

THE PROHIBITION OF RAPE IN INTERNATIONAL HUMANITARIAN LAW AS A NORM OF *JUS COGENS*: CLARIFYING THE DOCTRINE

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I. INTRODUCTION

“In the law, it is not the obvious that needs be specified, but the ambiguous that must be clarified.”¹

The recent abuse of Iraqi prisoners by American soldiers at Abu Ghraib prison, including sexual violence and torture, shocked the public conscience.² Photographs appearing on the front page of every major news source in the world vividly depicted a pattern of systematic, sexualized abuse that wrenched the private horrors of war into the public sphere.³ Yet these images represent nothing new: rape,

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1. M. CHERIF BASSIOUNI, *CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW* 369 (1999).

2. Ian Fisher, *Iraqi Tells of U.S. Abuse, from Ridicule to Rape*, N.Y. TIMES, May 14, 2004, at A8; Robert Fisk, *The Destruction of Morality*, INDEP. (London), May 7, 2004, at 1; *Iraq: America's Shame*, GUARDIAN (London), May 1, 2004, at 25; David Scheffer, *The Legal Double Standards of Bush's War*, FIN. TIMES, May 6, 2004, at 21; Julian Borger, *U.S. Soldiers Face Action Over Abuse Charges*, HINDU, May 1, 2004, at 1. Methods of abuse at Abu Ghraib included forcing prisoners to masturbate publicly, forced sexual acts between male prisoners, stripping prisoners naked and binding them together, beating and urinating on prisoners, and chaining prisoners naked to the bars of their cells. Fischer, *supra*; *Iraq: America's Shame, supra*. Rape was also used as a threat to elicit confessions. Fisher, *supra*. It is important to note how torture often has a sexualized component. See Seymour M. Hersh, *Torture at Abu Ghraib*, THE NEW YORKER, May 10, 2004, at 42, 43–44 (describing instances of torture and sexual abuse that were especially dehumanizing to those of Islamic faith).

3. Kelly D. Askin, *The Quest for Post-Conflict Gender Justice*, 41 COLUM. J. TRANSNAT'L L. 509, 512 (2003) (noting how "wartime violence has deliberately become sexualized as a means of inflicting physical or mental harm on members of the opposition group"). Sexual violence has two functions in war: (1) as a means to demoralize the opposition; and (2) as a reward for combatants, to entertain, energize, and galvanize troops. *Id.* at 512. While sexual violence was once

torture, and sexual violence have been endemic during armed conflict for centuries.⁴ Rather, “what is new is the role of the media. Instant reporting from the field has resulted in [the] rapid sensitization of public opinion . . . [to] make some kind of action a moral imperative.”⁵ Indeed, the paradox of violent conflict is that it promotes the

considered an inevitable byproduct of war, “it is now recognized that women and girls are regularly and intentionally targeted for abuse, particularly sexual abuse.” *Id.* at 509. To be sure, rape and other forms of sexual violence are also committed against men, albeit on a much smaller scale. ASKIN, WAR CRIMES AGAINST WOMEN, *infra* note 5, at 95. For instance, the abuses at Abu Ghraib were carried out almost exclusively against men, in order to dominate, control, and emasculate Iraqi prisoners. *See supra* note 2, and accompanying texts. However, for the purposes of this article, discussion will focus primarily on sexual violence committed against women because of the disproportionate number of gender-related crimes experienced by women in war and the unique after-effects of rape experienced by women that are not shared by men (though the analysis should be applied to sexual crimes against men as well). Askin, *supra* note 3, at 512. *See* Harry van Tienhoven, *Sexual Violence: A Method of Torture Also Used Against Male Victims*, in *III International Conference: 'Health, Political, Repression and Human Rights'*, ACTAS PROCEEDINGS, 24-29 Nov. 1991, at 393-95.

4. *See generally infra* notes 5-12 and accompanying texts (establishing the long history or rape, torture, and sexual violence during armed conflict).

5. Theodor Meron, Comment, *Rape As A Crime Under International Humanitarian Law*, 87 AM. J. INT'L LAW 424, 424 (1993) [hereinafter Meron, *Rape as a Crime*] (observing that “[b]ecause the international community has failed in the central task of ending the bloodshed and atrocities, the establishment of the tribunal has become the preferred means to promote justice and effectiveness of international law”). For a more detailed discussion of the history of rape in war and the failure of nations to prosecute wartime rape, see Theodor Meron, *Shakespeare's Henry the Fifth and the Law of War*, 86 AM. J. INT'L LAW 1, 29-30 (1992) (observing that, though prohibited by King Henry, rape was considered an incentive for soldiers involved in siege warfare during the Hundred Years War) [hereinafter Meron, *Henry the Fifth*]; HILARY CHARLESWORTH & CHRISTINE CHINKIN, *THE BOUNDARIES OF INTERNATIONAL LAW: A FEMINIST ANALYSIS* 252-55 (2000) (chronicling rape and sexual violence during World War II, the Iraqi invasion of Kuwait, and the armed conflict in the Former Yugoslavia); SUSAN BROWNMILLER, *AGAINST OUR WILL: MEN, WOMEN AND RAPE* 30-115 (1975) (providing examples of rape during wartime, from ancient Greek and Roman battles, through World War II and Vietnam); Rhonda Copelon, *Surfacing Gender: Reconceptualizing Crimes Against Women in Time of War*, in *MASS RAPE* 197 (Alexandra Stiglmeier ed., 1994) (stating that the rape of women during war has historically been “comfortably cabined as a mere inevitable ‘by-product of war’”); Kathleen M. Pratt & Laurel E. Fletcher, *Time for Justice: The Case for the International Prosecutions of Rape and Gender-Based Violence in the Former Yugoslavia*, 9 BERKELEY WOMEN'S L. J. 77, 80-82 (1994) (finding that, despite being globally pervasive, rape and gender-based violence do not receive the same attention as other international law violations, either through prosecution or in U.N. investigation and reporting); Rosalind Dixon, *Rape as a Crime in International Humanitarian Law: Where to from Here?* 13 EJIL 697, 698-705 (2002) (suggesting that recent prosecutions of sexual violence remain inadequate and that “the potential to recognize the specific gendered harms suffered by the victims of war crimes and crimes against humanity is inherently limited within the international criminal process”); *see generally* KELLY DAWN ASKIN, *WAR CRIMES AGAINST WOMEN: PROSECUTIONS IN INTERNATIONAL WAR CRIMES TRIBUNALS* (1997) [hereinafter ASKIN, *WAR CRIMES AGAINST WOMEN*] (providing an exhaustive historical analysis of gender specific war crimes and the development of gender crimes in customary international law); YOUNGINDRA KHUSHALANI, *DIGNITY AND HONOUR OF*

possibility of advancing the very human rights that were denied in conduct, such that the visible perpetration of atrocities often leads to the development and expression of the symbolic and regulative functions of international law—precedents of accountability arising from the production of law to generate post-conflict peace building and long-term deterrence—and the international criminalization of its most serious breaches.⁶ In this way, we traditionally think of a very ordered and gratifying connection between violence and the production of law.⁷ And yet, as the images from Abu Ghraib show, that relationship is anything but direct, particularly when the violence is sexualized. What happens when the sources of violence are also responsible for administering justice and defining order? To what extent is the relationship between atrocities and law disturbed when the crimes involve sexual violence? How does the treatment of rape as a *sexual* crime rather than a *violent*⁸ crime complicate regulation and in-

WOMEN AS BASIC AND FUNDAMENTAL HUMAN RIGHTS (1982) (providing a detailed history and critical analysis of documents protecting the rights of women during armed conflict); Catherine N. Niarchos, *Women, War, and Rape: Challenges Facing The International Tribunal for the Former Yugoslavia*, 17 HUM. RTS. Q. 649 (1995) (noting the rape of civilian women in the former Yugoslavia and other armed conflicts throughout history, the gender-biased status of rape in international humanitarian law, and the challenges of prosecuting rape before the International Tribunal for the Former Yugoslavia); Kelly D. Askin, *Prosecuting Wartime Rape and Other Gender-Related Crimes Under International Law: Extraordinary Advances, Enduring Obstacles*, 21 BERKELEY J. INT'L L. 288 (2003) [hereinafter Askin, *Prosecuting Wartime Rape*] (observing centuries of disregard in the development of international humanitarian law regarding women, but also noting extraordinary progress in this area of law since World War II—particularly the jurisprudence of the ICTY, ICTR, and ICC).

6. Meron, *Rape as a Crime*, *supra* note 5, at 424. Meron goes on to note that,

Nazi atrocities, for example, led to the establishment of the Nuremberg Tribunal; the evolution of the concepts of crimes against peace, crimes against humanity and the crime of genocide; the shaping of the fourth Geneva Convention; and the birth of the human rights movement. The starvation of Somali children prompted the Security Council to apply chapter VII of the U.N. Charter to an essentially internal situation, bringing about a revolutionary change in our conception of the authority of the United Nations to enforce peace in such situations . . . [additionally] it took the repeated and massive atrocities in former Yugoslavia, especially in Bosnia-Herzegovina, to persuade the Security Council that the commission of those atrocities constitutes a threat to international peace, and that the creation of an ad hoc international criminal tribunal would contribute to the restoration of peace.

Id. See also M. Cherif Bassiouni, *The Proscribing Function of International Law in the Process of International Protection of Human Rights*, 9 YALE J. WORLD PUB. ORD. 193, 193 (1982) (stating that "[r]esort to criminal proscription is a compelled when a given right encounters an 'enforcement crisis' in which other modalities of protection appear inadequate").

7. Bassiouni, *id.* at 193; Meron, *Rape as a Crime*, *supra* note 5, at 424 ("It is a pity that calamitous circumstances are needed to shock the public conscience into focusing on important, but neglected areas of law . . . [t]he more offensive the occurrence, the greater the pressure for rapid adjustment").

8. BASSIOUNI, *supra* note 1, at 345 n.246 (observing that "[v]iolent crimes are viewed generally as more serious than crimes to property or nonviolent crimes. The violence inherent in

ternational obligation? The events at Abu Ghraib bring to light a number of issues that make it a relevant time to consider such questions, and to that end, this article examines the current status and legal value of sexual violence as a crime in international humanitarian law.

In the last decade, the international community has witnessed atrocities of sexual violence on an unimaginable scale.⁹ Abuses in Rwanda,¹⁰ the former Yugoslavia,¹¹ Sierra Leone,¹² and the recent ex-

rape is often difficult to detect . . . [t]hus rape and sexual assault are often referred to as crimes of 'honour,' which do not sound as serious . . . [and] obscures the fact that rape and sexual assault are violent crimes which cause lasting physical and psychological harm").

9. Sexual violence is commonplace in international and internal armed conflict. See U.N. Special Rapporteur on Violence Against Women, *Mission to Indonesia and East Timor on the Issue of Violence Against Women (20 November-4 December 1998)*, U.N. ESCOR Comm'n on Hum. Rts., 55th Sess., Agenda Item 12(a), paras. 9, 93-98, U.N. Doc. E/CN.4/1999/68/Add.3 (1999) (providing case examples of large-scale sexual violence by the Indonesian army during counter-insurgency operations during 1989-1993); Seth Mydans, *Sexual Violence as a Tool of War: Pattern Emerging in East Timor*, N.Y. TIMES, Mar. 1, 2001, at A1 (describing "dozens, even hundreds of rapes," during violence in East Timor in 1999); SURVIVORS' RIGHTS INTERNATIONAL & WOMEN'S ALLIANCE FOR PEACE AND HUMAN RIGHTS IN AFGHANISTAN, JOINT REPORT: SEVERE PERSECUTION AND VIOLENCE UNDER THE TALIBAN'S VEIL: WAR AGAINST WOMEN AS CRIMES AGAINST HUMANITY 2 (2002) (stating that women were specifically targeted for various brutal crimes, including rape, under Taliban rule of Afghanistan); JOANNE CSETE & JULIANE KIPPENBERG, THE WAR WITHIN THE WAR: SEXUAL VIOLENCE AGAINST WOMEN AND GIRLS IN EASTERN CONGO 1 (2002), available at <http://www.hrw.org/reports/2002/drc/Congo0602.pdf> (describing sexual violence as "a weapon of war" used by most of the forces involved in armed conflict in Congo); *Rape in Haiti: a Weapon of Terror*, 6 HUMAN RIGHTS WATCH 8 (July 1994) (citing numerous reports detailing rape during conflict in Haiti in the early 1990s); Martina Vandenberg & Kelly Askin, *Chechnya: Another Battleground for the Perpetration of Gender Based Crimes*, 2 HUM. RTS. REV. 140, 141-143 (2001) (detailing witness accounts of rape during 1999 conflict in Chechnya); Marie Colvin, *Saddam Blackmails Rebels With Rape*, SUNDAY TIMES (U.K.), July 9, 2000 (describing Saddam Hussein's practice of using rape of female family members as a method of "keep[ing] his people under control or threaten[ing] his enemies"); See Kelly Askin, *supra* note 3, at 509, 509 citing JUDITH G. GARDAM & MICHELLE J. JARVIS, WOMEN, ARMED CONFLICT AND INTERNATIONAL LAW 27 (2001) (describing wartime rape in Aceh, Afghanistan, Algeria, Angola, Azerbaijan, Bosnia, Bougainville, Chad, Chechnya, Croatia, Cyprus, East Timor, Georgia, Guatemala, Haiti, India, Indonesia, Irian Jaya, Kashmir, Kosovo, Liberia, Mozambique, Myanmar (Burma), Namibia, Palestine territories, Persian Gulf Conflict (1990-91), Peru, Philippines, Rwanda, Sierra Leone, Somalia, South Africa during the apartheid, Sudan, Tibet, Uganda, and West Papua).

10. See generally Binaifer Nowrojee, *Shattered Lives: Sexual Violence During the Rwanda Genocide and Its Aftermath*, HUMAN RIGHTS WATCH (AFRICA DIVISION) (Sept. 1996), available at <http://www.hrw.org/reports/1996/Rwanda.htm> (noting the extremely widespread abuse of women during the Rwandan genocide: "[R]ape and other forms of violence were directed primarily against Tutsi women on the basis of their gender and ethnicity"). *Id.* at 1.

