The Prohibition of Widespread Rape as a *Jus Cogens**

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I. INTRODUCTION

International law affords protections at varying levels. *Jus cogens* represents the most fundamental principles from which no state may derogate. Few principles are recognized as *jus cogens*. Widespread rape, a term of art, denotes the rape of large numbers of women by aggressors often attempting to procure political power. Even the most accomplished international legal scholars, however, fail to acknowledge the prohibition of widespread rape as a *jus cogens*. This comment explains why the prohibition of widespread rape should be recognized as a *jus cogens* through analyses of the failure of existing international legal instruments, advances within international law towards the universal prohibition of widespread rape, and policy reasons for classifying widespread rape as a *jus cogens*. In doing so, this comment will demonstrate the particular timeliness of this topic by reviewing the use of widespread rape in several countries throughout the 1990s, the widespread rape presently occurring in Kenya, and the emerging reports from Iraq of rape

committed at the hands of the Saddam Hussein regime. Finally, this comment will explore arguments against the classification of widespread rape as a *jus cogens* and demonstrate that such classification actually produces a net benefit.

II. *JUS COGENS*

The Vienna Convention on the Law of Treaties (Vienna Convention) defines *jus cogens* as "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted. . ."[1] In other words, *jus cogens* is "[a] mandatory norm of general international law from which no two or more nations may exempt themselves or release one another."[2] Since its first codification in the Vienna Convention, *jus cogens* have also been applied beyond the law of treaties.[3]

Jus cogens represents norms so universally accepted that no state may exercise the common exceptions to customary international law such as force majeure, state of necessity, or self-defense.[4] In fact, no treaty or domestic law may deviate from *jus cogens*, which is only amendable by a subsequent norm of the same character.[5] Absent an "International Legislature" charged with the task of creating *jus cogens*, however, no clear mechanism exists to create or designate *jus cogens* principles.[6] Notwithstanding this ambiguity, *jus cogens* maintains the force of law,

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

2. BLACK'S LAW DICTIONARY 864 (7th ed. 1999).

3. *See, e.g.*, Military and Paramilitary Activities (*Nicar. v. U.S.*), 1986 I.C.J. 14, 100 (June 27) [hereinafter Nicaragua]; *International Law Commission Draft Articles on State Responsibility*, U.N. GAOR, 51st Sess., Supp. No. 10, art. 19, at 131 U.N. Doc. A/51/10 (1996); *see also* Grennady M. Danilenko, *International Jus Cogens: Issues of Law-Making*, 2 EUR. J. INT'L L. 42 (2001) (arguing "[t]he importance of [*jus cogens*] for the international legal order is further confirmed by the trend to apply it beyond the law of treaties, in particular in the law of state responsibility").

4. *See generally* THEODOR MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW 20–21, 215–22 (Oxford University Press 1989). The author notes the very existence of *jus cogens* is disputed at international law. *See infra* note 20 and accompanying text.

5. *Report of the International Law Commission on the Work of Its Eighteenth Session*, U.N. GAOR, 21st Sess., Supp. No. 9, U.N. Doc. A/6309/Rev. 1 (1966), *reprinted in* 2 Y.B. INT'L L. COMM'N 169, 247 (1966) (providing: "A treaty is void if it conflicts with a peremptory norm of general international law from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character").

6. Danilenko, *supra* note 3, at 44 (addressing the tension between natural law and positivism in the creation of *jus cogens*).

as evidenced by the Statute of the International Court of Justice and application of the same in cases before the International Court of Justice (ICJ).[7]

Jus cogens consists of both rights and responsibilities.[8] For instance, *jus cogens* promotes certain activities such as self-determination.[9] Alternatively, *jus cogens* prohibits conduct that is so heinous that it threatens "the peace and security of mankind and the conduct, or its result, is shocking to the conscience of humanity."[10] Although *jus cogens* continues to gain ground since its initial inception in the 1969 Vienna Convention,[11] the international community prohibits relatively few actions by way of *jus cogens*.

Traditional *jus cogens* norms include slavery, piracy, and genocide.[12] Since World War II, *jus cogens* has become increasingly prevalent due, in part, to the international community's willingness to permit exceptions to the typically required element of state consent.[13] Thus, since 1945, *jus cogens* expanded to include crimes against humanity, murder, torture,[14] and use of force or aggression.[15] Additionally, according to the Restatement

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7. Article 38 (1)(c) of the Statute of the International Court of Justice (ICJ) provides in pertinent part: "The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply ... the general principles of law recognized by civilized nations." STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, June 26, 1945, art. 38, 59, Stat. 1055, T.S. No. 993 [hereinafter STATUTE OF THE ICJ]. For ICJ application of *jus cogens*, *see* Nicaragua *supra* note 3; *see also* United States Diplomatic and Consular Staff in Tehran (*U.S. v. Iran*), 1979 I.C.J. 7, 19 (Interim Order of Dec. 15) [hereinafter Tehran] (recognizing *jus cogens* by noting: "There is no more fundamental prerequisite for the conduct of relations between States than the inviolability of diplomatic envoys and embassies, so that throughout history nations of all creeds and cultures have observed reciprocal obligations for that purpose").

8. IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 513 (4th ed. 1990).

9. *Id.* For example, the Conference on Yugoslavia Arbitration Commission questioned the right to self-determination when faced with the question whether the Serbian population in Croatia and Bosnia-Herzegovina, as one of the constituent peoples of Yugoslavia, had the right to self-determination. *See* Conference on Yugoslavia Arbitration Commission, Opinion No. 2, 31 I.L.M. 1497, 1498 (1992) (wherein the right to self-determination is both questioned and limited).

10. M. Cherif Bassiouni, *Sources and Theories of International Criminal Law*, 1 INTERNATIONAL CRIMINAL LAW 42 (2d ed. 1999).

11. Danilenko, *supra* note 3.

12. *See* M. Cherif Bassiouni, *Searching for Peace and Achieving Justice: The Need for Accountability*, 59 AUT. LAW & CONTEMP. PROBS. 9, 17 (1996).

13. Pia Zara Thadhani, *Regulating Corporate Human Rights Abuses: Is UNOCAL the Answer?*, 42 WM. & MARY L. REV. 619, 623 (2000).

14. International legal scholar Ian Browlie, Barrister at Blackstone Chambers, London, former Chichele Professor of Public International Law at the University of Oxford, and Fellow of All Souls College, Oxford, recognizes five separate *jus cogens*: murder, genocide, torture, slavery, and piracy. BROWNLIE, *supra* note 8.

15. The International Law Commission (ILC) asserts "the [United Nations] Charter concerning the prohibition of the use of force in itself constitutes a conspicuous example of a rule in international law having the character of *jus cogens*." *Draft Articles on the Law of Treaties*, para. 1 of the commentary of the Commission to Article 50, ILC

(Third) of Foreign Relations Law, a state effectively violates a *jus cogens* if it condones a breach of a *jus cogens*.[16]

No consensus presently exists among international law scholars regarding the creation of *jus cogens*.[17] Liberally, *jus cogens* include all rules of international law created for humanitarian purposes.[18] Conservatively and realistically, *jus cogens* emerge only when the international community, acting as a whole, recognizes a rule as preemptory in nature.[19] In fact, some international law practitioners dispute the very existence of *jus cogens*.[20] In any event, *jus cogens* represents the pinnacle of international law given its commonality among the major legal systems of the world[21] and its incorporation of those values considered fundamental to the international community.[22]

Yearbook, 1966-II, p. 247; *see also* Nicaragua, *supra* note 3, at 90.

16. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 (1987) [hereinafter RESTATEMENT].

17. Elizabeth A. Reimels, *Playing for Keeps: The United States Interpretation of International Prohibitions Against the Juvenile Death Penalty—The U.S. Wants to Play the Human Rights Game, but only if it Makes the Rules*, 15 EMORY INT'L L. REV. 303, 332 (2001).

18. Amjad Mahmood Khan, *Persecution of the Ahmadiyya Community in Pakistan: An Analysis Under International Law and International Relations*, 16 HARV. HUM. RTS. J. 217, 232 (2003).

19. RESTATEMENT, *supra* note 16, § 102, reporter's note 6.

20. International legal scholars dispute the existence of *jus cogens* on many levels. The debate concerning the existence of *jus cogens* is extensive and beyond the scope of this comment. However, the following provides a brief yet instructive view of the debate. Generally, those proponents of *jus cogens* argue United Nations conventions, scholarly opinions, and moral principles evidence the existence of *jus cogens*. Conversely, opponents argue international law requires the existence of treaty obligations and, absent said obligations, the notion of *jus cogens* fails to enunciate principles countries may reasonably expect in its relations with other countries and, thus, negates its existence as a matter of international law. *See* RESTATEMENT, *supra* note 16, § 102 reporter's note 6; G.I. Tunkin, THEORY OF INTERNATIONAL LAW 145–60 (William E. Butler trans., 1974) (providing detailed arguments from various cultures both recognizing and disputing the existence of *jus cogens)*; David Weissbrodt, *An Introduction to the Sources of International Human Rights Law*, *in* C399 ALI-ABA COURSE OF STUDY MATERIALS: INTERNATIONAL HUMAN RIGHTS 1, 11 (1989) (arguing that the Vienna Convention on the Law of Treaties' "content is disputed, and thus far, only the UN Charter's principles prohibiting the use of force are generally agreed to be *jus cogens"*); A. Mark Weisburd, *The Emptiness of the Concept of Jus Cogens, as Illustrated by the War in Bosnia-Herzegovina*, 17 MICH. J. INT'L L. 1, 34–36 (1996); A. Mark Weisburd, *American Judges and International Law*, 36 VAND. J. TRANSNAT'L L. 1475, 1493 (2003) (asserting that "the status of the concept of *jus cogens* as an element of international law is quite confused").

21. David F. Klein, *A Theory for the Application of the Customary International Law of Human Rights by Domestic Courts*, 13 YALE J. INT'L L. 332, 343–46 (1988).

22. Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 714–15 (9th Cir.

Despite the lack of uniformity in the creation of *jus cogens* and the theoretical and practical debate regarding the existence of *jus cogens*, the ICJ decides international disputes with the guidance of *jus cogens*[23] and incorporates those principles into its holdings.[24] This comment therefore proceeds with the assumption that *jus cogens* are valid and that the principle should be applied to include the prohibition of widespread rape.[25]

III. WIDESPREAD RAPE

Defining widespread rape requires independent analysis of the terms "widespread" and "rape." Simply put, "widespread" denotes an act committed on a mass scale against a large number of victims.[26] The term excludes isolated acts committed by a perpetrator acting on his own initiative and directed against a single victim.[27] The attack must therefore be directed towards many potential victims with intent, rather than a specific physical result, to be "widespread."[28]

At present, international law provides no commonly accepted definition

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1992) [hereinafter *Siderman*].

23. STATUTE OF THE ICJ, *supra* note 7, art. 38(c).

24. Nicaragua, *supra* note 3, at 113–14; *see also* Tehran, *supra* note 7 (recognizing *jus cogens* by noting "there is no more fundamental prerequisite for the conduct of relations between States than the inviolability of diplomatic envoys and embassies, so that throughout history nations of all creeds and cultures have observed reciprocal obligations for that purpose").

25. Nicaragua, *supra* note 3, at 113–14; Tehran, *supra* note 7; *see also* Tunkin, *supra* note 20 (acknowledging the existence and use of *jus cogens* at international law).

26. *See Report of the International Law Commission on the work of its 48th session, 6 May – 26 July 1996*, U.N. GAOR, 51st Sess., Supp. No. 10, at 94–95, U.N. Doc. A/51/10 (1996) *available at* http://www.un.org/law/ilc/reports/1996/96repfra.htm (last visited Oct. 26, 2004) (defining widespread as "inhumane acts . . . committed on a large scale" or acts that "are directed against a multiplicity of victims"); *see also*, CAMBRIDGE INTERNATIONAL DICTIONARY OF ENGLISH, *available at* http://dictionary.cambridge.org/default.asp (last visited Oct. 19, 2004) (defining "widespread" as "existing or happening in many places and/or among many people"). Note that international tribunals commonly utilize "systematic" synonymously with "widespread" in addressing human rights violations. For further support of the provided definition, *see Prosecutor v. Tadic a/k/a "Dule"*, Case No. IT-94-1-T, ¶ 646–47, (Judgment, May 7, 1997) [hereinafter *Tadic*]; s*ee also Prosecutor v. Blaskic*, Case No. IT-95-14-T, ¶ 203, (Judgment, Mar. 3, 2000) [hereinafter *Blaskic*] (enunciating four elements that comprise a 'systematic attack' including: (a) the perpetration of a criminal act on a very large scale against a group of civilians or the repeated and continuous commission of inhuman acts linked to one another; (b) the existence of a political objective, a plan pursuant to which the attack is perpetrated or an ideology, in the broad sense of the word, that is, to destroy, persecute or weaken a community; (c) the perpetration and use of significant public and private resources, whether military or other; and (d) the implication of high-level political and/or military authorities in the definition and establishment of the methodical plan).

27. *Blaskic*, *supra* note 26, ¶ 206.

28. *Id.*

of "rape."[29] Despite the absence of a single definition of rape, the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for the former Yugoslavia (ICTY) define rape as a "physical invasion of a sexual nature, committed on a person under circumstances which are coercive."[30] This comment defines "rape" chiefly in accordance with the definition provided by the ICTR and ICTY, but in a slightly broadened fashion that includes near penetration of a woman's body committed without consent and with force.[31]

Widespread rape is a topic of particular concern to the international community, as demonstrated by its frequent prohibition in international legal instruments.[32] Yet, notwithstanding the protections advanced by these instruments, widespread rape is prevalent particularly in developing countries.[33] In fact, with the recent developments in Iraq, evidence of widespread rape continues to surface, further demonstrating the need for strong and effective prohibitions. Consequently, as developed below, the present state of international affairs and the vulnerability of women worldwide require recognizing the prohibition of widespread rape as a matter of *jus cogens*.

IV. INADEQUATE EXISTING PROTECTIONS

At present, international law prohibits widespread rape through three mechanisms: international legal instruments, customary international law, and correlation to existing *jus cogens*. As discussed below, however, standing alone or taken together, each fails to adequately protect against widespread rape.

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29. Prosecutor v. Akayesu, Case No. ICTR-96-4-T, chs. 6.4, ¶ 596, 7.7, ¶ 686 (Judgment, Sept. 2, 1998), *at* http: //www.ictr.org/ENGLISH/cases/Akayesu/judgment/akay001.htm (last visited Oct. 28, 2004) [hereinafter Akayesu]; *see generally* 37 I.L.M. 1399 (1998) (case summary reprinted).

30. Akayesu, *supra* note 29, chs. 6.4, ¶ 598, 7.7, ¶ 688; ICTY STATUTE OF THE INTERNATIONAL TRIBUNAL art. 5.

31. For justification on the broadening definition of rape, *see* Asian Legal Resource Centre, *Sexual Torture and CIDT of Women by State-agents*, *at* http://www.alrc.net/doc/mainfile.php/torture/150/ (last visited Oct. 26, 2004).

32. *See generally UN Security Council, Preliminary Report of the Special Rapporteur on the Situation of Systematic Rape, Sexual Slavery and Slavery Like Practices During Periods of Armed Conflict*, U.N. ESCOR, Hum. Rts. Comm., 48th Sess., Provisional Agenda Item 15, U.N. Doc. E/CN.4/Sub.2/1996/26 (1996); Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 (entered into force Oct. 21, 1950) [hereinafter Fourth Geneva Convention]; International Committee of the Red Cross Aide-Memoir (Dec. 3, 1992).

33. MARGUERITE GUZMAN BOUVARD, WOMEN RESHAPING HUMAN RIGHTS: HOW EXTRAORDINARY ACTIVISTS ARE CHANGING THE WORLD 196 (1996).

A. *Inadequate Protection under Existing Legal Instruments*

Numerous international legal instruments[34] purport to protect the interests of women. For example, the Fourth Geneva Convention,[35] the United Nations Charter,[36] the Convention on the Elimination of All Forms of Discrimination against Women,[37] the International Convention on Civil and Political Rights,[38] and the Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment[39] all prohibit widespread rape. As demonstrated herein, however, critics target each for failing to properly protect women from widespread rape.

Alternatively, the following also analyzes the theoretical view held by several international scholars that treaty obligations, as a concept, may correlate with high incidences of human rights violations. In doing so, the following demonstrates how, while treaties expressly attempt to protect women, certain empirical studies demonstrate that they either maintain the present levels of atrocities against women or actually increase the occurrences of the very crimes for which the instruments intend to suppress.[40]

1. The Fourth Geneva Convention

Adopted in 1949, the Fourth Geneva Convention (Geneva Convention) represents one of the oldest international codified prohibitions against widespread rape. The Geneva Convention specifically provides: "[W]omen shall be especially protected against any attack on their honor, in particular against rape, enforced prostitution, or any form of indecent

34. The author recognizes many international legal instruments expressly or implicitly protect women from rape, but includes simply a few to establish the existence of said protections. Those included are not intended to provide an exhaustive listing or designate the most effective or least effective. Although a given instrument may be excluded, the same analysis applies and, as demonstrated *infra*, factual circumstances demonstrate the ultimate failure of attempts to mitigate widespread rape.

35. Fourth Geneva Convention, *supra* note 32, art. 27.

36. *See* U.N. CHARTER pmbl. (providing in its preamble that the United Nations is "determined . . . to reaffirm faith in the equal rights of men and women and of nations large and small").

37. Convention on the Elimination of All Forms of Discrimination against Women, G.A. Res. 34/180, U.N. GAOR, 34th Sess., Supp. No. 46, at 193, U.N. Doc. A/34/180 (1979) [hereinafter CEDAW].

38. International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

39. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N., GAOR, 39 Sess., Supp. No. 51, at 197, U.N. Doc. A/39/51 (1984) [hereinafter Torture Convention].

40. *See generally* Oona Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935 (2002); *see also infra* note 73 and accompanying text.

assault."[41] The Geneva Convention further prohibits "willfully causing great suffering or serious injury to body or health. . ."[42] The Geneva Convention, however, fails to include rape under the definition of "grave breaches," thereby reducing the priority of the crime to an extent that precludes its prosecution.[43]

2. *The United Nations Charter*

Likewise, the United Nations Charter protects individuals from rape by permitting the Security Council to establish tribunals to prosecute persons responsible for human rights violations.[44] For example, in 1993, the Security Council established the ICTY in part to prosecute those accused of widespread rape.[45] As of January 2004, out of the 104 accused who appeared before the ICTY, thirty are now serving sentences, five died before trial, and five were acquitted or found not guilty.[46]

Eighteen months following the creation of the ICTY, the Security Council established the ICTR. As of January 2004, the ICTR had detained fifty-five individuals, ten of whom were tried and convicted.[47] Further, as of January 2004, the ICTR was trying fifty-eight cases with forty-eight of the alleged perpetrators in custody.[48]

Despite developments within the ICTY, critics allege progress to date is slow and note that some of the highest ranking government officials

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41. Fourth Geneva Convention, *supra* note 32, at art. 27.
42. *Id.* at art. 147.
43. Julia Hall, *Violence against Women and International Law: Rape as a War Crime*, 90 AM. SOC'Y INT'L PROC. 605, 607 (1996).
44. U.N. CHARTER, ch. VI.
45. *International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia*, S.C. res. 827, U.N. Doc. S/RES/827 (1992) (establishing an international tribunal for the sole purpose of prosecuting persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia based on reports of widespread and flagrant violations of international humanitarian law occurring within the territory of the former Yugoslavia, and especially in the Republic of Bosnia and Herzegovina, including reports of the systematic detention and rape of women).
46. INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, THE ICTY AT A GLANCE: KEY FIGURES OF ICTY CASES, *available at* http://www.un.org/icty/glance/index.htm (last visited Oct 19, 2004).
47. *See* International Criminal Tribunal for Rwanda, *Detention of Suspects and Imprisonment of Convicted Persons* (undated), *at* http://www.ictr.org/ENGLISH/factsheets/7.htm (last visited Oct. 19, 2004).
48. *See* International Criminal Tribunal for Rwanda, *Cases in Progress*, *at* http://www.ictr.org/ENGLISH/cases/inprogress.htm (last visited Oct. 19, 2004).

