the crime since, in its view, enslavement flows from claimed rights of ownership; accordingly, lack of consent does not have to be proved by the Prosecutor as an element of the crime. However, consent may be relevant from an

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[123] *See supra* n. 109 and accompanying text.
[124] *See supra* n. 95, and accompanying text.
[125] *See* IMT Judgment, *supra* n. 95, at 318-20.
[126] See *Kunarac, et al.* Trial Judgment, *supra* n. 101, ¶ 63.
[127] *See supra* n. 105 and accompanying text.
[128] *See, e.g., Kunarac, et al.* Trial Judgment, *supra* n. 101, ¶ 742 (explaining that two of accused Kunarać's victims "had to obey all orders, they had to do household chores and they had no realistic option whatsoever to flee the house… or to escape their assailants"); *id.* ¶ 751 ("While they were detained in Radomir Kovac's apartment, the girls were required to take care of the household chores, the cooking and the cleaning."); *id.* ¶ 780 (explaining that, during the entire time that the accused Kovać detained female victims in his apartment, "he had complete control over their movements, privacy and labour" and "made them cook for him, serve him and do the household chores for him").
[129] *Kunarac, et al.* Appeals Judgment, *supra* n. 59, ¶ 108.
[130] *Id.* ¶ 119.
[131] *Id.*
[132] *Id.* ¶ 120.

> evidential point of view as going to the question whether the Prosecutor has established the element of the crime relating to the exercise by the accused of any or all of the powers attaching to the right of ownership. In this respect, the Appeals Chamber considers that circumstances which render it impossible to express consent may be sufficient to presume the absence of consent.[133]

Regarding the facts before it, the Appeals Chamber concluded that "the circumstances in this case" were of the kind that rendered consent impossible.[134]

Acts amounting to forced "domestic" labor were also prosecuted as the crime against humanity of enslavement before the SCSL.[135] In analyzing the charge in the *Brima, et al.* case, the court explained that the "crime of 'enslavement' has long been criminalised under customary international law" and that forced labor is an "indication of" enslavement.[136] Forced labor, in turn, was defined by the court as "all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily."[137]

e) Outrages upon Personal Dignity

(1) Outrages upon Personal Dignity as a War Crime

The final charge against the defendants in this case is outrages upon personal dignity. As discussed above, such conduct is expressly prohibited under Common Article 3 to the Geneva Conventions and has been used to prosecute acts "which would be generally considered to cause serious humiliation, degradation or otherwise be a serious attack on human dignity."[138] While this provision has been used to capture acts of rape and sexual slavery, it has also been the basis on which to convict acts as diverse as using detainees as human shields or trench-diggers,[139] forcing persons to relieve bodily functions in their clothing or to perform "subservient acts,"[140] and generally subjecting detainees to inhumane conditions of confinement.[141] Thus, outrages upon personal dignity may be an appropriate vehicle through which to convict the accused in this case of any conduct not more appropriately captured by any of the other charges, but that is of equal gravity and demands punishment.

(2) Outrages upon Personal Dignity as a Crime Against Humanity

While "outrages upon personal dignity" is a term of art directly associated with Common

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[133] *Id.*
[134] *Id.*
[135] *Prosecutor v. Brima et al.*, Judgment, Case No. SCSL-2004-16-T, ¶ 740 (SCSL Trial Chamber, June 20, 2007).
[136] *Id.* ¶ 742.
[137] *Id. See also Prosecutor v. Taylor*, Judgment, Case No. SCSL-03-01-T, ¶ 1875 (SCSL Trial Chamber, May 18, 2012) (holding that the charge of enslavement as a crime against humanity was supported by evidence that insurgent forces "engaged in widespread and large scale abductions of civilians in Freetown and the Western Area and used them as forced labour to carry loads, *perform domestic chores* and destroy a bridge") (emphasis added).
[138] *Kunarac, et al.* Appeals Judgment, *supra* n. 59, ¶ 161.
[139] *Prosecutor v. Aleksovski*, Judgment, ¶ 229 (ICTY Trial Chamber, June 25, 1999).
[140] *Kvočka, et al.*, Trial Judgment, *supra* n. 59, ¶ 173.
[141] *Id.*

Article 3, conduct committed in the context of armed conflict that is appropriately criminalized under that provision, it may also be prosecuted as the crime against humanity of other inhumane acts, assuming all relevant elements are satisfied. As explained above, "other inhumane acts" has been recognized as a category of crimes against humanity in a number of international instruments dating back to the London Charter[142] and serves as a "residual" clause designed to capture conduct not envisioned by the drafters of any particular codification of crimes against humanity.[143] One particular application of the "other inhumane acts" clause that may be relevant to this case is discussed in the *Kayishema & Ruzindana* case tried before the ICTR, in which the Trial Chamber held that subjecting third parties to mental harm by forcing them to witness violence against family and friends could amount to other inhumane acts as a crime against humanity, so long as the accused intended to cause the suffering of the third parties.[144]

III. CONCLUSION

Based on an analysis of conventional and customary international law as it existed as of the early 1980s, acts of rape, sexual violence, sexual slavery, domestic slavery, and outrages upon personal dignity committed between 1982 and 1988 in the context of Guatemala's internal armed conflict may be prosecuted as violations of international humanitarian law and crimes against humanity under Article 378 of the Guatemalan Penal Code.

[142] *See supra* n. 84 and accompanying text.
[143] *See supra* n. 92 and accompanying text.
[144] *Prosecutor v. Kayishema & Ruzindana*, Judgement, ICTR-95-1-T, ¶ 153 (ICTR Trial Chamber, 21 May 1999).