11. Amnesty International, *Bosnia-Herzegovina, Rape and Sexual Abuse by Armed Forces* (Jan. 1993).

posure of the mass rape and sexual enslavement of some 200,000 so-called "comfort women" by Japanese military personnel during World War II¹³ clearly placed the issue of sexual violence on the international agenda and have subsequently led to a growing recognition of the importance of prohibiting crimes of sexual violence, including rape, such that these crimes have been given a special normative character in the international legal system. Historically, rape and other crimes of sexual violence have received little attention in international law and, until recently, the failure of humanitarian law instruments to adequately incorporate,¹⁴ characterize, or even

12. Louise Taylor, "We'll Kill You If You Cry": *Sexual Violence in the Sierra Leone Conflict*, 15 HUMAN RIGHTS WATCH (AFRICA DIVISION) 1(A) (Jan. 2003), at 6-8, 28-63, 76-7, available at <http://www.hrw.org/reports/2003/sierraleone/> (describing how extreme sexual violence was used systematically throughout the Sierra Leone conflict to terrorize, humiliate, and punish thousands of women of all ages, including very young girls, on the basis of their gender); See generally Corinne Dufka, *Sierra Leone: Getting Away with Murder, Mutilation and Rape*, 11 HUMAN RIGHTS WATCH (AFRICA DIVISION) 3(A) (June 1999), available at <http://www.hrw.org/reports/1999/sieraal/>; Physicians for Human Rights, *War-Related Sexual Violence in Sierra Leone: A Population-based Assessment* (Boston: Physicians for Hum. Rts 2002) [hereinafter Physicians for Human Rights], available at <http://www.phrusa.org/research/sierraleone/report.html>; Scott Campbell & Jane Lowicki, *Sierra Leone: Sowing Terror: Atrocities Against Civilians in Sierra Leone*, 10 HUMAN RIGHTS WATCH (AFRICA DIVISION) 3(A) (July 1998), available at http://www.hrw.org/reports98/sierra/Sier988-01.htm#P88_2258. In the Sierra Leone conflict from March 1991 to 2001, more than half of all women and girls, or as many as 215,000-257,000, suffered some form of sexual violence. See Physicians for Human Rights, *id.*, at 2-4 (describing the extraordinary level of brutal human rights abuses during the decade long conflict in Sierra Leone, including sexual violence against women and girls).

13. *Update to the Final Report on Contemporary Forms of Slavery: Systematic Rape, Sexual Slavery and Slavery-like Practices During Armed Conflict*, U.N. ESCOR Comm'n on Hum. Rts, 52nd Sess., Prov. Agenda Item 6, paras. 71-78, U.N. Doc. E/CN.4/sub.2/2000/21 (2000).

14. Instead, crimes against women have been traditionally defined and prosecuted alongside or "folded into" other atrocities, which tends to "subsume the incidence of sexual violence and prevent it from receiving the individual condemnation from which it would benefit." Hannah Pearce, *An Examination of the International Understanding of Political Rape and the Significance of Labeling it Torture*, 17 INT'L J. REF. L. 534, 544-45 (2003). See also Niarchos, *supra* note 5, at 665 (discussing how rape does not appear anywhere in the 179 page judgment of the IMT at Nuremberg); Charter of the International Military Tribunal, Aug. 8 1945, art. 6(b), 59 Stat. 1546, 1547, 82 U.N.T.S 279 [hereinafter London Charter] (listing war crimes coming within the jurisdiction of the Tribunal, of which rape is not included). Notably, the indexes of the Nuremberg proceedings included 3^{1/2} pages for the crime "looting," while the headings "rape," "prostitution," or even "women," are not included at all. ASKIN, WAR CRIMES AGAINST WOMEN, *supra* note 5, at 98 (citing TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, 14 Nov. 1945-1 Oct. 1946 (42 Vols., 1947) [hereinafter IMT Docs], at Vol. XXIII (providing a 732-page chronological and subject matter index that fails to mention gender crimes)). Although the London Charter and the Tokyo Charter fail to explicitly list rape and sexual assault as war crimes, both documents implicitly refer to them as such under the term "ill treatment." BASSIOUNI, *supra* note 1, at 348. As a result, rape was not prosecuted as a war crime at Nuremberg under customary international law, but it was, however, prosecuted in Tokyo—though these prosecutions were viewed as ancillary to other war

mention rape and sexual assault has downplayed crimes against women as the unfortunate but inevitable byproduct of war.¹⁵ Indeed, the Lieber Instructions (1863)—the first codification of customary international laws of land warfare and an important influence on the modern law of war—classified rape as a crime of “troop discipline,” and the current applicable law regarding war contained within the Nuremberg Charter, the 1949 Geneva Conventions, and the 1977 Additional Protocols contain a number of shortcomings and contradictions with respect to defining sexual violence as a serious international offense.¹⁶ As Askin notes, “it is only recently that the international community is beginning to grasp the moral, social, economic, and legal importance of taking adequate measures to prevent and punish gender crimes.”¹⁷ Yet despite these shortcomings, the legal

crimes. *See id.*; *See also*, ASKIN, *id.* at 378 (noting that “in the Nuremberg and Tokyo Tribunals, abuses against women were never adequately reported, investigated, or prosecuted”).

15. United Nations, *Impact of Armed Conflict on Children*, Final Report submitted by Ms. Grac'a Machel, expert of the Secretary-General, pursuant to General Assembly resolution 48/157, A/51/306 of 26 August 1996, at 22, para. 91 (stating that “while abuses such as murder and torture have long been denounced as war crimes, rape has been downplayed as an unfortunate but inevitable side effect of war”).

16. *See e.g.*, *supra* note 5 and accompanying text (supporting the global prevalence of the use of rape during war and the failure to prosecute); Askin, *Prosecuting Wartime Rape*, *supra* note 5, at 294-296 (discussing the inadequacy of international humanitarian law instruments—such as the Hague Conventions, Nuremberg Charter, 1949 Geneva Conventions, and 1977 Additional Protocols—with regard to protecting women, Askin argues, “[w]omen and girls have habitually been sexually violated during wartime, yet even in the twenty-first century, the documents regulating armed conflict either minimally incorporate, inappropriately characterize, or wholly fail to mention these crimes”). *See generally* Lieber Code, *infra* note 58; IMT Docs, *supra* note 14; Geneva Convention IV, *infra* notes 68-70; Additional Protocol I & II, *infra* note 71-72. For a feminist analysis of *jus cogens*, see Hilary Charlesworth & Christine Chinkin, *The Gender of Jus Cogens*, 15 HUM. RTS. Q. 63, 65 (1993) (arguing that *jus cogens* is gender biased and does not reflect equally on women and men by asserting male-oriented values and masculine interpretations of international law); *see also* Hilary Charlesworth, *Symposium on Method: Feminist Methods*, 93 AM J. INT'L L. 379, 386-871 (1999) (noting that “the provisions on rape [in the Geneva Convention] are not specifically included in the category of grave breaches of international humanitarian law”); Hilary Charlesworth, et. al., *Feminist Approach to International Law*, 85 AM J. INT'L L. 613, 627-29 (1991) (arguing that the definition of torture in international law does not include many instances of brutality and sexual violence against women—deeming them “private” crimes and thus beyond the reach of international law); Judith Gardam, *A Feminist Analysis of Certain Aspects of International Humanitarian Law*, 12 AUST. Y.B. INT'L L. 265, 267 (1992) (arguing that international humanitarian law is a gendered legal regime); Mark A. Drumbl, *Rights, Culture, and Crime: The Role of Rule of Law for the Women of Afghanistan*, 42 COLUM. J. TRANSNAT'L L. 349, 363 (2004) (noting that local contours affect legitimacy of international justice initiatives for women who are victims of gender crimes).

17. Askin, *Prosecuting Wartime Rape*, *supra* note 5, at 298 (noting that “the international community has been even slower in providing other forms of accountability to victims of sex crimes”); Askin, *supra* note 3, at 520 (observing that “[d]espite its insidious prevalence during armed conflict, even the most notorious or egregious cases of sexual violence are typically

value of rape as a crime in humanitarian law has progressed remarkably. Over the last ten years, the extraordinary developments in gender jurisprudence ushered in by the *ad hoc* Tribunals and the International Criminal Court (ICC) reflect the international community's willingness to combat and redress crimes of sexual violence as a specific means of warfare,¹⁸ and there is now a strong indication that such crimes constitute *jus cogens*.¹⁹

This article argues that the prohibition of sexual violence in humanitarian law has emerged as one of the most fundamental standards of the international community as a norm of *jus cogens*. Although the prohibition of rape has not been formally designated as a *jus cogens* rule by courts, its peremptory status, like that of torture, is likely to become an important normative standard within the international legal system. Part II of this article elucidates the criteria for establishing a rule of *jus cogens*. Part III argues that state law and practice, international conventions, and the decisions of international and regional judicial bodies present compelling evidence of a demonstrable and legitimate *jus cogens* norm barring rape and sexual violence under international humanitarian law. Thus in doing so, this article hopes to rethink the doctrine of *jus cogens* by clarifying the ambiguous legal status of rape.

For the purposes of this article, the term 'sexual violence' is defined as "any violence, physical or psychological, carried out through sexual means or by targeting sexuality"²⁰ and embraces "all serious

committed with absolute impunity . . . an overwhelming majority of perpetrators or facilitators of sexual violence are not held accountable for their crimes and few survivors ever receive justice or any other form of accountability or reparation, much less medical, psychological, or financial redress").

18. Many forms of sexual violence have been found to constitute forms of genocide, torture, slavery, war crimes and crimes against humanity and, when they meet the constituent elements of these crimes, they may be prosecuted as peremptory norms subject to universal jurisdiction. See ASKIN, WAR CRIMES AGAINST WOMEN, *supra* note 5, at 375; Askin, *Prosecuting Wartime Rape*, *supra* note 5, at 349; *infra* Part III, Section C.

19. ASKIN, WAR CRIMES AGAINST WOMEN, *id.* at 242 (noting that "[i]nternational treaties, documents, and U.N. resolutions serve as an indication of the direction international law is heading regarding fundamental norms of international law. The greatly increased activity in international law in the 1990s towards affording greater protection, status, and equality to women evidences a universal trend toward *jus cogens* status for gender based abuses, particularly violence").

20. United Nations, *Contemporary Forms of Slavery: Systematic Rape, Sexual Slavery and Slavery-like Practices during Armed Conflict*, Final Report submitted by Ms. Gay J. McDougall, Special Rapporteur, E/CN.4/Sub.2/1998/13, at 7–8 [hereinafter *Contemporary Slavery*] (citing M. Cherif Bassiouni, *Sexual Violence: An Invisible Weapon of War in the Former Yugoslavia*, Occa-

abuses of a sexual nature inflicted upon the physical and moral integrity of a person by means of coercion, threat of force or intimidation in a way that is degrading and humiliating for the victim's dignity."²¹ This includes not only the explicit commission of sexual violence by an individual, but also the conspiring, ordering, inducing, or aiding and abetting in the perpetration of such acts in times of both conflict and peace.²²

Rape is an indefensible act. It is hard to imagine a situation where an ordinary rule of international law would permit rape under any circumstances, and purely by this logic rape evinces the non-derogable character necessary for establishing a principle of *jus cogens*. Indeed, the argument that rape should *not* be treated as a *jus cogens* principle inevitably "force[s] one to make an inhumane, almost barbaric argument regarding why rape should not be expressly prohibited in all situations."²³ Moreover, the importance that states attach to the eradication of rape has led to a general body of domestic, treaty, and customary law rules that evidence its *jus cogens* status.²⁴ Rape is prohibited in every major domestic legal system, is universally included as a component of every other *jus cogens* norm, and has long been a violation of customary international law.²⁵ And yet, while rape is often treated as *jus cogens*, its prohibition is rarely enforced and the proliferation of violence against women continues to thrive with remarkable impunity.²⁶ Women's lives remain under-

sional Paper No. 1, at 3, International Human Rights Law Institute, DePaul University College of Law (1996)).

21. See Prosecutor v. Furundzija, No. IT-95-17/1-T, 73, para. 186 (International Criminal Tribunal for the former Yugoslavia, 1998), available at <http://www.un.org/icty/furundzija/trialc2/judgement/index.htm>.

22. See ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, adopted by the U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998, art. 25, U.N. Doc A/CONF. 183/9 [hereinafter Rome Statute].

23. James R. McHenry III, *The Prosecution of Rape Under International Law: Justice That Is Long Overdue*, 35 VAND. J. TRANS. L. 1269, 1309 (2002) (calling for the establishment of an inviolable *jus cogens* principle against rape).

24. See *infra* Part III.

25. See BASSIOUNI, *supra* note 1, at 348 (arguing that "Rape has long been considered a war crime under customary international law. . . ."); Meron, *Rape as a Crime*, *supra* note 5, at 425 ("Rape by soldiers has of course been prohibited by the law of war for centuries"); *infra* note 118 and accompanying text.

26. See Amnesty International, *It's in Our Hands: Stop Violence Against Women* [hereinafter Amnesty International, *It's in Our Hands*], at 2, available at <http://web.amnesty.org/actforwomen/reports-index-eng> (noting that violence against women is prevalent across the world and that power structures which perpetuate such violence are rooted deep within varying societies); Alex Duval Smith, *Amnesty says violence on women is as great an evil as terrorism*,

valued such that the application of gender law at the international level continues to be limited and selective, and the persistence and proliferation of gender violence remains insufficiently addressed.²⁷ This gap between treatment and recognition results from the failure to clearly define rape as a serious international crime on its own merit. Part III attempts to clarify this ambiguity and argues that the legal value prohibiting rape expressly places it among the international community's highest crimes as *jus cogens*. First, however, the criteria for identifying a *jus cogens* norm must be established.

INDEP., Mar. 6, 2004, at 32 (noting that in the United States "[a] women is raped every 90 seconds; four women die each day as a result of violence in the family," in Sierra Leone "[m]ore than half of all women suffered sexual violence during the 1999 conflict," in Egypt "97 percent of married women aged 15 to 49 had female genital mutilation," and in Pakistan "[a]t least a thousand women a year die in 'honour' killings"); Somini Sengupta, *Relentless Attacks on Women In West Sudan Draw an Outcry*, N. Y. TIMES, Oct. 26, 2004, at A1 (reporting that crimes often go unreported to officials due to fear and distrust, compounded by a lack of legal protection following the report).