have yet to be taken into custody.[49] These skeptics attack ICTY procedures, their inability to arrest and detain suspects, and difficulties they have in accessing documents held by Serbian and Montenegrin authorities. Finally, even the former ICTY Prosecutor Louise Arbour acknowledges the ICTY's limitations are based, in part, on the uncertain and developing nature of international criminal law.[50]

Similarly, many critics condemn practices within the ICTR.[51] Specifically, they argue the ICTR has failed to prosecute allegations of crimes other than genocide in a timely manner, non-cooperation by the government of Rwanda has thwarted investigations, and jurisdiction has been lost over alleged human right violators due to sham domestic legal proceedings.[52]

3. The Convention on the Elimination of All Forms of Discrimination against Women

In addition to the U.N. Charter, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) specifically prohibits violence against women, forbidding "[p]hysical, sexual and psychological violence occurring within the general community, including rape. . ."[53] CEDAW enjoys considerable acceptance by the international community with 175 ratifications as of December 10, 2003.[54]

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49. Human Rights Watch, Human Rights News, *Progress on War Crimes Accountability, the Rule of Law, and Minority Rights in Serbia and Montenegro, HRW Statement to the U.S. Commission on Security and Cooperation in Europe* (June 4, 2003), *at* http://www.hrw.org/backgrounder/eca/serbiatestimony060403.htm (last visited Oct. 30, 2004) (stating: "The past year has seen continued stutter-step progress toward cooperation with the ICTY and accountability for war-time atrocities. Still missing is the clear political leadership to ensure that all those responsible for war crimes are held accountable").

50. Jordan J. Paust, Book Review, 96 AM J. INT'L L. 1006 (2002) (reviewing SUBSTANTIVE AND PROCEDURAL ASPECTS OF INTERNATIONAL CRIMINAL LAW: THE EXPERIENCE OF THE INTERNATIONAL AND NATIONAL COURTS (Gabrielle Kirk McDonald & Olivia Swaak-Goldman eds., 2000)).

51. Human Rights Watch, Human Rights News, *Leading Rights Groups Urge Security Council to Ensure Management Reforms do not Undermine Rwanda Tribunal* (Aug. 7, 2003), *available at* http://hrw.org/press/2003/08/rwanda080703.htm (last visited Oct. 31, 2004). It should also be noted that many international scholars praise the progress of both the ICTY and ICTR. *See, e.g.*, Gabrielle Kirk McDonald, *The International Criminal Tribunals: Crime and Punishment in the International Arena*, 7 ILSA J. INT'L & COMP. L. 667, 673 (2001).

52. McDonald, *supra* note 51.

53. *See Optional Protocol to the CEDAW*, G.A. Res. 54/4, Annex, U.N. GAOR, 54th Sess., Supp. No. 49, at 5–6, U.N. Doc. A/54/49 (Vol. I) (2000).

54. United Nations, *Division for the Advancement of Women, CEDAW State Parties*, *available at* http://www.un.org/womenwatch/daw/cedaw/states.htm (last visited Jan. 5, 2004). Interestingly, the United States is the only signatory party that has not ratified the treaty. Nonetheless, its signature requires it act in a manner consistent with

Although a controversial matter, given its acceptance both as a matter of state practice and *opinio juris*, CEDAW likely represents customary international law.[55] Thus, stated generally, all nations, even those refusing to sign or ratify CEDAW, must refrain from violating its provisions, unless the country is a persistent objector or has articulated specific reservations to the Convention.[56]

Notwithstanding its international acceptance, CEDAW is arguably fatally flawed because, like many human rights instruments, it lacks an enforcement mechanism.[57] Interestingly, the substance of many human rights laws are effectuated through shaming offending states, rather than through formal enforcement mechanisms.[58] This shaming effect, however,

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the Convention. *See* Vienna Convention, *supra* note 1, art. 18, at 336.

55. UNITED NATIONS DEVELOPMENT FUND FOR WOMEN, BRINGING EQUALITY HOME: IMPLEMENTING THE CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN 9 (Ilana Landsberg-Lewis ed., 1998) (indicating that the non-discrimination elements advanced by CEDAW represent customary international law); Jo Lynn Southard, *Protection of Women's Human Rights Under the Convention on the Elimination of All Forms of Discrimination against Women*, 8 PACE INT'L L. REV. 1, 86 (1996); Chantalle Forgues, Note, *A Global Hurdle: The Implementation of an International Non-Discrimination Norm Protecting Women from Gender Discrimination in International Sports*, 18 B.U. INT'L. L.J. 247, 262 (2000) (asserting CEDAW's representation of customary international law is exemplified through the legal obligation certain nations have felt to not discriminate against women. This sense of legal obligation to the nondiscrimination norm, or *opinio juris*, can be identified throughout the women's movement as discussed earlier. The women's movement also demonstrates the second element of customary international law, widespread and consistent state practice involving the nondiscrimination norm); Shruti Rana, *Restricting the Rights of Poor Mothers: An International Human Rights Critique of "Workfare,"* 33 COLUM J.L. & SOC. PROBS. 393, 400 (2000); Lena Ayoub, Note, *Nike Just Does It—and why the United States shouldn't: The United States' International Obligation to Hold MNCS Accountable for their Labor Rights Violations Abroad*, 11 DEPAUL BUS. L.J. 395, 430–31 (1999) (asserting that the United States' refusal to ratify the CEDAW does not compromise its position as customary international law).

56. For state reservations to the CEDAW, *see* United Nations Division for the Advancement of Women, *Reservations to CEDAW at* http://www.un.org/womenwatch/daw/cedaw/reservations.htm (last visited Nov. 1, 2004).

57. Fara Gold, Comment, *Redefining the Slave Trade: The Current Trends in the Trafficking of Women*, 11 U. MIAMI INT'L & COMP. L. REV. 99, 123 (2003) (arguing CEDAW's lack of a viable enforcement mechanism renders the Convention "nothing more than an idealistic wish list"); *see also* Cynthia Price Cohen, *International Fora for the Vindication of Human Rights Violated by the U.S. International Population Policy*, 20 N.Y.U. J. INT'L L. & POL. 241, 242, 252, 266 (1987) (asserting human rights treaties lack adequate enforcement mechanisms).

58. Carole J. Petersen & Harriet Samuels, *The International Convention on the Elimination of All Forms of Discrimination against Women: A Comparison of its Implementation and the Role of Non-Governmental Organisations in the United Kingdom and Hong Kong*, 26 HASTINGS INT'L & COMP. L. REV. 1, 5 (2002).

is minimized and results ultimately in the inequality of women because the United States refuses to ratify CEDAW.[59] Finally, the failure to adopt appropriate policies implementing the fundamental goals of the Convention further evidences CEDAW's shortcomings.[60]

4. The International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights (ICCPR) prohibits widespread rape through its prohibition against cruel, inhumane, and degrading treatment.[61] Administered by the U.N. Human Rights Committee, the ICCPR protects individuals from rape by placing an affirmative duty upon states to implement preventative measures, compensate victims, investigate allegations, and prosecute those who violate human rights.[62] As demonstrated most notably by the atrocities in the former Yugoslavia, however, citizens of member states suffer when their governments allow grave breaches of the ICCPR over extended periods of time without efficient and adequate prosecution.[63]

5. The Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment

The Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment (Torture Convention) protects against all forms of torture.[64] The Torture Convention's prohibition of torture is

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59. Nora O'Connell & Ritu Sharma, *Treaty for the Rights of Women Deserves Full U.S. Support*, 10 HUM. RTS. BR. 22 (asserting that "the failure of the United States to ratify CEDAW allows other countries to continue their neglect of women and undermines the powerful principle that human rights of women are universal across all cultures and religions" and also analogizing CEDAW to the U.S. ratification of the U.N. Convention to Eliminate All Forms of Racial Discrimination in 1994 that resulted in a successful international drive to end racial apartheid in South Africa).

60. MARILOU MCPHEDRAN *ET AL.*, THE FIRST CEDAW IMPACT STUDY: FINAL REPORT 25–26 (2000).

61. ICCPR, *supra* note 38, art. 7, at 175; *see also* Adriana Kovalovska, Comment, *Rape of Muslim Women in Wartime Bosnia*, 3 ILSA J. & INT'L COMP. L. 931, 939 (1997) (asserting the same prohibits widespread rape); Elizabeth A. Kohn, Comment, *Rape as a Weapon of War: Women's Human Rights during the Dissolution of Yugoslavia*, 24 GOLDEN GATE U. L. REV. 199, 211 (1994); Laurel Fletcher *et al.*, *Human Rights Violations against Women*, 15 WHITTIER L. REV. 319, 356 n.95 (1994).

62. The United Nation's Human Rights Commission requires prevention, compensation, investigation, and prosecution following violations of the ICCPR. *See, e.g.*, Bleier v. Uruguay, *Hum. Rts. Comm.*, at 130 U.N. Doc. A/37/40, (1982); Mojica v. Dominican Republic, *Hum. Rts. Comm.*, U.N. Doc. CCPR/C/51/D/449/1991 (1994); Quinteros v. Uruguay, *Hum. Rts. Comm.*, at 216 U.N. Doc. A/38/40 (1983).

63. *See* discussion *infra* Part VI.B.