27. See United Nations, *Preliminary Report Submitted by the Special Rapporteur on Violence Against Women* E/CN.4/1995/42 (1995), p.64 (noting that rape "remains the least condemned war crime" despite being commonplace during armed conflict). The law of war has prohibited rape and other forms of sexual violence for centuries. Under international law, sexual violence can be prosecuted as crimes against humanity, war crimes, genocide, torture, and as grave breaches of the Geneva Conventions. Sexual violence may also be prosecuted under universal jurisdiction as a constituent element of the above crimes, which have attained *jus cogens* status with entailed *ergo omnes* obligations for all nations to prosecute or extradite alleged offenders whom they find on their territory. BASSIOUNI, *supra* note 1, at 348 (supporting that the law of war has prohibited rape for centuries). And yet, gender violence remains insufficiently addressed in international law due to the gap between state practice and recognition: "Rape has been prohibited under IHL through many wars, but the prohibition has been largely ignored or unenforced. This dismal state of affairs results from the interplay of two systems. One is a legal system that tends to overlook or dismiss women's pain; the other is a war system in which rape is an effective weapon. Both systems reveal themselves as male-dominated, with little regard for the rights of women." Niarchos, *supra* note 5, at 689. In Part III, *infra*, I argue that rape has risen to the level of a *jus cogens* norm as an international crime in its own right on the basis that it is included in every other peremptory norm, but that the failure to *clarify* rape as a serious violent crime allows such crimes to go unpunished and makes options of redress difficult to use in the current international legal system. Indeed, the *jus cogens* status of rape presents a paradox: In theory, gender violence has risen to the level of *jus cogens* through its inclusion as a component of every other *jus cogens* norm, and its prohibition in customary international law and domestic law systems. Yet, in practice, states have failed to effectively prosecute gender-based crimes. This paradox results, I argue, from the failure to clarify the ambiguous legal language surrounding rape as a high-level international crime. See *infra* Part III, IV.

II. THE NORMATIVE DEVELOPMENT AND FUNCTION OF *JUS COGENS*

Jus cogens means compelling or higher law.²⁸ The *jus cogens* doctrine defines peremptory norms from which no derogation is permitted and is “essentially a label placed on a principle whose perceived importance, based on certain values and interests, rises to a level that is acknowledged to be superior to another principle, norm or rule and thus overrides it.”²⁹ Drafted in 1969, Article 53 of The Vienna Convention on the Law of Treaties formally defines the international legal principle of *jus cogens*:

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.³⁰

Peremptory norms represent the top of the international legal hierarchy and take precedence over national law at the international level and other sources of international law. They protect the most compelling and essential interests of the international community as a whole and invalidate treaty law and other ‘ordinary’ rules of customary international law not endowed with the same normative force.³¹

28. M. Cherif Bassiouni, *A Functional Approach to "General Principles of International Law,"* 11 MICH. J. INT'L L. 768, 801 (1989-1990) (“The very words '*jus cogens*' mean 'the compelling law' and, as such, a *jus cogens* principle holds the highest position in the hierarchy of all other norms, rules, and principles. It is because of that standing that *jus cogens* principles have come to be known as 'peremptory norms'”); Kenneth C. Randall, *Universal Jurisdiction Under International Law,* 66 TEX. L. REV. 785, 829–31 (1988) (discussing the history of universal jurisdiction). Please note that I will use the terms 'peremptory' and '*jus cogens*' interchangeably.

29. BASSIOUNI, *supra* note 1, at 210.

30. Vienna Convention on the Law of Treaties, May 23, 1969, art. 53, 1155 U.N.T.S. 331, 344 [hereinafter *Vienna Convention*].

31. Although the notion of *jus cogens* was originally conceived at the Vienna Convention as a restriction on state action from violating the interests of the community of states through international agreements thereof, the principle has expanded to include both unilateral state and individual action based on the compelling importance of the rights and values embodied in *jus cogens* and the reprehensibility of specific crimes sufficient to shock the public conscience. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702, cmt. n (1987) [hereinafter RESTATEMENT (THIRD)] (declaring that the human rights norms prohibiting genocide, slavery, murder, torture, prolonged arbitrary detention, and systematic racial discrimination as state policy constitute peremptory norms). See Theodor Meron, *On a Hierarchy of International Human Rights,* 80 AM. J. INT'L L. 1, 14, 19–20 (1986) (arguing that *jus cogens* must prohibit illegitimate action undertaken by treaty but also by unilateral state action); Weller, *infra* note 36, at 693 (observing that “through the doctrine of universality, all perpetra-

Crucially, a peremptory norm permits no derogation and “supersedes the principle of national sovereignty,”³² thereby creating a deterrent effect against contrary state practice that shapes and limits the legislative powers of sovereign nation-states with respect to the given principle.

As a result of its universal character and nonderogability, a rule of *jus cogens* creates state responsibility *erga omnes*.³³ Put differently,

tors of violations against certain core rules [*jus cogens*] are threatened, directly under international law, with individual criminal responsibility for their conduct”).

32. BASSIOUNI, *supra* note 1, at 213. The notion of binding law derives from natural law foundations and is in direct opposition to an international legal order premised on state consent. For discussion surrounding the validity of *jus cogens* as a normative doctrine, see L. HANNIKAINEN, PEREMPTORY NORMS (JUS COGENS) IN INTERNATIONAL LAW: HISTORICAL DEVELOPMENT, CRITERIA, PRESENT STATUS 723–24 (1988) (suggesting that while the “clarification of . . . *jus cogens* in international law is advancing . . . the international community of states has been *inactive in stating expressly* which norms it recognizes as peremptory . . . this inactivity, and the consequent uncertainty as to which norms are peremptory, constitute at present *the main problem of the viability of jus cogens*”). The scholarly debate surrounding *jus cogens* centers on the existence of a hierarchy of applicable law. For instance, Prosper Weil does not see an existent hierarchy and criticizes the doctrine of *jus cogens* for forcing states to contract into rules, even rules they were not prepared to recognize as ordinary norms, without consent. Prosper Weil, *Towards Relative Normativity in International Law*, 77 AM. J. INT’L L. 413, 423, 429–30 (1983). He argues that because the international legal order is primarily a consensual system, introducing rules of ‘relative normativity’ weakens the unity of that system. *See id.* at 423–30. For further views on the topic of *jus cogens* see Anthony A. D’Amato, *It’s a Bird, It’s a Plane, It’s Jus Cogens!*, 6 CONN. J. INT’L L. 1 (1990) (illustrating the ephemeral nature of *jus cogens* and ease with which legal scholars have classify differing ordinary norms as *jus cogens*); Mark W. Janis, *Jus Cogens: An Artful Not a Scientific Reality*, 3 CONN. J. INT’L L. 370 (1988) (arguing that *jus cogens* should be interpreted as international constitutional or natural law); Georg Schwarzenberger, *International Jus Cogens*, 43 TEX. L. REV. 455 (1965) (examining the substantive law supplementing the International Law Commission views of *jus cogens*); N.G. Onuf and Richard K. Birney, *Peremptory Norms of International Law: Their Source, Function and Future*, 4 DENVER J. INT’L L. & POL’Y 187 (1974) (attempting to define the source of *jus cogens*); JERZY SZTUCKI, *JUS COGENS AND THE VIENNA CONVENTION ON THE LAW OF TREATIES: A CRITICAL APPRAISAL* 1-5, 97-123 (1972) (presenting a critical analysis of the conventional *jus cogens* concept); M. Cherif Bassiouni, *International Crimes: Jus Cogens and Obligatio Erga Omnes*, 59 LAW & CONTEMP. PROBS. 63, 66 (1996) (arguing that the “practice of . . . states evidences that, more often than not, impunity has been allowed for *jus cogens* crime, the theory of universality has been far from being universally recognized and applied, and the duty to prosecute or extradite is more inchoate than established, other than when it arises out of specific treaty obligations”).

33. *Id.* In the *Barcelona Traction Case*, the International Court of Justice (ICJ) held:

[A]n essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.

Barcelona Traction, Light and Power Co. Ltd. (Belg. v. Spain), 1970 I.C.J. 3, 32 (Feb. 5). For a discussion of state responsibility with respect to women’s human rights, *see generally* Rebecca

peremptory principles of “compelling law” necessarily impose obligations of an absolute character “flowing to all” states not to allow impunity for such crimes and evoke an international duty to prosecute or extradite alleged offenders.³⁴ In this way, peremptory norms identify the ethical underpinnings of the international system and legally obligate states to uphold them. For some peremptory rules, this relationship gives rise to universal jurisdiction.³⁵ The universality princi-

Cook, *State Responsibility for Violations of Women's Human Rights*, 7 HARV. HUM. RTS. J. 126 (1994).

34. See BASSIOUNI, *supra* note 1, at 212 (citing the work of the ILC in [1976] 2 Y.B. INT'L COMM'N, Part Two, 113; for a discussion of state responsibility, see generally IAN BROWNLIE, *SYSTEM OF THE LAW OF NATIONS: STATE RESPONSIBILITY* (1983); FARHAD MALEKIAN, *INTERNATIONAL CRIMINAL RESPONSIBILITY OF STATES* 189 (1985)). See also Weller, *infra* note 36, at 693 (noting that “all states have a legal interest in compliance with these core [*jus cogens*] rules by all other states (*erga omnes* effect) In relation to such offenses, any state can act as an agent of the international constitution and exercise jurisdiction on behalf of the international community as a whole”). This duty is requisite in all circumstances based on the principles of state responsibility. It follows, therefore, that states may not violate, by treaty or by practice, the compelling interests of the global community embodied in *jus cogens* norms, despite the justifications of state sovereignty. See e.g., Mark W. Janis, *The Nature of Jus Cogens*, 3 CONN. J. INT'L L. 359, 362 (1988). But see Mary E. Turpel & Philippe Sands, *Peremptory International Law and Sovereignty: Some Questions*, 3 CONN. J. INT'L L. 364, 365 (1988) (questioning Janis' arguments for *jus cogens* by arguing that *jus cogens* must necessarily include consideration of the traditional notion of sovereignty).

35. PRINCETON UNIVERSITY PROGRAM IN LAW AND PUBLIC AFFAIRS, *THE PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION* 23 (2001), available at <http://www.law.uc.edu/morgan/newsdir/univjuris.html>. Universal jurisdiction attaches to piracy, slavery, war crimes, crimes against peace, crimes against humanity, genocide, and torture. *Id.* at 29. For instance, while the crime of aggression is often recognized as violating *jus cogens*, it does not attract universal jurisdiction. Consider the U.S. campaign against Iraq in 2003 to bring about regime change: Iraq refused to consent to binding international legal rules in Security Council Resolutions 697 and 1441, prohibiting the development of chemical and biological weapons. However, when the U.N. would not authorize the use of force the U.S. went around the international legal system and utilized its superior military power to remove Saddam's regime, waging a preemptive war of aggression to disarm Iraq without its consent. Yet, the U.S. crime of aggression—arguably a violation of a peremptory norm—does not attract universal jurisdiction. See generally James Nicholas Boevig, Note, *Aggression, International Law, and the ICC: An Argument for the Withdrawal of Aggression from the Rome Statute*, 43 COLUM. J. TRANSNAT'L L. 557 (on the crime of aggression in international law in the context of the Iraq war and the ICC); Nigel White & Eric Myjer, Editorial, *The Use of Force Against Iraq*, 8 J. CONFLICT & SECURITY L. 1 (2003) (on the use of force in Iraq); Michael J. Glennon, *Why the Security Council Failed*, FOREIGN AFFAIRS, May 1, 2003 (on the role of the Security Council and the use of force in an era of the American hyperpower). For a discussion of the general legality of the Iraq war, see Peter Ford, *As Attack on Iraq Begins, Question Remains: Is It Legal?*, CHRISTIAN SCI. MONITOR, Mar. 21, 2003, at 5 (discussing the Iraq invasion as illegal without a U.N. mandate, alongside other views); Sean Murphy, *Assessing the Legality of Invading Iraq*, 92 GEO. L.J. 173 (2004) (on the legality of the U.S. invasion of Iraq); Thomas Franck, *Humanitarian and Other Interventions*, 43 COLUM. J. TRANSNAT'L L. 321, 328 (2005) (comparing NATO's actions in Kosovo with the U.S. invasion of Iraq). Furthermore, the lack of a definition for aggression underscores the fact that a number of states consider the use of force to be important in a

ple enables any state to arrest and prosecute those who have violated certain *jus cogens* norms³⁶ and is restricted by neither territory nor nationality.³⁷

Jus cogens norms are notoriously difficult to identify, developing over time through the general consensus of the international community.³⁸ Although *jus cogens* is widely acknowledged as a principle of international law, there is no agreement on what constitutes the cor-

number of circumstances. See generally *The Definition of Aggression and the ICC*, 96 PROC. AM. SOC. INT'L L. 181 (2002).

36. Marc Weller, *Undoing the Global Constitution: UN Security Council Action on the International Criminal Court*, 78 INT'L AFFAIRS 693, 699 (2002) ("Certain types of conduct are deemed so harmful to all mankind that any state can exercise jurisdiction in relation to them").

37. There is a trend toward the increased willingness and ability of states to utilize universal jurisdiction. Recent indictments by national courts exercising universal jurisdiction in the UK, Belgium, and the Netherlands show that the principle has gained legal teeth. See M. Cherif Bassiouni, *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice*, 42 VA. J. INT'L L. 81, 82 (2001) (observing that "[u]niversal jurisdiction has become the preferred technique by those seeking to prevent impunity for international crimes"); William W. Burke-White, *A Community of Courts: Toward a System of International Criminal Law Enforcement*, 24 MICH. J. INT'L L. 1, 13-20 (observing that "universal jurisdiction is likely to play a significant role in the future enforcement of international criminal law"); Weller, *supra* note 36, at 693 (noting that "through the concept of serious breaches of obligations under peremptory norms of general international law, the international community as a whole is moving towards common action at the state level against violations of these rules"); William J. Aceves, *Liberalism and International Legal Scholarship: The Pinochet Case and the Move Toward a Universal System of Transnational Law Litigation*, 41 HARV. INT'L L. J. 129, 132 (2000) (discussing the universalization of transnational law litigation in the context of the Pinochet case and U.S. Alien Tort Claims Act); Marc Weller, *On the hazards of foreign travel for dictators and other international criminals*, 75 INT'L AFFAIRS 599, 599-609 (1999) (using the Pinochet case to highlight the increasing scope of universal jurisdiction); Chandra Lekha Sriram, *Revolutions in Accountability: New Approaches to Past Abuses*, 19 AM. U. INT'L L. REV. 301, 314-58 (discussing the explosive, but uneven development of universal jurisdiction in the context of prosecutions in Belgium, Netherlands, the Pinochet cases, and others); see generally Pita J.C. Schimmelpenninck van der Oije, *A Surinam Crime Before a Dutch Court: Post-Colonial Injustice or Universal Jurisdiction?* 24 LEIDEN J. INT'L L. 455 (2001) (analyzing the 1982 Amsterdam Court's use of universal jurisdiction to prosecute a human rights case); Randall, *supra* note 27 (detailing expansion of universal jurisdiction from offenses such as piracy and slave trading to war crimes and crimes against humanity); Amnesty International, *The Duty of States to Enact and Enforce Legislation* (2001), at Ch.1-2 (on the history of universal jurisdiction), Ch.3-4 (discussing war crimes), Ch.5-6 (crimes against humanity), Ch.7-8 (genocide), Ch. 9-10 (torture) available at http://web.amnesty.org/pages/legal_memorandum (providing examples of state practice at the national level and detailing the legal basis for universal jurisdiction for war crimes, crimes against humanity, torture, genocide, and other crimes). Importantly, universal jurisdiction derives its force from the special normative character of peremptory norms and the *erga omnes* obligations they entail. Bassiouni, *supra* note 32, at 72-4. If certain conduct can never be lawful—such as two states entering into a treaty purporting to commit genocide against individuals of a third state—it follows that all states should have the legal right to exercise jurisdiction over alleged offenders, especially if it is in the interest of international society to stop such conduct.

38. See McHenry, *supra* note 23, at 1309.

pus of *jus cogens* norms.³⁹ Generally speaking, however, such a list would presumably include genocide, crimes against humanity, war crimes, torture, aggression, piracy, and slavery as accepted peremptory norms.⁴⁰

In order to become *jus cogens*, there must be a general norm of international law that is recognized and accepted by the international community of states *as a whole*. As articulated in Article 38 of the Statute of the International Court of Justice (ICJ), an international rule must satisfy the three basic sources of international law: treaty, custom, and general principles of law.⁴¹ These basic sources of international law determine “how new rules are made and existing rules are repealed or abrogated.”⁴² International treaties are binding upon all parties to them and must be “expressly recognized by the consenting states.”⁴³ In addition, if a treaty is of a fundamentally norm-creating character and subsequently becomes a rule of custom through state practice, it may generate rights and duties for third parties who are not signatories to the convention.⁴⁴ Customary international law is binding upon all states,⁴⁵ and according to the ICJ Statute, requires “evidence of a general practice accepted as law.”⁴⁶ As defined in the *North Sea Continental Shelf Case*, customary law has two essential components: uniform and consistent state practice and

39. See Meron, *supra* note 31, at 4 (noting the lack of consensus concerning the content of *jus cogens* norms).

40. Bassiouni, *supra* note 32, at 68 (arguing that sufficient legal basis exists to conclude that all of these crimes are part of *jus cogens*. He cites the following sources: (1) the ICTY and ICTR Statutes address genocide, crimes against humanity, and war crimes; (2) the 1996 Code of Crimes includes these three crimes plus Aggression.). See *Draft Code of Crimes Against Peace and Security of Mankind: Titles and Articles on the Draft Code of Crimes Against Peace and Security of Mankind adopted by the International Law Commission on its Forty-Eight Session*, U.N. GAOR, 51st Sess., U.N. Doc. A/CN.4L.532 (1996), revised by U.N. Doc. A/CN.4L.532/Corr.1 and U.N. Doc. A/CN.41.532/Corr.3, arts. 16–20.

41. See STATUTE OF THE INTERNATIONAL COURT OF JUSTICE (ICJ) art. 38 (1).

42. CHARLESWORTH & CHINKIN, *supra* note 5, at 62 (citing A. CASSESE & J. WEILER (eds.), *CHANGE AND STABILITY IN INTERNATIONAL LAW-MAKING* 1-62 (1988)).

43. ICJ STATUTE, art. 38(1)(a). *North Sea Continental Shelf Case* (W. Ger. v. Den.; W. Ger. v. Neth.), 1969 I.C.J. 4, 42 (judgment of Feb. 20) [hereinafter *North Sea Continental Shelf*].

44. See Jonathan I. Charney, *Universal International Law*, 87 AM. J. INT'L L. 529, 541 (1993) (discussing that states and individuals may be bound by *jus cogens* rules, even without explicit consent).

45. A persistent objector to a customary rule may be bound by that rule if it constitutes *jus cogens*. *Id.*

46. ICJ STATUTE, art. 38(1)(b).

evidence of *opinio juris*.⁴⁷ State practice requires that the state consent to the rule in question by engaging in “constant and uniform” behavior,⁴⁸ while *opinio juris* requires that states have acted out of a sense of legal obligation.⁴⁹ Finally, general principles of international law are fundamental rules “recognized by civilized nations,”⁵⁰ common to the major legal systems of domestic law, and serve as a secondary source of international law in situations where conventional or customary international law is not applicable.⁵¹

In addition to satisfying the basic sources of international law, during the drafting of the Vienna Convention some members of the International Law Commission (ILC) suggested that a peremptory norm could be identified by the following objective indicia: (1) whether the norm is incorporated into norm-creating multilateral agreements and is prohibited from derogation in those instruments; (2) whether a large number of nations have perceived the norm to be essential to the international public order, whereby the norm is reflected in general custom and is perceived and acted upon as an obligatory rule of higher international standing; and (3) whether the norm has been recognized and applied by international tribunals, such that when violations occur, the norm is treated in practice as a

47. *North Sea Continental Shelf*, 1969 I.C.J. 42, 44 (noting that two conditions must be fulfilled to evidence *opinio juris*: (1) the acts concerned must amount to a settled practice; and (2) states must believe that the behavior is required by law and amounts to a specific legal obligation.). See also *Case Concerning the Continental Shelf (Libyan Arab Jamahiriya v. Malta)* 1985 I.C.J. 29 (Judgment of 3 June) para. 27.

48. See *Asylum Case (Columbia v. Peru)*, 1950 I.C.J. 7 (Judgment of Nov. 20), reprinted in ICJ REPORTS 266, 276 (1950) (noting that the “Columbian Government must prove that the rule invoked by it is in accordance with a constant and uniform usage practiced by the States in question” in order to establish a customary rule thereof).

49. *North Sea Continental Shelf*, 1969 I.C.J. 42, 44 (observing that evidence of *opinio juris* requires that “not only must the acts concerned amount to settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it”). Acts that evidence *opinio juris* include explicit acts and claims of states in their international relations, national laws and decisions concerning international law questions, communications between states, and collective assertions by international organizations such as the U.N. as well as international conventions. HANNIKAINEN, *supra* note 32, at 232.

50. ICJ STATUTE, art. 38(1)(c). Also note that “judicial decisions and the teachings of the most highly qualified publicists of the various nations” may be used “as subsidiary means for the determination of rules of law.” ICJ STATUTE, art. 38(1)(d).

51. Importantly, however, one state’s domestic law does not bind another state, so before a general principle can be concluded it must be shown that the wider international community accepts the norm before it can become obligatory to all nations. See HANNIKAINEN, *supra* note 32, at 244.

jus cogens rule with appropriate consequences ensuing.⁵² Norms satisfying, first, the basic sources of international law as articulated by the ICJ and, second, the objective criteria listed above can therefore be considered rules of *jus cogens*.⁵³ In arguing for the addition of rape to *jus cogens*, these criteria will be addressed in turn.

III. THE EXISTENCE OF AN INVIOLABLE *JUS COGENS* NORM PROHIBITING RAPE

The *jus cogens* nature of a norm barring rape under international humanitarian law is evident in a number of sources:

The landmark jurisprudence of the Yugoslav and Rwanda Tribunals recognizing [and prosecuting] sexual violence as war crimes, crimes against humanity, and instruments of genocide [and torture], the inclusion of various forms of sexual violence in the ICC Statute (including crimes that had never before been formally articulated in an international instrument), the increasing attention given to gender violence in international treaties, U.N. documents, and statements by the Secretary-General [and high-level jurists], the new efforts to redress sexual violence in internationalized/hybrid courts and by truth and reconciliation commissions, the recent recognition of gender crimes by regional human rights bodies, and the increasingly successful claims brought in domestic courts to adjudicate gender crimes.⁵⁴

52. Kha Q. Nguyen, Note, *In Defense of the Child: A Jus Cogens Approach to the Capital Punishment of Juveniles in the United States*, 28 GEO. WASH. J. INT'L L. & ECON. 401, 423 (1995) (noting that "leading authorities have suggested that a norm is peremptory when: (1) a large number of nations recognize it as being essential to the international public order; (2) it is embodied in multilateral agreements prohibiting derogation from the particular norm; and (3) it has been applied by international tribunals"); see *Summary Records of the 683rd-685th Meetings* [1963] 1 Y.B. Int'l L. Comm'n 72, U.N. Doc. A/CN.4/156/Add.1/1963 at 63, 74 (discussing Article 13 of the Vienna Convention on the Law of Treaties); Gordon A. Christenson, *Jus Cogens: Guarding Interests Fundamental to International Society*, 28 VA. J. INT'L L. 585, 592-593 (1988) (articulating criteria for *jus cogens*: (1) whether there are widespread rules and practices ingrained in the legal conscience of the international community; (2) whether the norm is indispensable to the existence of the public international law system; and (3) whether the norm creates an objective obligation requiring all states to observe the norm).

53. Only a sufficient combination of these elements (national law, customary law amounting to *opinio juris*, resolutions of international organizations, the jurisprudence of international courts, etc.) may evidence the creation of a true peremptory norm. See e.g., HANNIKAINEN, *supra* note 32, at 723-24.

54. Askin, *Prosecuting Wartime Rape*, *supra* note 5, at 349 (observing that this evidence "supports the assertion that sexual violence, at the very least rape and sexual slavery, has risen to the level of a *jus cogens* norm").

Furthermore, rape is included as a constituent element of every accepted peremptory norm.⁵⁵ Taken together, these sources confirm that rape is now considered to be among the most serious international crimes by the community of states.

This section attempts to clarify the ambiguous legal status of rape as a crime in international humanitarian law and asserts that its prohibition constitutes *jus cogens*. This section also considers the progression of gender law in the international legal system—outlining areas of both success and failure—to elucidate the development in thinking about such crimes toward their current peremptory status and to show why further legal clarification is needed. It begins with a consideration of international conventions and resolutions prohibiting rape as a non-derogable legal duty to provide a preliminary foundation for asserting the existence of a general norm of international law. Then it presents the law and practice of nations to show that such a prohibition is reflected in general custom and is perceived and acted upon as an obligatory rule of higher standing. Finally, it introduces decisions by international and regional courts, as well as actions undertaken by the U.N. Security Council and General Assembly in response to violations, to show that a customary rule prohibiting rape has been recognized and applied in international law.

A. International Conventions

The prohibition of sexual violence against women is expressly included in a number of multilateral instruments. The collective force of these international conventions, along with a large number of non-binding international resolutions, is indicative of uniform state practice and *opinio juris* and establishes the illegality of rape as a principle of customary international law.⁵⁶

55. *Id.* (noting that "[m]any forms of sexual violence constitute forms or instruments of genocide, slavery, torture, war crimes, and crimes against humanity, making them subject to universal jurisdiction when they meet the constituent elements of these crimes").

56. *See North Sea Continental Shelf Cases*, 1969 I.C.J. 42, 176–79 (on the generation of customary principles and general norms of international law through "law-making" treaties that are widely ratified without broad reservations).

Indeed, the law of war has prohibited rape for centuries.⁵⁷ In modern times, the process of codifying customary international laws of land warfare begins with the United States Civil War and the drafting of the Lieber Instructions (1863).⁵⁸ Significantly, the Lieber Instructions specify rape as a capital crime and clearly mandate that "all rape . . . [is] prohibited under the penalty of death."⁵⁹ That the first codification of the international customary laws of land warfare firmly outlaws rape as a serious war crime demanding severe punishment reflects the prohibition of rape as a fundamental law of war standard and signifies the strong condemnatory position of customary international law with respect to rape committed during war.⁶⁰ De-

57. Meron, *Rape as a Crime*, *supra* note 5, at 425 ("Rape by soldiers has of course been prohibited by the law of war for centuries and violators have been subjected to capital punishment under national military codes, such as those of Richard II (1385) and Henry V (1419)"). Going back further, in ancient times women were viewed as spoils of war. As Niarchos points out, in Homer's *The Iliad*, his description of the Trojan War shows that women could expect rape during war:

So now let no man hurry to sail for home, not yet . . .
not till he beds down with a faithful Trojan wife,
payment in full for the groans and shocks of war
we have all borne for Helen.

HOMER, *THE ILIAD*, bk. 2:420–24, at 111 (Robert Fagles trans., 1990); Niarchos, *supra* note 5, at 660.

58. Francis Lieber, "Instructions for the Government of Armies of the United States in the Field, by Order of the Secretary of War, April 24, 1863," *reprinted in* FRANCIS LIEBER, *LIEBER'S CODE AND THE LAW OF WAR* 45 (1983). [hereinafter Lieber Code]. The Lieber Code is also known as General Orders No. 100. For a discussion of developments prior to the Lieber Code, see BASSIOUNI, *supra* note 1, at 41-60, 344-347; Meron, *Henry the Fifth*, *supra* note 5, at 29-30; Meron, *Rape as a Crime*, *supra* note 5, at 425; ASKIN, *WAR CRIMES AGAINST WOMEN*, *supra* note 5, at 18-35.

59. Article 44 of the Lieber Code provides in part:

All wanton violence committed against persons in the invaded country, *all destruction of property* not commanded by the authorized officer, all robbery, all pillage or sacking . . . *all rape*, wounding, maiming, or killing such inhabitants, are prohibited the under penalty of death

Id. at art. 44 (emphasis added). Throughout history, rape has been closely associated with crimes of property rather than crimes against the person. Hence the phrase "rape and pillage." It is important to note how at this stage rape remains a property crime perpetuated against *man's* honor and that it was rare to find rape reported as a crime against the person. *See, e.g.*, ASKIN, *WAR CRIMES AGAINST WOMEN*, *supra* note 5, at 51.

60. While the Lieber Code was drafted as the official U.S. Army regulation guide on the laws of land warfare for the treatment of civilians, it was derived from international custom and usage, and subsequently had a significant impact on the international laws of war. Shortly after the Lieber Code was drafted, the characterization of rape as a violent crime was abandoned and international documents began to adopt the softer concept of "family honor and rights" as the basis for prohibiting rape. Significantly, associations of women with domesticity and the private sphere have served to keep violent sexual crimes behind closed doors as secondary crimes, ignoring both their seriousness and gender implications. In the wake of the Lieber Code, the

parting from the Lieber Instructions, the 1907 Hague Convention does not explicitly prohibit rape, but instead provides for the protection of women under the veiled language of Article 46, which states, "family honour and rights, the lives of persons, and private property . . . must be respected."⁶¹ Broadly considered, Article 46 can be taken to cover wartime rape, but in practice it has seldom been interpreted in this way.⁶² Strikingly in this early period, the status of women is not addressed directly—wartime rape is limited to a crime of troop discipline as an illegal but inevitable occurrence during armed conflict—and women are perceived as private objects rather than public subjects in law.