64. The Convention defines torture, in pertinent part, as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person. . .," Torture Convention, *supra* note 39, art. 1(1).

commonly interpreted to forbid widespread rape.[65] Further, the Torture Convention is interpreted by the United Nations Economic and Social Council to apply even to private acts coupled with government acquiescence.[66] Yet, ratification and consistent violation of the Torture Convention by several countries, such as Sierra Leone, Sri Lanka, Kenya, and the former Yugoslavia, highlight its shortcomings.[67]

6. The Relationship between State Adoption of Human Rights Instruments and Human Rights Abuses

Many political theorists argue that the codification of legal instruments attempting to prohibit offensive conduct represents the United Nations' and states' quintessential reaction to human rights abuses.[68] Yet, ratification of these legal instruments leads to a more important and central issue: compliance with the underlying norms and substantive goals advanced by the instrument.[69] Ultimately, "ratification of regional human rights treaties is not infrequently associated with worse than expected human rights practices."[70]

Although counterintuitive, solely analyzing state violations of human rights instruments in countries that adopted those instruments may provide an underdeveloped analysis. While state ratification of human rights instruments objectively evidences a state's intent to act in a manner consistent with the substance of the instrument, the opposite may be true. Notably, states gain several distinct advantages by adopting human rights treaties. For instance, states offset pressure for changes in policy through the ratification of human rights treaties.[71] These advantages produce the practical effect of leading states to either ignore the substance of the human rights instrument or, worse yet, to increase violations of the treaties.[72]

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65. *See* Zubeda v. Ashcroft, 333 F.3d 463 (3d Cir. 2003); 8 C.F.R. § 208.16(c)(3)(i) (2004).

66. Torture Convention, *supra* note 39, art. 1(1); *Report of the Special Rapporteur on Violence against Women, Its Causes and Consequences, Ms. Radhika Coomaraswamy*, U.N. Comm'n HR., 52d Sess., at 45 U.N. Doc. E/CN.4/1996/53, 45 (1996).

67. See discussion *infra* Part VI.B

68. Steven R. Ratner, *Overcoming Temptations to Violate Human Dignity in Times of Crisis: On the Possibilities for Meaningful Self-Restraint*, 5 THEORETICAL INQUIRIES IN L. 81, 100 (2004).

69. Harold Hongju Koh, *On American Exceptionalism*, 55 STAN. L. REV. 1479, 1484 (2003).

70. Hathaway, *supra* note 40, at 1995.

71. *Id.* at 1941.

72. In *Do Human Rights Make a Difference?*, Prof. Hathaway quantitatively analyzes

Perhaps the most comprehensive view of this phenomenon to date is embodied in Oona' Hathaway's article *Do Human Rights Treaties Make a Difference*? As Professor Hathaway's theories, which potentially bear upon the legitimacy of classifying widespread rape as a *jus cogens*, gain acceptance with several renowned international legal scholars,[73] mention of her position is warranted.

In her article, Prof. Hathaway quantitatively analyzes whether the human rights treaties prohibiting torture and genocide actually lead to a reduction in incidents for which the treaties are designed to protect. Initially, Prof. Hathaway analyzes ratification of human rights treaties against human rights records. Based on this analysis, Prof. Hathaway concludes that countries adopting the ICCPR, the Torture Convention, and the Genocide Convention have only marginally better human rights records than non-ratifying nations.[74] Notably, when analyzing regional

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the central question of whether human rights instruments affect state behavior. She employs a four-part analysis by, first, reconciling the prevailing theories regarding state compliance with international obligations, the rational actor model, and normative theory. Second, Prof. Hathaway examines the practices of non-ratifying and ratifying states, quantitatively analyzing the several internal and external pressures shaping government action including economic practices, development, war, and democratization. In doing so, Prof. Hathaway focuses her research on five areas: genocide, torture, civil liberty, fair and public trials, and the political representation of women. She concludes, at a minimum, that state ratification of treaties does not necessarily increase state compliance with the same. Third, Prof. Hathaway rationalizes this counterintuitive results stems from the often competing ends of human rights instruments' expressive functions and instrumental ends. Finally, notwithstanding her empirical results, Prof. Hathaway reviews the non-quantifiable benefits attendant state adoption of human rights instruments. *Do Human Rights Make a Difference?* persuasively demonstrates the counterintuitive phenomenon wherein state ratification of human rights instruments may be effectively divorced from actual implementation of protections advanced by the instruments. Hathaway, *supra* note 40, at 1941–42, 1968–76, 2001.

73. *See* Steven R. Ratner, *Overcoming Temptations to Violate Human Dignity in Times of Crisis: On the Possibilities for Meaningful Self-Restraint*, 5 THEORETICAL INQUIRIES IN L. 81, 100–01 (2004); Claire R. Kelly, *Realist Theory and Real Constraints*, 44 VA. J. INT'L L. 545, 548 (2004); David Luban, *A Theory of Crimes Against Humanity*, 29 YALE J. INT'L L. 85, 134 n.164 (2004); Daniel J. Steinbock, *The Qualities of Mercy: Maximizing the Impact of U.S. Refugee Settlement*, 36 U. MICH. J.L. REFORM 951, 965 n.61 (2003); Jonathan R. Macey, *Regulatory Globalization as a Response to Regulatory Competition*, 52 EMORY L.J. 1353, 1374 n. 62 (2003); Sanford Levinson, *"Precommitment" and Postcommitment": The Ban on Torture in the Wake of September 11*, 81 TEX. L. REV. 2013, 2018 (2003); Koh, *supra* note 69.; Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 CAL. L. REV. 1823 1832 n.30 (2002); Kathryn Abrams, *"Fighting Fire With Fire": Rethinking the Role of Disgust in Hate Crimes*, 90 CAL. L. REV. 1423, 1443 (2002).

74. Hathaway, *supra* note 40, at 1978–79. Yet, Prof. Hathaway also demonstrates that the marginal benefit between the adopting countries and their non-ratifying counterparts is unlikely due to better ratings as a result of signing the human rights treaties, but instead is attributable to the factors that lead a country to sign the human rights treaty. In other words, the marginally better human rights record of ratifying countries is not due to the adoption of the treaty, but rather is due to the country's more general feeling of obligation to human rights, the same feeling that ultimately led the

treaties, such as the American Torture Convention and the African Charter, Prof. Hathaway concludes countries adopting the human rights treaties actually have worse torture practices than their non-ratifying counterparts.[75]

Prof. Hathaway then conducts a multivariate analysis of both ratifying and non-ratifying countries, including variables associated with positive human rights records such as democracy, gross national product per capita, global economic interdependence, and dependence on foreign aid. Prof. Hathaway's analysis also includes factors commonly associated with poor human rights records such as international war, civil war, population size, population growth, and the length of the tenure of the present regime. Simply put, when combining all these factors, Prof. Hathaway concludes that adoption of human rights treaties actually correlates to worse human rights practices.[76]

Consequently, while the abovementioned examples demonstrate state non-compliance with human rights laws amidst state adoption of the same, this non-compliance may actually evidence the more generalized proposition that state ratification of human rights treaties correlates to worse human rights practices. Although Prof. Hathaway's proposition is reconciled with the author's ultimate recommendation, her position further shows the weakness of existing legal instruments.

B. Inadequate Protection under Customary International Law

Customary international law develops from principles established in legal instruments to which any state may become a party.[77] For classification as customary international law, a principle must represent the constant and uniform practice of states and *opinio juris*, the recognition of an obligation even in the absence of a treaty.[78] Over time, the repeated use and implementation of the principle may establish international customs.[79] Once established, international customs bind all

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country to adopt the instrument. *Id.* at 1989.

75. *Id.* at 1978–79.

76. *See id.* at 1992–42.

77. Vienna Convention, *supra* note 1, art. 38; North Sea Continental Shelf (W. Ger. v. Den.; W. Ger. v. Neth.), 1969 I.C.J. 3, 41–43 (Feb. 20) [hereinafter Continental Shelf]; Nottebohm (Liech. v. Guat.), 1955 I.C.J. 4 (Apr. 6) [hereinafter Nottebohm]; Anthony A. D'AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW 103–66 (1971).

78. D'AMATO, *supra* note 77, at 17; Continental Shelf, *supra* note 77, at 71.

79. BROWNLIE, *supra* note 8, at 4–5; Continental Shelf, *supra* note 77, at 41–43.

states regardless of whether the state agrees with the customs or, when codified in a international legal documents, the state is signatory to the instruments.[80]

To the extent each prohibits widespread rape, the Geneva Convention,[81] CEDAW,[82] and the Universal Declaration of Human Rights (UDHR)[83] represent customary international law.[84] Thus, even non-party states must adhere to the strict prohibitions against widespread rape. Yet, as indicated *infra*, widespread rape remains unpunished and common in many contemporary societies.

Further, consistent with Prof. Hathaway's empirical analyses, one may reasonably conclude, in the aggregate, that adoption of the Geneva Convention, CEDAW, and/or the UDHR does not statistically increase the likelihood that the adopting nation will curb continued human rights abuses.[85] Therefore, classification of these instruments as customary international law fails to adequately protect women from widespread rape.

C. Inadequate Protection under Correlation to Existing Jus Cogens

As indicated, the prohibition of widespread rape, in and of itself, is not yet specifically recognized as a *jus cogens.* International legal scholars, however, often correlate widespread rape with genocide[86] and

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80. Vienna Convention, *supra* note 1, art. 38, at 341; Continental Shelf, *supra* note 75, at 41–43; Nottebohm, *supra* note 77, at 4; *see also* D'AMATO, *supra* note 77; IAN BROWNLIE, BASIC DOCUMENTS ON HUMAN RIGHTS 21 (3d ed. 1992).

81. EYAL BENVENISTI, THE INTERNATIONAL LAW OF OCCUPATION 109–11, 118 (1993).

82. ANTHONY D'AMATO, INTERNATIONAL LAW: PROCESS AND PROSPECT 123–24 (1987); A.M. Weisburd, *State Courts, Federal Courts and International Cases*, 20 YALE J. INT'L L. 1, 10 (1995) (asserting: "[I]f one accepts Professor D'Amato's argument that generalizable provisions of multilateral treaties are *ipso facto* rules of customary international law, then the substantive provisions of the Convention on the Elimination of All Forms of Discrimination Against Women are rules of customary international law); *see also* discussion regarding CEDAW as a matter of customary international law, *supra* note 54.

83. IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 575 (5th ed.1998).

84. *See Tadic*, *supra* note 26, ¶ 94 (prohibiting rape via the Geneva Convention as a matter of customary international law); *see also* discussion *infra* note 54 regarding CEDAW as a matter of customary international law; *see also* Richard B. Lillich, *Civil Rights*, *in* HUMAN RIGHTS IN INTERNATIONAL LAW: LEGAL AND POLICY ISSUES 115, 133 (Theodor Meron ed., 1984); Laden Askari, *Girls' Rights Under International Law: An Argument for Establishing Gender Equity as a Jus Cogens*, 8 S. CAL. REV. L. & WOMEN'S STUD. 3, 8 (1998) (arguing non-discrimination against women articulated by the UDHR represents customary international law).

85. *See* discussion *supra* Part IV.A.6. and notes 68–76.

86. Akayesu, *supra* note 29, ch. 6.3.1, ¶ 496; Prosecutor v. Pauline Nyiramasuhuko & Arséne Ntahobali, Case No. ICTR-97-21-I [hereinafter *Nyiramasuhuko*]; Sherrie L. Russell-Brown, *Rape as an Act of Genocide*, 21 BERKELEY J. INT'L L. 350 (2003);

torture[87] in an effort to place the atrocity within the definition of *jus cogens*.

1. Widespread Rape as Genocide

To date, two cases, both adjudicated by the ICTR, correlate rape to genocide.[88] Essentially, through a series of legal hurdles, the ICTR conceptualized rape during armed conflict as genocide.[89] First, the Tribunal recognized that the perpetrators targeted their victims based on the victims' ethnicity and gender.[90] Next, the Tribunal characterized the practical effect of rape as an attempt to destroy a class of persons.[91] Finally, the Tribunal discounted the sexual characteristics of rape, finding the act includes the same physical components of genocide.[92]

While the ICTR correlation of rape to genocide represents a leap towards proper classification of widespread rape, and even assuming other tribunals recognize the holding as precedent, the holding fails to adequately mitigate the problem. Specifically, the Tribunal, in a laudable attempt to prosecute the accused, managed to box the correlation so tightly that application of the holding to other instances of widespread rape may fail to adequately prosecute the offender. More specifically, the correlation to genocide requires widespread rape to occur during armed conflict. Thus, in the event a sector of a population is subject to widespread rape in a non-war-time setting, the ICTR analogy fails.

Sherrie L. Russell-Brown, *Many Roads to Justice for Women: A Forward to the Symposium Issue of the Berkeley Journal of International Law*, 21 BERKELEY J. INT'L L. 191, 193 (2003). Note also that in 1946, the United Nations General Assembly adopted by unanimous vote a resolution defining genocide as the "denial of the right of existence of entire human groups such as to shock the conscience." G.A.Res. 96(I), U.N.Doc. A/64, at 188–89 (1947), *reprinted in* U.N.J., No. 58: Supp. A-A/P.V/55.

87. *See* Brenda Smiley, *Rape Tore the Fabric of Bosnian Families, Society*, WOMEN'S ENEWS, Aug. 11, 2000, *available at* http://www.womensenews.com/article.cfm/dyn/aid/231/context.archive (last visited Oct. 19, 2004) (summarizing the Karadzic case and decision, including statements by psychiatrist Mladen Loncar, who testified on the lasting effects for the individual victim and the greater community, as well as the use of rape as a devastating weapon of war).

88. Akayesu, *supra* note 29, ch. 6.3.1, ¶ 496; *Nyiramasuhuko*, *supra* note 86.

89. Sherrie L. Russell-Brown, *Rape as an Act of Genocide*, 21 BERKELEY J. INT'L L. 350, 351 (2003).

90. *Id.* at 351–52.

91. *Id.* at 352.

92. *Id.*

2. *Widespread Rape as Torture*

Similarly, the ICTY recently analogized rape to torture.[93] For instance, in *Prosecutor v. Kunarac*, the ICTY considered the treatment of Muslim women held in captivity by Kunarac, a Bosnian Serb commander.[94] While the women were in captivity, Kunrac and other ranking military officials raped them.[95] In finding the commander guilty of crimes against humanity, the Tribunal determined widespread rape represents a form of torture.[96]

In *Prosecutor v. Musema*, a subsequent case based on analogous facts, however, the ICTR Appeals Chamber quashed the Trial Chamber's conviction for a crime against humanity based on rape due to, in part, errors of law.[97] While, concededly, the quashed conviction was based on different evidence, *Musema* demonstrates a lack of uniformity among international tribunals regarding the categorization of rape as torture and, thus, a *jus cogens*.

V. FAILURE OF EXISTING PROTECTIONS

As demonstrated, numerous international legal instruments, customary international law, and correlation to *jus cogens* prohibit widespread rape. Present examples from Sierra Leone, Sri Lanka, Kenya, and Iraq, however, illustrate the catastrophic failure of international law to protect women from widespread rape.

A. Sierra Leone

Sierra Leone hosts possibly the most heinous example of widespread rape. In 2000, Amnesty International reported the abduction and rape of thousands of women by rebel militants.[98] Other reports suggest the widespread rape in Sierra Leone is the most brutal in the world as the victims, many of who were as young as eight years old, were frequently

93. Prosecutor v. Kvocka, Case No. IT-98-30/1-T, ¶¶ 546–61, (Judgment, Nov. 2, 2001); Prosecutor v. Delali, Case No. IT-96-21-T, (Judgment, Nov. 16, 1998); *see generally* Amnesty International, *Pakistan: Time to Take Human Rights Seriously*, AI Index ASA/330121997 (1997), *available at* http://www.web.amnesty.org/library/Index/ENGASA37001?open&of=ENG-LKA (last visited Apr. 12, 2004).

94. Prosecutor v. Kunarac, Case Nos. IT-96-23-T & IT-96-23/1-T, (Judgment, Feb. 22, 2001) [hereinafter *Kunarac*].

95. *Id.*

96. *Id.*

97. Prosecutor v. Musema, Case No. ICTR-96-13-A, ¶ 370 Appeals Chamber Judgment (Nov. 16, 2001) [hereinafter *Musema*].

98. Amnesty International, *Sierra Leone: Rape and Other Forms of Sexual Violence Must be Stopped*, AI Index AFR 51/048/2000 (2000), *available at* http://www.essex.ac.uk/armedcon/story_id/000057.htm (last visited Oct. 21, 2004).

mutilated and murdered.[99]

The widespread rape in Sierra Leone during the past decade was likely one of the most sophisticated networks of terror in the world. In a highly organized fashion, rebel perpetrators abducted their victims from mosques, churches, and refugee camps.[100] These victims were then ordered to rebel camps and systematically raped by rebels.[101] Those permitted to leave the rebel camps were ordered to return the following day or they would be murdered.[102] Alternatively, in an effort to shame opponents, rebel militants forced civilians to rape members of their own family under threat of being mutilated by having their hands or arms cut off.[103] In any event, most of the rape victims were raped by numerous individuals on a daily basis.[104] According to the victims, the rapes were often ordered and coordinated by rebel commanders and other known high ranking rebel officials.[105]

In Sierra Leone, the "typical" rape involves mutilation of the victim with objects.[106] Often, many of the victims were retained as the "wife" of combatants and raped on a daily basis.[107] As of 1999, hundreds of accounts of rape were filed with a Sierra Leone based human rights organization, however, the number is known to be a gross underestimation given cultural factors against reporting rape.[108]

Interestingly, all the abovementioned atrocities occurred against a backdrop of purported government commitment to human rights. For instance, Sierra Leone signed, ratified, or acceded to numerous international human rights instruments including the ICCPR,[109] the

99. Amnesty International, *Sierra Leone: Getting Away with Murder, Mutilation, Rape, New Testimony from Sierra Leone*, Vol.11 No 3(A) (July 2000), *available at* http://www.hrw.org/reports/1999/sierra/ (last visited Oct. 26, 2004).
100. *Id.*
101. *Id.*
102. *Id.*
103. *See Musema*, *supra* note 97.
104. *See* Amnesty International, *supra* note 98.
105. *Id.*
106. *Id.*
107. *See Musema*, *supra* note 97.
108. *See* Amnesty International, *supra* note 98.
109. Sierra Leone acceded to the ICCPR on August 23, 1996. *See* HUMAN RIGHTS INTERNET, FOR THE RECORD 2003: THE UN HUMAN RIGHTS SYSTEM (2003), *available at* http://www.hri.ca/fortherecord2003/vol2/sierraleonerr.htm (last visited Oct. 30, 2004).

Torture Convention,[110] the Convention on the Rights of the Child,[111] and the CEDAW.[112]

B. Sri Lanka

In 2001, hundreds of allegations surfaced regarding widespread rape by members of the Sri Lankan Army, Navy and police.[113] Despite numerous reports, however, the government took little action to prosecute and investigate the alleged widespread rape.[114] Frequently, those reports that were filed with law enforcement offices resulted in unnecessarily long investigations.[115] Further, those cases receiving judicial attention were often needlessly delayed or terminated for procedural reasons.[116] Finally, at the urging of the authorities, doctors examining rape victims regularly covered up evidence of sexual mistreatment.[117]

Following considerable pressure from organizations such as Amnesty International, the United Nations Special Rappourteur on Violence against Women articulated its concern regarding the rape victims to Sri Lankan government officials.[118] In response, these officials simply stated that all known perpetrators had been brought to justice.[119] In support of its contention that it adequately prosecuted rape perpetrators, Sri Lankan government officials cited a case involving Velu Arshadevi, a Sri Lankan woman gang raped at a security check point by three soldiers and three policemen.[120] At the completion of the trial, the Sri Lanka Supreme Court awarded Ms. Arshadevi 150,000 rupees (U.S. $1,560).[121] Following exhaustive research to date, it appears that the Sri Lankan officials have yet to bring these perpetrators to justice.