The current applicable law regarding war is contained within the Nuremberg Charter, the 1949 Geneva Conventions, and the 1977 Additional Protocols. Unfortunately, the legal definition and status of rape is ambiguous in all of these documents. The London Charter⁶³ and the Tokyo Charter⁶⁴ do not mention rape or sexual assault. As a result, rape was not prosecuted at Nuremberg,⁶⁵ and although it was prosecuted at Tokyo, these prosecutions were viewed as ancillary to

euphemism "family honor and rights," as a catchall phrase for the prohibition of rape and sexual assault, found itself promulgated in international documents. Along with the Lieber Code, these international documents influenced the Hague Peace Conventions of 1899 and 1907 in many significant respects. Perhaps most significantly (and unfortunately), the Hague Conventions continued the trend of using vague language to express sexual violence. ASKIN, *WAR CRIMES AGAINST WOMEN*, *supra* note 5, at 35-40; Niarchos, *supra* note 5, at 672-73.

61. Convention Respecting the Laws and Customs of War on Land, with Annex of Regulations, Oct. 18, 1907, art. 46, 36 Stat. 2277, *reprinted in* 2 MALLOY'S TREATIES, CONVENTIONS, INTERNATIONAL ACTS, PROTOCOLS AND AGREEMENTS 1776-1909, 2269 (1910), [hereinafter Hague Convention No. IV].

62. Meron, *Rape as a Crime*, *supra* note 5, at 425. As the primary regulations of codified humanitarian law in effect at the beginning of the First and Second World Wars, the absence of explicit language prohibiting rape is regrettable. However, as M. Cherif Bassiouni argues, "the general nature of . . . Article [46] should not be taken to mean that it does not prohibit sexual violence." BASSIOUNI, *supra* note 1, at 348. Indeed, many scholars argue that Article 46 could have been used to prosecute World War II criminals for sexual assault if the will to prosecute had been present. See BASSIOUNI, *id.*; ASKIN, *WAR CRIMES AGAINST WOMEN*, *supra* note 5, at 40.

63. London Charter, *supra* note 13, art. 6(b) (notably, the indexes of the Nuremberg proceedings included 3.5 pages for the crime "looting," while the headings "rape," "prostitution," and "women," are not included at all). IMT Docs, *supra* note 14.

64. Charter for the International Military Tribunal of the Far East, Jan. 19, 1946, art. 5(b)-(c), T.I.A.S. No. 1589, 4 Bevens 20 (1968), [hereinafter Tokyo Charter].

65. Meron, *Rape as a Crime*, *supra* note 5, at 425-26 n.13 (although rape was not prosecuted at Nuremberg, "In some cases, enforced prostitution was prosecuted in national courts outside Germany").

those for other war crimes.⁶⁶ In contrast, Control Council Law No. 10 (CCL 10) specifically lists rape as an offense under crimes against humanity.⁶⁷ The Fourth Geneva Convention,⁶⁸ relating to the protection of civilian persons during time of war, also prohibits rape and forced prostitution under Article 27.⁶⁹ However, rape and sexual assault are omitted from Article 147, which lists “grave breaches” under the Geneva Convention that give rise to universal jurisdiction and ob-

66. BASSIOUNI, *supra* note 1, at 348. While rape was not prosecuted separately, the Tokyo Tribunal *did* include rape as a war crime in its indictment. Rape was charged under “inhumane treatment,” “ill treatment,” and “failure to respect family honour and rights,” establishing a clear precedent for the international prosecution of rape as a war crime. ASKIN, *WAR CRIMES AGAINST WOMEN*, *supra* note 5, at 180.

67. Adopted by the four occupying powers in Germany, Control Council Law No. 10 (CCL 10) was established for the trial of war criminals other than those dealt with by the IMT and whose crimes had a specific locale. ASKIN, *id.* at 121-126. *See e.g.*, CONTROL COUNCIL FOR GERMANY, OFFICIAL GAZETTE, Jan. 31, 1946, at 50, *reprinted in* NAVAL WAR COLLEGE, DOCUMENTS ON PRISONERS OF WAR 304 (International Law Studies vol. 60, Howard S. Levie ed., 1979), BENJAMIN FERENCZ, AN INTERNATIONAL CRIMINAL COURT: A STEP TOWARDS WORLD PEACE 488 (1980). Even though no one was prosecuted in any of the twelve subsequent trials under the auspices of CCL 10, it did, however, establish several principles that have tremendous implications for the future of gender crimes in international criminal law. Niarchos, *supra* note 5, at 677. These implications include: (1) crimes against humanity require proof of government participation or conscious approval of systematic procedures “amounting to atrocities and offenses” committed against a “civilian population,” so that rape on a wide scale would be prosecuted as a crime against humanity, while an isolated case would be prosecuted as a war crime; (2) sexually violent crimes committed during peacetime can also be considered crimes against humanity; and (3) responsibility is not limited to military personnel and liability can include any persons occupying key positions. *Id.* at 677-78 & n.175, *citing* TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 (1949), *United States v. Altstoetter* (The Justice Case), 3 TRIALS UNDER CCL 10.

68. Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 27, 6 U.S.T. 3316, 74 U.N.T.S. 287, 306. [hereinafter Geneva Convention IV].

69. *Id.* Article 27 provides in part:

Protected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity *Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault.*

Id. (emphasis added). Yet, importantly, the Fourth Geneva Convention also reflects the primary inadequacies of international humanitarian law and confirms why rape has not been viewed as a serious international crime. First, the language of the convention is imprecise and continues to perpetuate destructive stereotypes by treating rape as a crime against honor. Violations of “honor” and “family rights” fail to account for the scale of wartime violence and also problematically resurrect the notion that the raped woman is “disgraced.” Second, rape is attached to the wrong category of rights in the Geneva Conventions. Rather than being defined under Article 32 expressing violations of physical integrity, rape is included in Article 27—a provision viewed as offering protection for “family rights” and not physical integrity of the person. *See* Niarchos, *supra* note 5, at 674.

ligate states to pursue and prosecute violations.⁷⁰ Article 76(1) of Additional Protocol I enumerates that “women shall be the object of special respect and shall be protected in particular against rape, enforced prostitution and any other form of indecent assault.”⁷¹ Article 4(2)(e) of Additional Protocol II prohibits “outrages upon *personal dignity*, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault.”⁷² In both of these constructions the language expressly prohibits rape, but it does so erroneously as a special consideration apart from other violent crimes and enforces the gendered need to ‘protect’ women as “*the object* of special respect.”⁷³ This suggests that women are perceived as objects of law rather than subjects *in* law. Additionally, the language limits the scope of rape as a crime committed only against women and problematically obscures the fact that men are also victims. By linking rape with crimes of honor or dignity instead of with crimes of violence, Additional Protocol II “grossly mischaracterizes the offense, perpetuates detrimental stereotypes, and conceals the sexual and violent nature of the crime.”⁷⁴

Given the above considerations, the statutes of the two *ad hoc* Tribunals—the International Tribunal for the Former Yugoslavia

70. Article 147 lists the following crimes as grave breaches:

[W]illful killing, torture or inhumane treatment, including biological experiments, willfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, . . . taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

Geneva Convention IV, *supra* note 68, art. 147. While a strong empirical case can be made that rape and sexual assault are included in the terms of Article 147 and thus constitute a grave breach, the omission indicates that rape and sexual assault are not perceived seriously. Furthermore, an examination of what the list *does* include reveals that “destruction of property” and “forcing a person to serve in the forces of a hostile power” are considered with more gravity than rape. See BASSIOUNI, *supra* note 1, at 350-60 (for a detailed argument of why sexual assault and rape clearly fall under “grave breaches”).

71. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, art. 76(1), 1125 U.N.T.S. 3, *reprinted in* 16 INT’L LEGAL MATERIALS 1391 (1977) [hereinafter Additional Protocol I].

72. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, art. 4(2)(e), 1125 U.N.T.S. 609, *reprinted in* 16 INT’L LEGAL MATERIALS 1442 (1977) [hereinafter Additional Protocol II].

73. Geneva Convention IV, *supra* note 68, art. 147 (emphasis added).

74. Askin, *Prosecuting Wartime Rape*, *supra* note 5, at 304. While rape is a violation of dignity it is also and primarily a physical assault: “The failure to recognize the violent nature of rape is one reason that it has been assigned a secondary status in international humanitarian law.” Niarchos, *supra* note 5, at 675–76.

(ICTY)⁷⁵ and the International Tribunal for Rwanda (ICTR)⁷⁶—reflect an important progression from the historically marginalized position of rape in international law by attempting to address the fact that gender difference might affect justice and law.⁷⁷ To be sure, the Statutes are contextual and formally applicable only to Rwanda and former Yugoslavia, but they do reflect a number of important developments in this area—particularly the treatment of rape as a specific tool of warfare rather than a byproduct of war or as a crime of troop discipline—and are quickly becoming normative instruments of the law of war.⁷⁸ Successes include: expanding the definitions of crimes against humanity and genocide to include rape; the participation of women in high-level positions and the inclusion of staff sensitive to gender issues; effectively prosecuting various forms of sexual violence as instruments of genocide, war crimes, crimes against humanity, means of torture, forms of persecution, and enslavement; and generally defining, clarifying, and redressing gender-related crimes.⁷⁹

The statutes of the Tribunals essentially confirm existing principles of international criminal law and therefore reinforce customary law up to this point with regard to gender violence. However, they were drafted cautiously to avoid *nullum crimen sine lege*⁸⁰ issues and

75. Statute of the International Tribunal for the Former Yugoslavia, *adopted by S.C. Res. 827, U.N. SCOR, 55th Sess., 3217th mtg., art. 5, U.N. Doc. S/Res/827 (1993), reprinted in BASIC DOCUMENTS OF THE ICTY (1998)* [hereinafter ICTY Statute].

76. Statute of the International Tribunal for Rwanda, *adopted by S.C. Res. 955, Annex, U.N. SCOR, 49th Sess., 3453d mtg., U.N. Doc. S/Res/955 (1994)* [hereinafter ICTR Statute].

77. See Niarchos, *supra* note 5, at 679. As Niarchos argues,

The prospect of rape prosecutions before the Tribunal presents something of a duality. On the one hand, the creation of the Tribunal reflects the best humanitarian intentions. On the other, as far as women's human rights are concerned, the Tribunal begins its task already hampered by a long history of neglect and by legal structures that may be inadequate to redress the situation.

Id.

78. Meron, *Rape as a Crime, supra* note 5, at 428. In terms of the former Yugoslavia,

The Tribunal's charter, like that of Nuremberg, is likely quickly to become a fundamental normative instrument of the general law of war. The approval of the Security Council (Res. 827), acting under chapter VII of the UN Charter, of the tribunal's charter recognizing rape as a punishable offense under international humanitarian law validates this important normative development and, it is hoped, may expedite the recognition of rape, in some circumstances, as torture or inhuman treatment in the international law

Id.

79. See ASKIN, WAR CRIMES AGAINST WOMEN, *supra* note 5, at 379; Askin, *Prosecuting Wartime Rape, supra* note 5, at 305-47; McHenry, *supra* note 23, at 1270-5, 1283-96.

80. See ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 139-145 (2003) (discussing the principle of legality of crimes, otherwise known as "*nullum crimen sine lege*").

do not develop the law further.⁸¹ Rape is explicitly listed as a crime against humanity in Article 5 of the ICTY Statute and Article 3 of the ICTR Statute.⁸² This formulation follows CCL 10 and definitively establishes rape as a crime against humanity in international law.⁸³ Rape as such may be prosecuted separately as a crime against humanity when committed as part of a widespread or systematic attack, or alternatively, rape may be prosecuted as a crime against humanity as a constituent offence under the torture, enslavement, inhumane acts, or persecution provisions.⁸⁴ However, the statutes fail to define rape as an individual crime and do not include other forms of sexual violence.⁸⁵ Moreover, rape is not expressly considered as a war crime or a grave breach of the Geneva Conventions under either statute,⁸⁶ so sexual violence may be prosecuted as a contributing offence but never as a crime on its own.

81. The jurisprudence of the Tribunals has been considerably more progressive than the substantive law contained within the statutes and has established an historic foundation for the prosecution of gender-related crimes by other international courts. For example, in the *Kunarac* judgment, wartime rape was unequivocally defined as both a crime against humanity and a war crime. Prosecutor v. Kunarac, IT-96-23-T & IT-96-23/1-T, paras. 436 (Feb. 22, 2001). The expansion of the definition of crimes against humanity in *Kunarac* and the application of war crimes' standards to acts of rape and sexual enslavement "closed holes in the international legal conceptualizations of rape and enslavement, torture, war crimes, genocide, and crimes against humanity." See *id.* paras. 436-57; R. McHenry III, *supra* note 23, at 1274.

82. ICTY Statute, *supra* note 75, art. 5(g); ICTR Statute, *supra* note 76, art. 3(g). Regrettably, the Rwanda tribunal defines crimes against humanity "as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial, or religious grounds," where gender is not included as one of the enumerated grounds. *Id.*

83. Meron, *Rape as a Crime*, *supra* note 5, at 428 (arguing that the "[c]onfirmation of the principle stated in Control Council Law No. 10, that rape can constitute a crime against humanity, is, both morally and legally, of ground-breaking importance").

84. The ICTY definition of crimes against humanity contains a nexus to an armed conflict, limiting rape prosecutions to those committed *only* at the time of war, ICTY Statute, *supra* note 75, at art. 5, while the Rwanda Tribunal does not. Significantly, however, the ICTY trial chamber has interpreted the Geneva Conventions and their protocols to give protection to citizens in both international and non-international conflicts. *Id.*

85. While in large part the ICTY has managed to overcome this by creatively interpreting the statute, "it clearly would have been preferable for . . . [other crimes of gender violence] to be identified from the outset." Cate Steains, *Gender Issues, in THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE: ISSUES, NEGOTIATIONS, RESULTS* 362-63 (Roy S. Lee ed., 1999).

86. Including rape as a grave breach would have been an important step in providing specificity on this matter rather than leaving it up to interpretation. Further, the inclusion of rape as a crime against humanity, but not as a crime by itself or expressly as a war crime, means that the higher threshold pertaining to crimes against humanity must be met before sexual violence crimes can be prosecuted. Crimes against humanity are defined as "widespread and systematic," meaning that the isolated case of wartime rape would most likely go unpunished unless it could be established that it was part of a larger campaign of sexual violence. Steains, *id.*

The Rome Statute of the International Criminal Court, ratified on April 11, 2002, provides a number of important legal specifications with respect to the status of sexual violence in international law.⁸⁷ It is the first international treaty to recognize a wide range of violent sexual crimes among the most serious international offences and represents a significant step forward for the international community in combating impunity for gender-related violence.⁸⁸ Significantly, the Rome Statute—as a widely endorsed multilateral treaty—can be taken to signify customary international law with respect to sexual violence as a war crime and crime against humanity.⁸⁹ The influence of the Rome negotiations and the subsequent work of the Preparatory Committee, as well as the virtually universal representation at the Rome Conference indicate that the Conference “can be taken to have exercised the function of an international constitutional convention on the issue of universality.”⁹⁰ The ICC Statute authoritatively expresses the legal views of the international community as a whole, and thus the Statute’s innovative definitions of crimes against humanity and war crimes, which include sexual slavery and other forms of sexual violence, are not merely aspirational and can be said to represent general norms of customary international law.⁹¹

87. Rome Statute, *supra* note 22, art. 11.

88. While some commentators argue that the Rome Statute does not go far enough in its gender provisions, it must be remembered that the statute is the product of a political compromise between a large number of states with very different values and ideologies. The universal acceptance of a gender component in the Statute, especially given the international community’s appalling record regarding crimes of sexual violence, is quite remarkable and represents an historic development. For a comprehensive discussion of the negotiating history of the Rome Statute see Steains, *supra* note 85, at 357-390.

89. Viseur-Sellers, *infra* note 103, at 300. See 2 YEARBOOK OF THE INT’L LAW COMM. 248, para. 4 (1966) (noting that in positive legal terms, the capacity of general multilateral treaties to generate *jus cogens* norms has been established by the Convention on the Law of Treaties. The commentary on Article 50 of the Draft (Article 53 of the Convention) states: “a modification of a rule of *jus cogens* would today most preferably be effected through a general multilateral treaty”).

90. Weller, *supra* note 36, at 700-01. Ironically, while the U.S. has been a persistent objector to the ICC Statute, it was closely involved in both the drafting of the Statute and was instrumental in getting many of the gender provisions included, therefore its objections “cannot, credibly, doubt the genuine universality of these crimes after having led their development and after having charged other states with them.” See Weller, *id.* (arguing that “the negotiation process itself made manifest universal agreement on elements of crimes against humanity and war crimes as genuinely universal crimes. Instead of inventing new elements of the crimes at issue, the meeting translated into express and positive terms recent customary law developments in this area”).

91. *Id.* at 701 (“The U.S. itself was in fact one of the most effective and technically competent delegations in this process, both before the Rome conference, at Rome and even after-

Article 7(1)(g) of the Rome Statute provides a definitive formulation of crimes against humanity that includes “. . .rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity.”⁹² This list of crimes is also included in two separate sub-paragraphs of Article 8 enumerating war crimes. Importantly, Article 8 confirms that rape and other forms of sexual violence constitute grave breaches of the Geneva Conventions. Specifically, the additional language “also constituting a grave breach of the Geneva Conventions”⁹³ and “also constituting a serious violation of Article 3 common to all four Geneva Conventions”⁹⁴ is found in relationship to gender crimes. Technically speaking, the Rome Statute cannot be seen as an amendment to the Geneva Conventions despite the large number of signatory states. However, the ICC did not establish rape as a grave breach afresh in international law as the provision follows declarations by the International Committee of the Red Cross (ICRC), various states and scholars, as well as the formal recognition by the United Nations investigating commission in Rwanda that rape constitutes a grave breach of the conventions.⁹⁵ Hence, the ICC statute effectively codifies a cus-

wards, when the elements of the crimes were being defined. The U.S. government has been one of the keenest advocates of the application of the advanced definitions of crimes against humanity and war crimes”). Moreover, even a persistent objector may be bound by a customary rule if it is of *jus cogens* nature.

92. Rome Statute, *supra* note 22, art. 7.

93. Rome Statute, art. 8(2)(b)(xxii) (“rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions”).

94. Rome Statute, art. 8(2)(e)(vi).

95. Meron, *Rape as a Crime*, *supra* note 5, at 426–27, citing ICRC, Aide-Mémoire (Dec. 3, 1992); COMMENTARY ON THE GENEVA CONVENTIONS OF 12 AUGUST 1949: GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 598 (Oscar M. Uhler & Henri Coursier eds., 1958) (noting that “as early as 1958, the ICRC Commentary on the fourth Geneva Convention recognized that the grave breach of ‘inhumane treatment’ (Art. 147) should be interpreted in the context of Article 27, which also prohibits rape”); Letter from Robert A. Bradtke, Acting Assistant Secretary for Legislative Affairs, to Senator Arlen Specter (Jan. 27, 1993) [hereinafter *Robert Bradtke Letter*] stating in part:

We believe that there is no need to amend the Geneva Conventions to accomplish the objectives stated in your letter, however, because the legal basis for prosecuting troops for rape is well established under the Geneva Conventions and customary international law . . . all parties to an international conflict (including all parties to the conflict in the former Yugoslavia) are required either to try persons alleged to have committed grave breaches or extradite them to a party that will.

In our reports to the United Nations on human rights violations in the former Yugoslavia, we have reported sexual assaults as grave breaches. We will continue to do so and will continue to press the international community to respond to the terrible sexual atrocities in the former Yugoslavia.

tomary law rule that rape is a grave breach. Nonetheless, while the codification of rape as a grave breach is significant, leaving it to the interpretation of the Rome Statute and not actually amending the Geneva Conventions leaves the grave breach status of rape unclear and allows relativism on this issue when it is not allowed for other violent crimes.⁹⁶

Importantly, the Geneva Conventions have moved beyond their status as a multilateral treaty and are now recognized as customary international law. As discussed above, rape is prohibited under Article 27 of the Geneva Conventions, Additional Protocols I and II, and most recently under the Rome Statute as a grave breach. Clearly, the prohibition of rape enters the corpus of customary international law with respect to these provisions.⁹⁷ Moreover, it is “uncontroversial that grave breaches of the conventions are also covered by genuine universality in customary law.”⁹⁸ The recognition of rape as a grave breach amounts to special *opinio juris* because it signifies the gravity of the offence and triggers an unremitting obligation for states to prosecute or extradite violations.

Additionally, while rape had been included as a crime against humanity before, the Rome Statute’s recognition of many other forms of sexual violence represents an important new precedent.⁹⁹ It is the first international treaty to codify the crimes of sexual slavery, forced pregnancy, and gender-based persecution.¹⁰⁰ As a constituent element

The UN also formally recognized rape as a grave breach. *See, e.g.*, Letter from the Secretary-General to the President of the Security Council transmitting the final report of the Commission of Experts, Dec. 9, 1994, para. 141, U.N. Doc. S/1405, *reprinted in* THE UNITED NATIONS AND RWANDA 1993-1996 415, 430 (1996).

96. For instance, it is hard to imagine the U.S. claiming that “there is no need to amend the Geneva Convention . . . because the legal basis for prosecuting troops for rape is well established under the Geneva Conventions and customary international law” with respect to a crime like torture or slavery. *See, e.g.*, *Robert Bradtke Letter*.

97. *See* Steains, *supra* note 85, at 365 (discussing the lack of serious opposition to the inclusion of gender crimes in the Rome Statute, Steains observes that “the ultimate inclusion of rape, sexual slavery, enforced prostitution, enforced sterilization and other forms of sexual violence as grave breaches and serious violations of Article 3 common to the four Geneva Conventions proceeded smoothly, reflecting the widespread acceptance of the fact that the listing of these crimes was merely codifying the current state of international law”).

98. Weller, *supra* note 36, at 699.

99. Steains, *supra* note 85, at 364 (“While there were precedents for the inclusion of rape as a crime against humanity, the Statute’s recognition of a range of sexual violence crimes, in addition to rape, under crimes against humanity creates an important new precedent”).

100. *Id.* at 357 (noting that “[t]he criminalization of these acts as war crimes represents a significant departure from the more restrictive approach to crimes of sexual violence in prior instruments”).

of crimes against humanity, the Statute also adds ‘gender’ as a ground for persecution, correcting the restrictive precedents set by the *ad hoc* Tribunals that gender-based persecution is “less prevalent—or less important—than persecution on the other grounds.”¹⁰¹

Regrettably, the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women¹⁰² is the only major human rights treaty that expressly lists rape as a violation or even mentions the word ‘rape’.¹⁰³ Article 7 of the Inter-American Convention requires parties to punish and eradicate violence against women including rape.¹⁰⁴ However, the Convention is only indicative of regional human rights norms governing North and South American signatories and does not bind the entire international community.¹⁰⁵ Two of the leading human rights instruments, the Universal Declaration of Human Rights (UDHR)¹⁰⁶ and the International Covenant on Civil and Political Rights (ICCPR),¹⁰⁷ have been interpreted as including sexual violence under provisions prohibiting ‘inhuman or degrading treatment’, but both documents avoid using certain crucial language describing rape as a violent crime committed against women on the basis of their gender. The tendency for international law to use ambiguous language when defining sexual violence, I argue, makes this compromise possible. Specifically, the failure to explicitly name rape as a serious violent crime on its own standing allows states to hedge on their international obligations and avoid clarity in documents like the UDHR and ICCPR.

101. *Id.* at 370.

102. Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, June 9, 1994, 27 U.S.T. 3301, General Assembly of the O.A.S., Doc. OEA/Ser.P AG/doc.3115/94 rev.2, *reprinted in* 33 INT’L LEGAL MATERIALS 1534 (1994) [hereinafter Inter-American Convention on Violence].

103. Patricia Viseur-Sellers, *Sexual Violence and Peremptory Norms: The Legal Value of Rape*, 34 CASE W. RES. J. INT’L L. 287, 301 (2002) (noting that the following human rights treaties fail to list rape as a violation: The Universal Declaration of Human Rights, the International Covenant for Civil and Political Rights, the International Covenant of Economic and Social Rights, the Convention for the Elimination and Discrimination Against Women, the Additional Protocol for the Convention for the Elimination and Discrimination Against Women, The Convention for the Child, the Apartheid Convention, the European Convention of Human Rights, the African Charter of Human Rights, the American Declaration of the Rights of Man).

104. Inter-American Convention on Violence, *supra* note 102, arts. 2, 7.

105. Viseur-Sellers, *supra* note 103, at 301.

106. G.A. Res. 217A (III), U.N. GAOR, 3d Sess., U.N. Doc. A/810, at 71, art. 5 (1948).

107. Dec. 16, 1966, art. 7, 993 U.N.T.S. 171, *reprinted in* 6 INT’L LEGAL MATERIALS 368, (1967).

In addition to international treaties, a number of non-binding international resolutions assert the basic importance of prohibiting sexual violence. While these instruments do not bind states to act, the repetition of statements through a variety of international fora articulating a legal duty to prevent rape can provide evidence of a growing *opinio juris* with respect to the crime.¹⁰⁸ The most significant of these is the U.N. Declaration on the Elimination of Violence Against Women adopted by the General Assembly in 1993.¹⁰⁹ The Declaration asserts that states should “[e]xercise due diligence to prevent, investigate and . . . punish acts of violence against women, whether those acts are perpetrated by the State or by private persons.”¹¹⁰ Similarly, the Inter-American Convention on Violence provides protection against all forms of violence against women.¹¹¹ The Vienna Conference on Human Rights in 1993 declared “the importance of working towards the elimination of violence against women in public and private life” and stressed that “[v]iolations of the human rights of women in situations of armed conflict are violations of the fundamental principles of international human rights and humanitarian law.”¹¹² The Conference further urged states “to combat violence against women.”¹¹³ The monitoring body of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) imparted that “gender based violence is a form of discrimination . . . which impairs or nullifies the enjoyment by women of human rights and fundamental freedoms.”¹¹⁴ Rape, particularly systematic rape in war, forced pregnancy, and forced abortion were also declared to be a

108. CHARLESWORTH & CHINKIN, *supra* note 5, at 75; *Legality of the Threat or Use of Nuclear Weapons* para. 70, 1996 I.C.J. 226, reprinted in 35 INT'L LEGAL MATERIALS 809 (1996) (noting that “a series of resolutions may show the gradual evolution of the *opinio juris* required for the establishment of a new rule”).

109. U.N. Declaration on the Elimination of Violence Against Women, G.A. Res. 104, U.N. GAOR, 48th Sess., Supp. No. 49, at 217, U.N. Doc. A/RES/48/104. (1993) [hereinafter U.N. Declaration].

110. *Id.* art. 4(c).

111. Inter-American Convention on Violence, *supra* note 102, art. 7.

112. World Conference on Human Rights, Vienna Declaration and Programme of Action, June 25 1993, para. 38, U.N. Doc. A/CONF. 157/23, reprinted in 32 INT'L LEGAL MATERIALS 1661(1993).

113. *Id.*

114. General Recommendations no. 19 Violence Against Women, C.E.D.A.W. Recommendation 19, U.N. Doc. A/47/38, CEDAW/C/ 1992/L.1/Add. 15, (1992), paras. 1 and 7.

grave violation of human rights by the Beijing Platform for Action,¹¹⁵ and similar provisions were included in the Cairo Programme of Action.¹¹⁶ Finally, the U.N. Crime Commission has also adopted resolutions condemning sexual violence.¹¹⁷ It is important to note, at this point, the remarkable progression of language in international law regarding sexual violence—from its treatment as a justifiable effect of war promulgated in early treaties to the establishment of the *ad hoc* Tribunals, the Rome Statute, and a number of international resolutions advancing the necessary prohibition of rape as a specific tool of warfare. As I have argued, rape has a unique stigma because of its general perception as a specifically sexual violation, which tends to subsume its violent nature and gravity as a gender-specific offense. In these resolutions, however, sexual violence is reclassified as an individual crime of violence with particular gender implications.

B. The Law and Practice of Nations

“The domestic law of every state in the world outlaws rape.”¹¹⁸ Significantly, the universality of this general norm regarding the prohibition of rape elucidates the existence of a widespread rule and practice ingrained in the legal conscience of the international community. For instance, in *Prosecutor v. Furundzija*,¹¹⁹ the Trial Chamber considered a range of national legislation in order to define rape

115. Fourth World Conference on Women, Declaration and Platform for Action, U.N. Doc. A/CONF. 177/20 (1995), *reprinted in* 35 INTERNATIONAL LEGAL MATERIALS (1996) 401 (Beijing Platform for Action), Critical Area of Concern D, paras. 112-30.

116. International Conference on Population and Development, Cairo, UN Doc. A/CONF. 171/13, 18 October 1994, para. 4.9.

117. *See generally* UN Commission on Crime Prevention and Criminal Justice, Draft Plan of Action on the Elimination of Violence Against Women, E.S.C. 5th Sess., U.N. Doc. E/CN.15/1996/11 (1996) (formulating a draft resolution with priorities member states are to implement to achieve the elimination of violence against women).