All of the crimes addressed herein occurred against a backdrop of Sri Lanka's purported commitment to human rights. For example, Sri

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110. Sierra Leone signed the Torture Convention on March 18, 1985 and ratified the same on March 1, 2001. *See id.*

111. Sierra Leone signed the Convention on the Rights of the Child Signed on February 13, 1990 and ratified the same on June 18, 1990. *See id.*

112. Sierra Leone signed CEDAW on September 21, 1988 and ratified the same on November 11, 1988. *See id.*

113. The Sri Lankan Monitor, *Rape in Custody*, *available at* http://brcslproject.gn.apc.org/slmonitor/January02/rape.html (last visited Oct. 31, 2004).

114. HUMAN RIGHTS WATCH, WORLD REPORT 2002, 254 (2002).

115. *Id.*

116. Sri Lankan Monitor, *supra* note 113.

117. HUMAN RIGHTS WATCH, *supra* note 114.

118. Sri Lankan Monitor, *supra* note 113.

119. *Id.*

120. Amnesty International, *News Flash Sri Lanka: Landmark Judgment on Rape Case*, AI Index ASA 37/003/2002 (Jan. 28, 2002), *available at* http://www.web.amnesty.org/library/Index/ENGASA370032002?open&of=ENG-LKA (last visited Oct. 28, 2004).

121. Sri Lankan Monitor, *supra* note 113.

Lanka has signed, ratified, and/or acceded to the International Covenant on Economic, Social and Cultural Rights (ICESCR),[122] the ICCPR,[123] the International Convention on the Elimination of All Forms of Racial Discrimination,[124] CEDAW,[125] the Torture Convention,[126] and the Convention on the Rights of the Child.[127]

Since public outcry in 2001, Sri Lankan authorities have allegedly renewed the country's commitment to human rights. For instance, Sri Lanka named May 22nd Human Rights Day in the interest of drawing attention to the country's human rights abuses and efforts to prevent additional catastrophes.[128] Yet, human rights organizations such as Human Rights Watch report that, although the government appeared ready to acknowledge past human rights abuses, progress towards this end is minimal with Draconian security laws continuing to perpetuate human rights abuses.[129]

C. Kenya

Kenya hosts perhaps the most frequent rate of widespread rape. Like Sierra Leone, the actual number of women raped on a daily basis is thought to be tremendously higher than actually reported given the cultural disdain placed on the rape victim.[130] In fact, Kenya's Attorney General acknowledged:

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122. Sri Lanka acceded to the International Covenant on Economic, Social and Cultural Rights on June 11, 1980. *See* HUMAN RIGHTS INTERNET, FOR THE RECORD 2003: THE UN HUMAN RIGHTS SYSTEM (2003), *available at* http://www.hri.ca/fortherecord2003/vol3/srilankarr.htm (last visited Oct. 24, 2004).

123. Sri Lanka acceded to the Covenant on Civil and Political Rights on June 11, 1980. *See id.*

124. Sri Lanka acceded to the International Convention on the Elimination of all forms of Racial Discrimination on February 18, 1982. *See id.*

125. Sri Lanka signed CEDAW on July 17, 1980 and ratified the same on October 5, 1981. *See id.*

126. Sri Lanka acceded to the Torture Convention on January 3, 1994. *See id.*

127. Sri Lanka signed the Convention on the Rights of the Child on January 26, 1990 and ratified the same on July 12, 1991. *See id.*

128. Basil Fernando, *Sri Lanka: Sri Lankan Government Declares May 22 as Human Rights Day* (May 22, 2001), *available at* http://www.ahrchk.net/statements/mainfile.php/2001statement/24/?print=yes (last visited Oct. 28, 2004).

129. HUMAN RIGHTS WATCH, *supra* note 114, at 254–55.

130. Amnesty International, *Kenya: Rape—The Invisible Crime*, AI Index AFR 32/001/2002 (2002), *available at* http://web.amnesty.org/library/Index/engAFR320072002?OpenDocument&of=THEMES%5CWOMEN (last visited Oct. 26, 2004).

> Violence against women pervades all social and ethnic groups ... [S]ome cultural practices relegate women to a second class in society thereby ... violating [their] rights as human beings[,] leading to discrimination against women. Some ... customs and cultural practices have found their way into law [and] are a justification for violence against women.[131]

Like Sierra Leone, this widespread rape occurs even in light of Kenya's purported commitment to human rights. For example, Kenya has signed, ratified, or acceded to CEDAW,[132] the African Charter on Human and Peoples' Rights,[133] the ICCPR,[134] the Torture Convention,[135] and the Convention on the Rights of the Child.[136] Yet, despite Kenya's acceptance of these instruments, the world for the most part remains idle as thousands of women continue to become the victims of widespread rape.

Notwithstanding its apparent commitment to the protection of women's rights and prohibition of acts of violence before the international community, Kenya has not adopted domestic legislation against violence directed at women.[137] In fact, most of the rapes reported by women are either dismissed or receive no attention by police and prosecutors.[138]

Further perpetuating the under-reporting of rape, Kenyan authorities require victims to obtain medical examination prior to reporting a rape.[139] The P3, the medical examination form required to file a rape charge, is available at all police stations for free. Police, however, generally require victims to purchase (satisfy a bribe) the form for one hundred shillings.[140] Given the cost and humiliation, the reporting system required by the government precludes the reporting of most rapes and nearly all rapes committed by police officers.[141]

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131. Hon. S. Amos Wako, Kenya Attorney General, Statement during the Sixteen Days of Activism Against Violence Against Women (Dec. 10, 1999).

132. Kenya acceded to the International Covenant on Economic, Social and Cultural Rights on May 1, 1984. *See* HUMAN RIGHTS INTERNET, FOR THE RECORD 2003: THE UN HUMAN RIGHTS SYSTEM (2003), *available at* http://www.hri.ca/fortherecord2003/vol2/kenyarr.htm (last visited Oct. 24, 2004).

133. African [Banjul] Charter on Human and Peoples' Rights, *adopted* June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), *entered into force* Oct. 21, 1986.

134. Kenya acceded to the International Convention on Civil and Political Rights on May 1, 1972. *See supra* note 132.

135. Kenya acceded to the Torture Convention on February 21, 1997. *See supra* note 132.

136. Kenya signed the Convention on the Rights of the Child on January 26, 1990 and ratified the same on July 30, 1990. *See supra* note 132.

137. Amnesty International, *supra* note 130, at 8.

138. *Id.* at 17.

139. *Id.*

140. *Id.* at 18.

141. *See generally id.*

D. Iraq

As international aid associations continue to sift through the ravages of the Saddam Hussein regime, perhaps the most recent reports of widespread rape are beginning to emerge. According to many refugees, widespread rape was sanctioned by the highest ranking government officials of Iraq under the Saddam Hussein regime.[142] In fact, refugees allege Saddam Hussein's sons, Uday and Qusay, frequently orchestrated rapes of unsuspecting pedestrians on city streets.[143] Although rape is illegal under Iraqi law, cultural stigma attaches shame to the victim and often places the victim in the position of the wrongdoer, causing the perpetrator to go free.[144] Reports also indicate that Saddam Hussein's militia utilized rape against his dissenters[145] and, potentially, invaders.[146] Specifically, Hussein would order the rape of a dissenter's wife or female family members in the event one criticized his actions.[147]

Further, extensive research by the United States Department of State and the Iraq Research and Documentation Project at Harvard University identify the use of widespread rape. For instance, the Department of State reports Saddam Hussein's regime silenced the voices of Iraq's women through rape.[148] In fact, the Department of State reports:

> The Iraqi Government uses rape and sexual assault of women to achieve the following goals: to extract information and forced confessions from detained family members; to intimidate Iraqi oppositionists by sending videotapes showing the rape of female family members; and to blackmail Iraqi men into future cooperation with the regime. Some Iraqi authorities even carry personnel cards identifying their official 'activity' as the 'violation of women's honor.'[149]

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142. U.S. Department of State, *Iraqi Women Speak Out about Life under Saddam's Dictatorship* (Oct. 9, 2002), *available at* http://usinfo.state.gov/regional/nea/iraq/text/1009irwom.htm (last visited Apr. 12, 2004).

143. *Id.*

144. Human Rights Watch, *Climate of Fear: Sexual Violence and Abduction of Women and Girls in Baghdad*, Volume 15, No. 7(E) (Jul. 2003), *available at* http://hrw.org/reports/2003/iraq0703/1.htm#_Toc45709960 (last visited Apr. 12, 2004).

145. Interview by Barbara Walters with Maha Hussain, Zainab al-Suwaij, Katrin Michael, and Roz Rasool, (March 21, 2003), *available at* http://abcnews.go.com/sections/2020/World/2020_iraqiwomen030321.html (last visited Apr. 12, 2004).

146. *Jessica Lynch was Raped by Captors, Book Says*, ASSOC. PRESS, Nov. 6, 2003 (asserting that United States Private Jessica Lynch was raped by her captors) *available at* http://www.chron.com/cs/CDA/ssistory.mpl/ae/books/news/2205222 (last visited Oct. 21, 2004).

147. *Id.*

148. U.S. Department of State, Office of International Women's Issues, *Iraqi Women Under Saddam's Regime: A Population Silenced, Fact Sheet*, *available at* http://www.state.gov/g/wi/rls/18877.htm (last visited Nov. 1, 2004).