118. Viseur-Sellers, *supra* note 103, at 302. *See e.g.*, Section 361(2) of the Chilean Code, Código Penal del Chile, Biblioteca del Congreso Nacional, COD-18742 (2001); Art. 236 of the Chinese Penal Code (1997); Art. 177 of the German Penal Code (StGB); Art. 177 of the Japanese Penal Code, *translated in* THE CRIMINAL CODE OF JAPAN (Thomas L. Blakemore, trans., 1954); Art. 179 of the Socialist Federal Republic of Yugoslavia Penal Code; §132 of the Zambian Penal Code, *reprinted in* 7 LAWS OF THE REPUBLIC OF ZAMBIA (REVISED) 1995; Art. 201 of the Austrian Penal Code (StGB); French Code Pénal Arts. 222-22; Art. 519 of the Italian Penal Code *reprinted in* 23 THE AMERICAN SERIES OF FOREIGN PENAL CODES, ITALIAN PENAL CODE (1978);. CÓD. PEN. art. 119 (Arg.). PEN. CODE § 375 (Pak.). PEN. CODE art. 375 (India). PEN. CODE § 117 (Uganda). PEN. CODE art. 242 (Neth.). CRIM. CODE ch. XXXII, art. 297 (S. Korea); CRIM. CODE ch. 24, art 216(1) (Den.); CRIM. CODE § 271-73 (Can.); CRIMES ACT OF 1961 § 128 (N.Z); CÓD. PEN. art. 195 (Nicar.).

119. *Prosecutor v. Furundzija*, IT-95-17/1-T (Dec. 10, 1998).

and found that “in spite of inevitable discrepancies, most legal systems in the common and civil law worlds consider rape to be the forcible sexual penetration of the human body by the penis or the forcible insertion of any other object into either the vagina or the anus.”¹²⁰ Implicit in this statement is that most legal systems in the common and civil law worlds *prohibit* rape,¹²¹ and more importantly, this prohibition clarifies a common underlying principle that substantiates a legal and moral duty undertaken by states to penalize serious violations of sexual autonomy.¹²² As Judge Patricia Viseur-Sellers states, “unmistakably, there is a general norm of international law de-

120. *Id.* at para. 181. See also *Prosecutor v. Tadic*, IT-94-1-A-R77, para. 15 (Jan. 31, 2000) (“It is otherwise of assistance to look to the general principles of law common to the major legal systems of the world, as developed and refined (where applicable) in international jurisprudence”). When it is not possible to discern an international legal rule from international treaties, custom or general principles, international courts may resort to general principles of law common in national legal systems if they are able to disclose a common indicator of international law on the subject. See RESTATEMENT (THIRD), *supra* note 31, at 25 (holding that: “[g]eneral principles common to the major legal systems, even if not incorporated or reflected in customary law or international agreement, may be invoked as supplementary rules of international law where appropriate”).

121. To be sure, domestic law regarding rape is not without problems; it is often biased or inadequate and even where laws are not discriminatory, they may be applied differently to women by the legal system or so flawed that they fail to protect women from violence. Furthermore, even when a sufficient legal framework is in place, authorities may fail to implement it. See *Contemporary Slavery*, *supra* note 20, at para. 96.

A general survey of municipal legal systems reveals the following examples of gender-based discrimination codified in criminal laws and justice systems around the world: rape and other forms of sexual assaults that are defined as crimes against the community and not against the individual victim, even though non-sexual assaults are defined as crimes against the individual victim; rape being defined as acts committed by a man against a woman (not his wife), even though men are also victims of sexual violence; procedural laws requiring women to take independent action to initiate prosecutions of rape by the prosecutor's office; evidentiary laws which accord less weight to evidence if presented by a woman; evidentiary laws in rape and sexual assault cases which require women to provide corroborating testimony from men; substantive laws which provide that a married woman who is unsuccessful in proving that she was raped can then be charged with adultery; penalties for sexual violence which allow a man convicted of rape to avoid punishment if he marries the victim; laws which prevent women from serving as judges or as fact-finders; laws which restrict women's access to abortions, contraception or reproductive information; and the absence of adequate, gender-specific witness protection programmes—leaving survivors of sexual and gender violence vulnerable to retaliatory attacks and at the mercy of their male relatives for protection—the very relatives who often regard the survivors as “dishonoured women.”

Id.

122. See *Prosecutor v. Kunarac*, IT-96-23-T & IT-96-23/1-T, paras. 436-50, 457 (Feb. 22, 2001) (noting that “[t]he basic principle which is truly common to these legal systems is that serious violations of sexual *autonomy* are to be penalized. Sexual autonomy is violated wherever the person subjected to the act has not freely agreed to it or otherwise is not a voluntary participant”).

rived from municipal law regarding the illegality of rape.”¹²³ The caveat, however, is that such a norm only binds each state to its own law and does not produce an international legal effect governing the prohibition of rape for the entire international community and therefore does not translate directly into a peremptory norm in and of itself—although it certainly illuminates a specific legal attitude that rape is a violation of *jus cogens* character and thereby creates an objective obligation requiring all states to observe the norm as an essential component to the existence of the international legal order.¹²⁴

Two recent domestic cases redressing international gender crimes, *Kadic v. Karadzic*¹²⁵ and *Hwang Geum Joo, et al. v. Japan*,¹²⁶ pronounced on the legal value of rape and implicitly confirmed its *jus cogens* character. In *Kadic v. Karadzic*—a claim brought against Bosnian-Serb leader Radovan Karadzic by plaintiffs representing citizens of the former Yugoslavia under the Alien Tort Claims Act (ATCA)¹²⁷—Croat and Muslim Bosnian women filed tort actions alleging various atrocities, including “brutal acts of rape, forced prostitution, forced impregnation, torture, and summary execution.”¹²⁸ The case extended the exercise of civil jurisdiction by U.S. courts to cover acts of sexual violence to the extent that they are committed in pursuit of genocide or war crimes, regardless of the location of the crimes or the nationality of the victims or the accused.¹²⁹ In its judgment, the Second Circuit Court recognized that “acts of murder, rape, torture, and arbitrary detention (slavery) have long been recognized as violations of ‘the most fundamental norms of the law of war’ and direct

123. Viseur-Sellers, *supra* note 103, at 296, 302 (noting generally her counter-argument that “the community of states has not expressed a more poignant interest in accepting prohibition of rape, in and of itself, as a peremptory norm . . . states still do not ‘act obligated’ in the face of present day massive trafficking of eastern European women or Asian women throughout Europe, that is essentially institutionalized rape”).

124. Importantly, however, the derivation of international law from domestic legal systems “presupposes a process of identification of the common denominators in these legal systems so as to pinpoint the basic notions they share,” *Prosecutor v. Furundzija*, No. IT-95-17/1-T, 73, at para. 74.

125. *Kadic v. Karadzic*, 70 F. 3d 232 (2d Cir. 1995).

126. *Hwang Geum Joo v. Japan*, 172 F. Supp. 2d 52 (D.D.C. 2001).

127. Alien Tort Claims Act, 28 U.S.C. § 1350. See generally Anne-Marie Burley, *The Alien Tort Statute And The Judiciary Act Of 1789: A Badge Of Honor*, 83 AM. J. INT’L L. 461 (1989) (discussing the Alien Tort Claims Act).

128. *Kadic*, 70 F. 3d at 232, 236-37 (noting the importance of sexual violence in the alleged acts).

129. *Id.* at 243-43. Such jurisdiction under the Alien Tort Claims Act was first established in *Filartiga v. Pena-Irala*, 630 F. 2d 876, 885-86 (2d Cir. 1980).

violations of international law.”¹³⁰ To be sure, the Court’s decision does not directly address questions of *jus cogens*, but it does validate victims’ accounts of the violent sexual crimes committed against them as grave violations of the law of war and importantly shows the effects of a *jus cogens* norm through *opinio juris*.¹³¹ Specifically, by making such claims actionable in U.S. courts, *Kadic* confirms a non-derogable legal obligation to civilly prosecute such cases and establishes the exercise of jurisdiction over sexual violence as a universal crime.

In *Hwang Geum Joo*, a class action complaint on behalf of fifteen Asian women filed in the U.S. District Court for the District of Columbia, plaintiffs alleged that along with approximately 200,000 other women and girls they were forced into sexual slavery by the Japanese military during World War II.¹³² These “comfort women” were “repeatedly raped—often by as many as thirty or forty men a day—tortured, beaten, mutilated, and sometimes murdered.”¹³³ The plaintiffs and their counsel argued that Japan’s abduction and forced sexual enslavement of thousands of women violates *jus cogens* principles and that this should constitute an implied waiver of sovereign immunity.¹³⁴ Although the Court did not specifically rule on the *jus cogens* status of sexual slavery, the Court’s decision appears to have turned on the view that the acts in question were a violation of *jus cogens*. In

130. Memorandum Complaint, *infra* note 132, at 40, citing *Kadic*, 70 F. 3d at 243.

131. Civil jurisdiction cannot result in any punishment, but the hearing of such cases confirms the seriousness of the alleged crimes and may eventually be used to criminally punish offenders in extreme cases. Similar actions have also been filed against corporations and their executives for violations of human rights, including rape. See generally, *John Doe I v. Unocal Corp.*, 395 F 3d 932 (9th Cir. 2002) (alleging the Myanmar government and government owned oil company, a French oil company, and an American oil company committed human rights violations). See generally *RECENT CASE: Civil Procedure - Choice of Law - Ninth Circuit Uses International Law To Decide Applicable Substantive Law Under Alien Tort Claims Act*, 116 HARVARD LAW REV. 1525 (2003) (discussing *John Doe I v. Unocal Corp.* case in relations to the Alien Tort Claims Act). See also Craig Forcese, *ATCA's Achilles Heel: Corporate Complicity, International Law and the Alien Tort Claims Act*, 26 YALE J. INT'L L. 487 (2001) (discussing the Alien Tort Claim's Act).

132. Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Declaratory Judgment That Japan Cannot Claim Sovereign Immunity in Defense of Claims of Systematic Sexual Slavery During World War II, *Hwang Geum Joo v. Japan*, 172 F. Supp. 2d 52 (D.D.C. 2001) (No. 00-CV-2288, renumbered 00-CV-2233) at 1 [hereinafter Memorandum Complaint], available at <http://www.cmht.com/pdfs/comfortwomen2.pdf> (last visited Feb. 17, 2005) (submitted by Michael D. Hausfeld and Agnieszka M. Fryszman of Cohen, Milstein, Hausfeld & Toll, PLLC on behalf of fifteen Asian women).

133. *Hwang Geum Joo*, 172 F. Supp. 2d at 52, 55.

134. Memorandum Complaint, *supra* note 132, at 38-45 (the plaintiffs argued that "the actions of Japan in forcing hundreds of thousands of women into military sexual slavery violates *jus cogens* principles of international law, which are not subject to sovereign immunity").

the Trial Chamber's memorandum opinion, Judge Henry H. Kennedy, Jr., writes: "In light of the binding precedent of the D.C. Circuit in *Princz*, the court concludes that Japan's *jus cogens* violations do not constitute an implied waiver under § 1605(a)(1)."¹³⁵ Here, the Court acts as if sexual violence violates *jus cogens*, which in turn suggests that the illegality of sexual violence constitutes an existing *jus cogens* norm. The Court's pronouncement condemns the alleged acts as being among "the worst atrocities ever committed by mankind"¹³⁶ and clearly asserts sexual slavery as a peremptory norm.

Both of these cases provide implicit confirmation that the international disapproval of violent sexual acts is so fundamental and so compelling that the prohibition amounts to a *jus cogens* rule. It is evident from domestic law and practice that the illegality of rape establishes a general norm of international law. Nonetheless, that general norm only binds each state to its own law and does not translate into a peremptory norm by itself.¹³⁷ At this stage, however, I would like to point out that the weight of domestic practice opposing rape, both uniform and expressive of an objective legal obligation, reflects the fundamental interests of the international public order and provides further justification for asserting that this prohibition is of a peremptory nature.

C. Decisions of International and Regional Judicial Bodies

Uniquely, rape is a constituent element of every accepted *jus cogens* norm. Under the jurisprudence of the *ad hoc* Tribunals and regional human rights courts, rape has been characterized and prosecuted as a component of genocide, torture, slavery, crimes against humanity and war crimes. It is important to note that the seriousness of violent sexual crime requires treatment and consequences beyond 'lesser' crimes of war such that when violations occur these crimes are accounted for and characterized as elements of other *jus cogens* norms as particularly grave violations of international law.

135. *Hwang Geum Joo*, 172 F. Supp. 2d at 61 (holding that *jus cogens* violations do not constitute an implied waiver).

136. *Id.* at 55.

137. Viseur-Sellers, *supra* note 103, at 302 (noting that "[m]unicipal law does not 'act' to protect the overriding interest of the international community in relation to the prohibition of rape. Hence, even the widely recognized municipal-derived general norm regarding rape does not translate into a peremptory norm").

First, rape has been found by several international judicial bodies to constitute the elements of torture.¹³⁸ At the regional level, *Aydin v. Turkey*¹³⁹ and *Mejia Egocheaga v. Peru*,¹⁴⁰ both issued decisions interpreting rape as an act of torture. In *Mejia*, the Inter-American Commission of Human Rights ruled that the rape of Raquel Mejia by members of the Peruvian Army constituted torture in breach of the Geneva Conventions and Article 5 of the Inter-American Convention.¹⁴¹ In *Aydin*, the European Court of Human Rights interpreted rape as an act of torture under Article 3 of the European Convention¹⁴² and “specifically affirmed the view that rape involves the infliction of suffering at a requisite level of severity to place it in the category of torture.”¹⁴³ Rape was also characterized as an act of torture under the jurisprudence of the Yugoslav Tribunal. In the *Celebici* case, the Trial Chamber held that mass rapes at a Muslim-run detention center where Serbian men and women were sexually assaulted constituted acts of torture,¹⁴⁴ and both *Prosecutor v. Kunarac*¹⁴⁵ and

138. In addition to the noted judgments, the United Nations Special Rapporteur also expresses the view that rape constitutes torture, whose report lists various forms of sexual violence as methods of torture. See *Question of the Human Rights of All Persons Subjected to Any Form of Detention or Imprisonment, In Particular: Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment; Report of the Special Rapporteur, Mr. Nigel S. Rodley, submitted pursuant to Commission on Human Rights resolution 1992/32*, U.N. ESCOR, Comm'n on Human Rights, 50th Sess., Agenda Item 10(a), at para. 16, 25 U.N. Doc. E/CN.4/1995/34 (1995).

139. *Aydin v. Turkey* (1997) 3 Butterworths Human Rights Cases 300.

140. *Mejia Egocheaga v. Peru* (1996) 1 Butterworths Human Rights Cases 229.

141. *Id.* at 263.

142. *Aydin*, 3 Butterworths Human Rights Cases 300, at 314. The *Akayesu* case referred to rape as torture in the following terms:

Like torture rape is used for such purposes as intimidation, degradation, humiliation, discrimination, punishment control or destruction of a person. Like torture rape is a violation of personal dignity, and rape in fact constitutes torture when inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

Prosecutor v. Akayesu, ICTR-96-4-T, para. 687 (2 Sept. 1998).

143. *Prosecutor v. Delalic*, IT-96-21-T, para. 489 (Nov. 16, 1998) [hereinafter *Celebici*].

144. *Id.*, at para. 495-496. The court also indicated the gravity of sexual violence and rape as an individual offense, stating that it “considers the rape of any person to be a despicable act which strikes at the very core of human dignity and physical integrity.” *Id.* (emphasis added). The court further stated:

Rape causes severe pain and suffering, both physical and psychological. The psychological suffering of persons upon whom rape is inflicted may be exacerbated by social and cultural conditions and can be particularly acute and long lasting. Furthermore, it is difficult to envisage circumstances in which rape, by, or at the instigation of a public official, or with the consent or acquiescence of an official, could be considered as occurring for a purpose that does not, in some way, involve punishment, coercion, discrimination or intimidation. In the view of this Trial Chamber *this is inherent in situations of armed conflict*. Accordingly, whenever rape and other forms of sexual violence

Prosecutor v. Furundzija upheld convictions that in certain circumstances “rape can amount to torture” as a violation of international law.¹⁴⁶

Similarly, sexual violence has been proven to satisfy genocidal conduct under the jurisprudence of the Rwandan Tribunal in *Prosecutor v. Akayesu*.¹⁴⁷ Specifically, the Trial Chamber found that sexual violence and rape were committed with requisite genocidal intent such that “rape and sexual violence . . . constitute genocide in the same way as any other act as long as they were committed with the specific intent to destroy, in whole or in part, a particular group.”¹⁴⁸ The Trial Chamber also notes that rape and sexual violence were an integral part of the process of destroying the Tutsi population and amount to one of the worst ways to inflict injury on the victim because of the combination of physical and psychological harm.¹⁴⁹

meet the aforementioned criteria, they shall constitute torture, in the same manner as any other acts that meet this criteria.

Id. (emphasis added). In the italicized statement, the Trial Chamber clearly evinces *opinio juris*—a perceived legal obligation—as the expression of *ius cogens* effects.

145. *Prosecutor v. Kunarac*, IT-96-23-T & IT-96-23/1-T, para. 557 (Feb. 22, 2001) (“the Judgment”), and paras. 179-185 (June 12, 2002) (“the Appeal”) (the Appeals Chamber noting that “[t]he physical pain, fear, anguish, uncertainty and humiliation to which the Appellants repeatedly subjected their victims elevate their acts to those of torture . . . the deliberate and coordinated commission of rapes was carried out with breathtaking impunity over a long period of time . . . the victims endured repeated rapes, implicating not only the offence of rape but also that of torture under Article 5 of the Statute”). *Id.* at para. 185.

146. *Prosecutor v. Furundzija*, IT-95-17/1-T, 73, at paras. 163-189; *see also* *Prosecutor v. Furundzija*, No. IT-95-17/1-A, para. 210 (2000), available at <http://www.un.org/icty/furundzija/appeal/judgement/index.htm>. Additionally, *Furundzija* expressed the universal character of sexual violence as a serious offense from which no derogation is permitted, stating that “the prohibition of rape and serious sexual assault has evolved in customary international law . . . [into] universally accepted norms of international law prohibiting rape and serious sexual assault . . . applicable in any armed conflict.” *Furundzija*, No. IT-95-17/1-T, 73, at para. 168-169. Furthermore, the Trial Chamber expressed the legal duty for states to prosecute these crimes when they occur in armed conflict: “It is indisputable that rape and other serious sexual assaults in armed conflict entail the criminal liability of the perpetrators.” *Furundzija*, No. IT-95-17/1-T, 73, at para. 168-169.

147. *Prosecutor v. Akayesu*, ICTR-96-4-T, paras. 507-08, 731 (Sept. 2, 1998).

148. *Id.* at para. 731.

149. *Id.* The court went on to describe the rapes against Tutsi women:

The rape of Tutsi women was systematic and was perpetrated against all Tutsi women and solely against them. A Tutsi woman, married to a Hutu, testified before the Chamber that she was not raped because her ethnic background was unknown. As part of the propaganda campaign geared to mobilizing the Hutu against the Tutsi, the Tutsi women were presented as sexual objects. Indeed, the Chamber was told, for an example, that before being raped and killed, Alexia, who was the wife of the Professor, Ntereye, and her two nieces, were forced by Interahamwe to undress and ordered to run and do exercises ‘in order to display the thighs of the Tutsi women.’ The Interahamwe who raped Alexia said, as he threw her on the ground and got on top of her, ‘let us see what the vagina of a Tutsi woman tastes like.’ As stated above, Akayesu

Finally, it has been demonstrated that rape and sexual violence are forms of slavery.¹⁵⁰ Under the Yugoslav Tribunal, the *Kunarac* judgment was the first to ever prosecute rape as enslavement.¹⁵¹ In addition, a recent report of the United Nations Special Rapporteur specified that “in all respects and in all circumstances, sexual slavery is slavery and its prohibition is a *jus cogens* norm.”¹⁵²

Thus, rape can be characterized and prosecuted as *jus cogens* when it fulfills the requisite elements proving torture, genocide, slavery, crimes against humanity, and war crimes.¹⁵³ Significantly, the inclusion of rape as a component of every other peremptory norm reflects the expression of a legal obligation and therefore articulates *opinio juris*. However, while it is important to applaud this jurisprudence and note how it has helped to illuminate ways in which these offences are committed uniquely through rape, the failure to define rape as a separate *jus cogens* violation ignores the seriousness of rape as an international problem on its own and allows states to treat sexual violence as a ‘softer’ offense than other peremptory norms.¹⁵⁴

Lastly, a number of U.N. General Assembly and Security Council Resolutions have strongly condemned sexual violence regarding atrocities in Rwanda, the former Yugoslavia, Sierra Leone, East Timor, Japan, Haiti, Myanmar (Burma), and Afghanistan.¹⁵⁵ The col-

himself, speaking to the Interahamwe who were committing the rapes, said to them: 'don't ever ask again what a Tutsi woman tastes like.' This sexualized representation of ethnic identity graphically illustrates that the Tutsi women were subjected to sexual violence because they were Tutsi. Sexual violence was a step in the process of destruction of the Tutsi group—*destruction of the spirit, of the will to live, and of life itself*.

Id. at para. 732 (emphasis added).

150. See *Contemporary Slavery*, *supra* note 20, at para. 30 (noting that “the ‘comfort stations’ that were maintained by the Japanese military during the Second World War . . . and the ‘rape camps’ that have been well documented in the former Yugoslavia are particularly egregious examples of sexual slavery”).

151. Prosecutor v. Kunarac, IT-96-23-T & IT-96-23/1-T, at para. 186 (June 12, 2002) (“the Appeal”).

152. *Contemporary Slavery*, *supra* note 20, at para. 30.

153. Rape and various forms of sexual violence are elements of crimes against humanity and war crimes in the Statute of the International Criminal Court. See Rome Statute, *supra* note 22, at articles 7, 8.

154. Viseur-Sellers, *supra* note 103, at 296 (noting how “the result is a form of legal piggy-backing. Prohibitions of sexual violence do not rise on their own volition, but enters [sic] by way of a non-explicit sexual crime, to reach the glory of *jus cogens*”). The lack of explicit legal force behind rape as an independent peremptory norm permits rape to be interpreted by states in ‘soft’ ways that are not allowed with respect to other peremptory norms. Consequently, states can hedge on their international obligations and downplay the severity of violent sexual offenses.

155. S.C. Res. 798, U.N. SCOR, 47th Sess., 3150th mtg., U.N. Doc. S/RES/798 (1992) (strongly condemning “reports of massive, organized and systematic detention and rape of

lective force of these resolutions responding to violations that have occurred validates the important normative development of rape as a peremptory norm. To be sure, U.N. Resolutions are not legally binding and remain subject to political pressure; however, such documents play an important role in providing a general context for international interests as an indicator of consensus on international issues.

For example, Security Council Resolution 798, pursuant to the atrocities in the former Yugoslavia, states that the Council was “appalled by reports of the massive, organized and systematic detention and rape of women . . . [and] strongly condemns these acts of unspeakable brutality.”¹⁵⁶ Following this resolution, the General Assembly expressed its desire “of ensuring that persons accused of upholding and perpetrating rape and sexual violence as a weapon of war . . . be brought to justice . . . without further delay.”¹⁵⁷ Furthermore, Security Council Resolution 1325, the first ever Security Council Resolution specifically regarding violence against women, “[c]alls on all parties to armed conflict to take special measures to protect women and girls from gender-based violence, particularly rape and other forms of sexual abuses” and “emphasizes the responsibility of all States to put an end to impunity and to prosecute those responsible for genocide, crimes against humanity, and war crimes including those relating to sexual and other violence against women and girls.”¹⁵⁸

women" in Bosnia and Herzegovina); S.C. Res. 820, U.N. SCOR 48th Sess., 3200th mtg. at 2, U.N. Doc. S/RES/820 (1993) (condemning detention and rape of women in Bosnia and Herzegovina and affirming individual responsibility for those responsible for committing or ordering such acts); G.A. Res. 49/205, U.N. GAOR, 49th Sess., 94th mtg., at 1, U.N. Doc. A/RES/49/205 (1994) ("Appalled at the continuing and substantiated reports of widespread rape and abuse of women and children in the areas of armed conflict in the former Yugoslavia"); G.A. Res. 48/143, U.N. GAOR, 48th Sess., 85th mtg., U.N. Doc. A/RES/48/143 (1993) (discussing rape and abuse of women in the Yugoslav conflict); *Rape and Abuse of Women in the Territory of the Former Yugoslavia*, U.N. Comm'n on Human Rights, 49th Sess., Agenda Item 27, U.N. Doc. E/CN.4/1993/L.3 (1993) (condemning sexual violence of women during Yugoslav conflict); S.C. Res. 917, U.N. SCOR 49th Sess., 3376th mtg. at 2, U.N. Doc. S/RES/917 (1994) ("Strongly condemning the numerous instances of . . . rape and enforced disappearances" in Haiti); S.C. Res. 1076, U.N. SCOR 51st Sess., 3706th mtg. at 3, U.N. Doc. S/RES/1076 (1996) ("Denounces the discrimination against girls and women and other violations of human rights and international humanitarian law in Afghanistan").

156. S.C. Res. 798, *supra* note 155.

157. G.A. Res. 49/205, *supra* note 155.

158. S.C. Res. 1325, U.N. SCOR, 55th Sess., 4213th mtg., at 1, 3, U.N. Doc. S/Res/1325 (2000) ("reaffirming the important role of women in the prevention and resolution of conflicts and in peace-building, and stressing the importance of their equal participation and full involvement in all efforts for the maintenance and promotion of peace and security, and the need to increase their role in decision-making with regard to conflict prevention and resolution").

As an international forum representing the community of states, U.N. General Assembly Resolutions suggest state opinion about international law and Security Council Resolutions reflect the international community's gravest concerns. Taken together, the corpus of U.N. Resolutions indicates the *erga omnes* effects of an existing peremptory norm. Put differently, the international community is aware of the overriding importance of prohibiting sexual violence and as a result of its especially grave character this obligation is expressed as non-derogable and essential for the maintenance of the international public order. Unmistakably, the proliferation of General Assembly and Security Council pronouncements condemning sexual violence indicates an international obligation to denounce such acts and therefore identifies *opinio juris* supporting the prohibition of rape—at least during armed conflict—as a customary rule.

IV. CONCLUSION

Undeniably, the prohibition of rape as a crime in international humanitarian law possesses the character of *jus cogens*. As argued above, a general norm prohibiting rape satisfies the basic sources of international law—treaty, custom, and general principles—as well as the objective indicia put forth by the ILC.¹⁵⁹ First, the norm is prohibited from derogation in a large number of normative multilateral agreements. Second, the municipal law of every nation in the world outlaws rape as part of general custom and rape is frequently condemned in the practice of most nations as an obligatory rule of higher international standing.¹⁶⁰ Finally, international courts, regional tribunals, and the U.N. Security Council have recognized and applied this protective concept as a *jus cogens* rule.

Growing consensus confirms that the interest of the international community in prohibiting rape is, both morally and legally, a value so basic and fundamental to the international public order that this prohibition has acquired the status of *jus cogens*.¹⁶¹ The most immediate

159. See *supra*, Part II.

160. See *supra*, Part III, Section B.

161. See *Statement by Mary Robinson, United Nations High Commissioner for Human Rights before the Beijing+5 Review Conference*, (2000) available at <http://www.unhchr.ch/hurricane/nsf/424e6fc8b8e55fa6802566b0004083d9/db6643258a4cc97f802568fd005b10ba?OpenDocument>

("When we speak of violations of humanitarian law, when we speak of crimes which are so abhorrent that they are considered *jus cogens* under international law . . . and when we consider the particular way that these crimes can be committed against women, there is no room for negotiation nor derogation from international legal obligation"); see also Askin, *Prosecuting War-*

challenge is to recognize this emerging norm by clarifying the legal language surrounding rape and formally defining it in practice as a peremptory norm. This realization will require self-awareness among judges and recognition by lawyers and lawmakers that the legal value of rape has emerged as a basic standard of the international public order. Given that the prevalence of sexual violence in international law is equally matched by the tendency not to adjudicate,¹⁶² the assertion of an inviolable peremptory norm prohibiting rape will be an important step toward increasing normative compliance, state responsibility, and effective prosecution.¹⁶³ By developing the legal capacity to prosecute rape as a serious violation independently from other peremptory norms, states will be compelled to recognize and act on their obligation to pursue those responsible, which will help to ensure accountability and deter future violations.¹⁶⁴ After centuries of disregard, it is time to firmly establish an inderogable protection against rape as a high level constitutional principle of the international legal system.

time Rape, supra note 5, at 349 ("It has taken over twenty-one centuries to acknowledge sex crimes as one of the most serious types of crimes committable, but it appears that this recognition has finally dawned").

162. The continued oppression, discrimination, and sexual violence perpetrated against women is a worldwide phenomenon and constitutes "one of those rare [international law] areas where there is genuinely consistent and uniform state practice." See Charlesworth & Chinkin, *The Gender of Jus Cogens, supra* note 16, at 71. Amnesty International recently declared that "[v]iolence against women is the greatest human rights scandal of our times." See e.g., Amnesty International, *It's in Our Hands, supra* note 26, at 1 (declaring that "from birth to death, in times of peace as well as war, women face discrimination and violence at the hands of the state, the community and the family . . . violence against women is not confined to any particular political or economic system, but is prevalent in every society in the world and cuts across boundaries of wealth, race and culture").

163. See generally, *supra* note 5 and accompanying text (noting failure of the international community to effectively prosecute crimes of rape and sexual violence).

164. Meron, *Rape as a Crime, supra* note 5, at 428 (noting that "[m]eaningful progress in combating rape can only be made by more vigorous enforcement of the law").