149. *Id.*

In 2002, the United Nations adopted a resolution sponsored by the European Union condemning Saddam Hussein and Iraq for its "systematic, widespread and extremely grave violations of human rights and international humanitarian law."[150] The resolution demanded that Iraq immediately put an end to its "summary and arbitrary executions . . .[,] the use of rape as a political tool and all enforced and involuntary disappearances."[151]

During these atrocities, Iraq not only prohibited rape through its domestic laws, but also joined many international legal instruments condemning the same. Specifically, Iraq signed, ratified, and/or acceded to the ICESCR,[152] the ICCPR,[153] the International Convention on the Elimination of All Forms of Racial Discrimination,[154] CEDAW,[155] and the Convention on the Rights of the Child.[156]

VI. PROGRESS IN INTERNATIONAL LAW

Despite these efforts to prevent widespread rape, it has long been mischaracterized and dismissed by military and political leaders as a private crime and the ignorable act of the occasional soldier. Worse still, it has become accepted precisely because it is so commonplace. Longstanding discriminatory attitudes have viewed crimes against women as incidental or less serious violations. Yet, despite the failure of the abovementioned international legal instruments, customary international law, and correlation to *jus cogens*, one cannot escape the conclusion that the international community is progressing towards prohibition of widespread rape. Such progress is evident through the ICTR and ICTY.

A. Rwanda

During the Hutu-Tutsi conflict in Rwanda in 1994, Hutu militia groups, civilians, and soldiers of the Forces Armées Rwandaises (FAR) raped thousands of women in furtherance of its goal to eliminate

150. *Situation of Human Rights in Iraq*, G.A. Res. 56/174, U.N. GAOR, 56th Sess., at 2, U.N. Doc. A/RES/56/174 (2002).

151. *Id.*

152. Iraq signed to the ICESCR on February 18, 1969. *See* HUMAN RIGHTS INTERNET, FOR THE RECORD 2003: THE UN HUMAN RIGHTS SYSTEM (2003), *available at* http://www.hri.ca/fortherecord2003/vol3/iraqrr.htm (last visited Oct. 26, 2004).

153. Iraq signed to the ICCPR on February 18, 1969 and ratified the same on January 25, 1971. *Id.*

154. Iraq signed to CEDAW on February 18, 1969 and ratified the same on January 14, 1971. *Id.*

155. Iraq signed to CEDAW on February 18, 1969 and ratified the same on August 13, 1986. *Id.*

156. Iraq acceded to the Convention on the Rights of the Child on June 15, 1994. *Id.*

Tutsis.[157] Those not murdered immediately following the heinous acts were permitted to live so they would "die from sadness."[158] According to Human Rights Watch, rape was used as a tool to inflict humiliation and terror on the entire Tutsi population.[159]

Throughout this conflict, Rwanda remained a member of many human rights conventions. Namely, Rwanda signed, ratified, and/or acceded to the ICESCR,[160] the ICCPR,[161] the International Convention on the Elimination of All Forms of Racial Discrimination,[162] CEDAW,[163] and the Convention on the Rights of the Child.[164]

Following the Rwanda civil war, the United Nations Security Council created the ICTR.[165] Shortly after creation of the ICTR, the Office of the Prosecutor brought charges against Jean-Paul Akayesu, bourgmestre[166] of the Taba Commune, for allegations including the disregard for widespread rape committed by his subordinates.[167] The ICTR reviewed evidence from numerous witnesses regarding Akayesu's willingness to permit widespread rape.[168] The ICTR found Akayesu guilty of genocide, in part, for his crimes of sexual violence.[169]

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157. Human Rights Watch, *Rwanda: Shattered Lives—Sexual Violence During the Rwandan Genocide and its Aftermath* (1996), *available at* http://www.hrw.org/reports/1996/Rwanda.htm (last visited Oct. 20, 2004).

158. *Id.*

159. *Id.*; *see also UN in Push to End Congo Violence,* CNN, (May 23, 2003) (indicating that human rights groups detected widespread rape spreading from Rwanda to Zaire), *at* http://www.cnn.com/2003/WORLD/africa/05/23/congo.fighting/index.html (last visited Oct. 19, 2004).

160. Rwanda acceded to the International Convenant on Economic and Social Rights on April 16, 1975. *See* HUMAN RIGHTS INTERNET, FOR THE RECORD 2003: THE UN HUMAN RIGHTS SYSTEM (2003), *available at* http://www.hri.ca/fortherecord2003/vol2/rwandarr.htm (last visited Oct. 28, 2004).

161. Rwanda acceded to the ICCPR on April 16, 1975. *See id.*

162. Rwanda acceded to the International Convention on the Elimination of All Forms of Racial Discrimination on April 16, 1975. *See id.*

163. Rwanda signed CEDAW on May 1, 1980 and ratified the same on March 2, 1981. *See id.*

164. Rwanda signed the Convention on the Rights of the Child on January 26, 1990 and ratified the same on January 24, 1991. *See id.*

165. The ICTR was Established by Security Council Resolution 955, S.C. Res. 955, U.N. SCOR, 49th Sess., 3,453rd mtg., at 2, U.N. Doc. S/Res/955 (1994).

166. Rwanda is divided into eleven prefectures. Each prefecture is further divided into communes. Each commune is governed by a bourgmestre with the exclusive authority to control the police, execute laws, and administer justice. Akayesu, *supra* note 29, ch. 6.3.1, ¶ 6(2).

167. *Id.* ¶¶ 12A, 12B.

168. *Id.*

169. *Id.* chs. 7.7, ¶ 696, 7.8, ¶ 698.

The *Akayesu* holding is notable for three reasons. First, it represents the first prosecution of an individual for widespread rape before an international tribunal. Second, it demonstrates the conceptual similarity between widespread rape and genocide. Third, the Court imputed the widespread rape of subordinates to their leader.[170]

Despite the notability of the opinion in *Akayesu*, Rwanda still lacks adequate protection against widespread rape. For instance, although Amnesty International reports a decline in instances of violence since commencement of the ICTR, it also reports rape by Rwandan forces and officials continues.[171] Consequently, the use of or threat of criminal prosecution of widespread rape under the ICTR and existing international legal authority fails to ensure adequate safety.

B. Bosnia-Herzegovina

During the civil war in Yugoslavia, government officials from police officers to high ranking officials on both sides of the conflict raped thousands of women.[172] Perhaps one of the most concentrated locations of the widespread rape by government officials occurred in the rape camps of Foca.[173] As tension mounted in Foca, Serbian reconnaissance forces at the direction of Commander Dragoljub Kunarac removed the weapons of many Muslim fighters and arrested and detained Muslim women and children at collection points throughout the city.[174] The Serbian troops continually raped the detained women and young girls.[175]

In response to these and other crimes, the U.N. Security Council created the ICTY.[176] Shortly thereafter, the Office of Prosecutor brought charges against Kunurac for the atrocities at Foca.[177] Evidence submitted at his trial demonstrated that Kunarac both engaged in and condoned the

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170. *Id.* ch. 1.2, ¶¶ 6, 12B.

171. Amnesty International, *Annual Report, 2002, Rwanda*, AI Index POL10/001/2002 (2002), *available at* http://web.amnesty.org/web/ar2002.nsf/afr/ rwanda?Open (last visited Dec. 22, 2004).

172. *See* HUMAN RIGHTS WATCH, BOSNIA AND HERCEGOVINA "A CLOSED DARK PLACE": PAST AND PRESENT HUMAN RIGHTS ABUSES IN FOCA, VOL. 10, NO. 6(D) (Jul. 1998).

173. *See generally id.*

174. *See generally id.*

175. Julie Mertius, *Judgment of Trial Chamber II in the Kunarac, Kovac and Vukovic Case* (Mar. 2001), *at* http://www.asil.org/insights/insigh65.htm (last visited Oct. 30, 2004).

176. *Eighth Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991*, U.N. GAOR, 56th Sess., Provisional Agenda Item 53, P 51, U.N. Doc. A/56/352-S/2001/865 (2001).

177. *Kunarac, supra* note 94, ¶¶ 4–8.

widespread rape of the Muslim women.[178] Based on the allegations of widespread rape, the ICTY charged and convicted Kunarac for crimes against humanity, torture, and enslavement.[179] The case against Kunarac represented the inaugural case trying rape as a crime against humanity.[180]

Also of notable importance is the ICTY's posture towards those facilitating the rape of women in the case of *Prosecutor v. Anto Furundzija*.[181] In *Furundzija*, the ICTY considered the international criminal culpability of Furundzija, the local commander of the "Jokers," a Croatian Defense Council Military Police unit, for rape commissioned by an accomplice.[182] Specifically, Furundzija condoned the rape of a Muslim woman during an interrogation.[183] Furundzija divided the interrogation by questioning the woman and passing her to his accomplice who would rape and sexually assault the woman.[184] Notwithstanding the absence of his direct act against the woman, the Court held Furundzija criminally liable for aiding and abetting in torture as perpetrated, in part, through the rape committed by his accomplices and his failure to intervene.[185]

Kunurac and *Furundzija* both set groundbreaking precedent in the prevention of widespread rape. First, *Kunurac* articulated that widespread rape amounts to a crime against humanity, torture, and enslavement. Further, both *Kunurac* and *Furundzija* show that criminal tribunals may hold superiors criminally culpable for the commission of many rapes or a single rape when the superior tacitly permits or otherwise fails to prevent the rape(s). These ICTY decisions may be used for precedential authority before other international tribunals.[186]

Although the ICTY represents a milestone in the prosecution for widespread rape, the Tribunal has several flaws. For instance, many

178. *Id.* ¶ 60.
179. *Id.*
180. William W. Burke-White, *Regionalization of International Criminal Law Enforcement: A Preliminary Exploration*, 38 TEX. INT'L L.J. 729, 735 (2003).
181. Prosecutor v. Furundija, Case No. IT-95-17/1-T, Trial Chamber (Judgment, Dec. 10 1998), *available at* http://www.un.org/icty/cases/jugemindex-ehtm [hereinafter *Furundija*].
182. *Id.*
183. *Id.*
184. *Id.*
185. *Id.*
186. Kelly D. Askin, *Reflections on Some of the Most Significant Achievements of the ICTY*, 37 NEW ENG. L. REV. 903, 910 (2003).

known rapists remain free.[187] Further, many individuals responsible for the widespread rape, including Petar Cancar, Vojislav Maksimovic, and Velibor Ostojic, flaunt the ICTY's failure to effectively prosecute by holding public offices and maintaining otherwise high profile positions in the municipality of Foca.[188] Thus, notwithstanding the numerous international legal instruments, customary international law, and the Tribunal's efforts to analogize widespread rape to *jus cogens*, the existing international legal structure inadequately addresses widespread rape. Thus, protecting women's rights worldwide requires classification of the prohibition of widespread rape as a *jus cogens*.

VI. CLASSIFYING WIDESPREAD RAPE AS A *JUS COGENS*

Although rape, as a practical matter, mirrors other human rights abuses, the failure of the international community to remedy rape through efforts implemented to eradicate other human rights abuses evidences a heightened tolerance of the crime.[189] As noted above, to date, international legal instruments, customary international law, and correlating widespread rape to existing *jus cogens* fail to address the frequent occurrences of widespread rape. Prohibiting widespread rape via *jus cogens*, as suggested, does present several advantages and disadvantages.

A. Advantages to Classifying Widespread Rape as a Jus Cogens

Raising international prohibition from merely legal instruments, customary international law, and relations to existing *jus cogens* presents a number of distinct advantages, ultimately leading to a reduction in the instances of widespread rape. For example, such a classification will permit the creation of international legal tribunals to address the issue of widespread rape similar to those created in Rwanda and Yugoslavia. Likewise, it will increase disdain towards countries that permit or otherwise condone widespread rape within its borders and defeat jurisdictional hurdles that prevent states from preventing atrocities in other states. Finally, significant policy considerations favor classifying widespread rape as *jus cogens*.

1. Commencement of International Tribunals

To date, the U.N. Security Council created the ICTR and ICTY based

187. HUMAN RIGHTS WATCH, *supra* note 172.
188. *Id.*
189. Human Rights Watch, *The Human Rights Watch Global Report on Women's Rights*, (undated), *at* http://www.hrw.org/about/projects/womrep/General-24.htm (last visited Oct. 21, 2004).

principally upon addressing alleged human rights abuses prohibited as *jus cogens*.[190] Similarly, legal scholars posit that the jurisdictional complications attending the International Criminal Court limit it to adjudicating only *jus cogens* violations.[191] Thus, prohibiting widespread rape as a *jus cogens* permits the U.N. Security Council to establish independent tribunals, such as the ICTY and the ICTR, to adjudicate claims of widespread rape against even the highest government officials without relying on arguably tenuous vulnerable legal relationships to genocide, as in *Akayesu*, or torture, as in *Kunarac* and *Musema*. Although said tribunals operate quite slowly, as discussed above, they represent a leap towards accountability and mitigation of human rights abuses. Therefore, the classification of widespread rape as a *jus cogens* would provide the Security Council with the necessary legal and political authority to establish tribunals regarding the ongoing rape in Sierra Leone, Sri Lanka, and Kenya and to properly try the former Sadaam Hussein regime members as they are captured.

2. *Defeats ICJ Jurisdictional Complications*

Typically, in order to establish standing to bring a claim before the ICJ, a state actor must possess *jus standi*.[192] *Jus standi* represents "the capacity to institute the proceedings . . . a real and existing individual interest."[193]

Violations of international legal instruments or customary international law do not necessarily confer standing upon a state party that wishes to commence an action against the allegedly offending party. Only state actors may be parties before the ICJ.[194] Therefore, a victim or the victims of widespread rape may not bring actions before the ICJ to remedy said crimes when the crimes are prohibited under an international legal instrument and/or merely classified as customary international law.

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190. *See* discussion *infra* Parts VI.A and VI.B.

191. Kenneth S. Gallant, *Jurisdiction to Adjudicate and Jurisdiction to Prescribe in International Courts*, 48 VILL. L. REV. 763, 838 (2003).

192. The ICJ denied standing to aggrieved parties in many instances. *See* Nottebohm, *supra* note 77; South West Africa (Eth. v. S. Afr.; Liber. v. S. Afr.), 1966 I.C.J. 6 (July 18) [hereinafter South West Africa]; Barcelona Traction, Light & Power Co., Ltd. (Belg. v. Spain), 1970 I.C.J. 3, 51 (Feb. 5) [hereinafter Barcelona].

193. Nuclear Tests (Austl. v. Fr., N. Z. v. Fr.), 1974 I.C.J. 253, 385 (Dec. 20); South West Africa, *supra* note 192, at 32; *see* Nottebohm, *supra* note 77.

194. STATUTE OF THE ICJ, *supra* note 7, art. 34.

Further, even violations of *erga omnes*[195] do not necessarily confer standing upon an aggrieved party.[196] For a state to bring an action before the ICJ for widespread rape, it must suffer a direct harm as a result of the rape. Therefore, when the subjects of the widespread rape are the nationals of the offending state and a second state wishes to bring an action before the ICJ, the second state lacks the requisite direct harm. Consequently, the aggrieved individuals are without recourse before the ICJ and must rely on tribunals, such as the ICTR and ICTY, to adjudicate their claims. Unless the U.N. Security Counsel authorizes the creation of such a tribunal, the victims are virtually completely barred from recourse. Thus, parties victimized by widespread rape lack standing before the ICJ through two separate devices.

Classification of widespread rape as a *jus cogens*, however, defeats this jurisdictional hurdle. For instance, Universal Jurisdiction provides a mechanism whereby a state may obtain jurisdiction over matters deemed offensive to the international community.[198] Further, the act must constitute a breach of *jus cogens,* an international treaty, or international customary law.[199] Finally, Universal Jurisdiction is inapplicable when domestic prosecution is available.[200] Consequently, prohibiting widespread rape as a *jus cogens* confers jurisdiction upon nations' judicial bodies, thereby creating several forums for the adjudication and resolution of allegations of widespread rape while also balancing state sovereignty complications by permitting effective domestic tribunals to resolve these allegations.

Further, classification of widespread rape as a *jus cogens* also confers standing upon domestic tribunals to adjudicate said offense occurring in

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195. The ICJ concludes *erga omnes* are obligations each state owes to all states that are of concern to all states. Barcelona, *supra* note 192, at 33.

196. Sompong Sucharitkul, *State Responsibility and International Liability Under International Law*, 18 LOY. L.A. INT'L & COMP. L.J. 821, 837 (1996).

198. BROWNLIE, *supra* note 8, at 307; Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. U. S.), 1992 ICJ Rep. 114, 178, 179 (Apr. 14) (dissenting opinion if Judge Weeramantry); RESTATEMENT, *supra* note 16, § 402(3).

199. ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 57 (1994); STEVEN R. RATNER & JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY 141 (1997); Roman Boed, *The Effect of a Domestic Amnesty on the Ability of Foreign States to Prosecute Alleged Perpetrators of Serious Human Rights Violations*, 33 CORNELL INT'L L.J. 297, 299 (2000).

200. *Report of the International Law Commission on the Work of Its Forty-eighth Session, Draft Code of Crimes against the Peace and Security of Mankind*, U.N. GAOR, 51st Sess., Supp. No. 10, cmt. to art. 9, para. 2, U.N. Doc. A/51/10 (1996).

another country.[201] Thus, during or following instances of widespread rape, foreign governments may adjudicate allegations of widespread rape within their domestic judicial systems despite the occurrence of the offense within the borders of another sovereign nation.[202] While, concededly, the threat of prosecution in a separate national jurisdiction is unlikely in and of itself to prevent widespread rape, it provides governments an additional vital mechanism to pressure the offending state and/or the United Nations to initiate efforts to suppress the instances of rape.

While opponents may argue that the U.N. Security Counsel retains adequate jurisdiction to create independent tribunals such as the ICTR and ICTY, these tribunals, as evidenced by their brief and spotted existence in international law, are inefficient. For example, as discussed above, several known human rights offenders in the former Yugoslavia remain free, and all indications suggest they will never be brought to justice.

3. Disdain of Offenders in the International Community

Human rights offending states receive tremendous negative media coverage throughout developed countries. Organizations such as the International Committee of the Red Cross,[203] Amnesty International,[204] and Human Rights Watch[205] publish frequent reports and conduct independent investigations regarding allegations of human rights abuses. These reports and investigations may be accessed via the Internet. Despite the publicity, the rise of the global marketplace has prompted large-scale multinational corporations to increasingly base operations in countries hosting widespread rape. By prohibiting widespread rape as a

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201. RESTATEMENT, *supra* note 16, § 404 (providing, in pertinent part:
A state has jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism, even where [the harm occurs outside the state's jurisdictional borders, does not involve one of its nationals or does not pose a substantial effect within its territory]).
See also id. § 402(3).

202. *Id.*

203. The International Committee of the Red Cross is available at http://www.icrc.org (last visited Oct. 24, 2004).

204. Amnesty International is available at http://www.amnesty.org (last visited Oct. 21, 2004).

205. Human Rights Watch is available at http://www.hrw.org (last visited Oct. 23, 2004).

jus cogens, the crime receives the highest level of scrutiny, increasing reporting and investigations to the public, in turn resulting in pressure upon interested actors, such as multinational corporations, to suppress the crime and punish the perpetrators. These actors, in turn, will pressure either the host government or the international community to resolve the human rights abuses. Ultimately, this pressure will result in the suppression of widespread rape.

4. Policy Considerations Favor Prohibiting Widespread Rape as a Jus Cogens

Many policy considerations favor designating widespread rape as a *jus cogens*. Among these considerations is the apparent need for increased protection (based on the failure of existing protections) and the unique nature and effects of the crime.

i. Failure of Existing Protections

As discussed above, numerous international legal instruments, including the Geneva Convention, the U.N. Charter, CEDAW, the ICCPR, the Torture Convention, and the UDHR, prohibit widespread rape against women. In fact, many countries such as Sierra Leone, Sri Lanka, Kenya, Iraq, and Rwanda objectively evidence their intent to remain committed to the fundamental principles advanced by these international legal instruments; yet, they blatantly violate the same. Further, the Geneva Convention, CEDAW, and the UDHR represent customary international law, thereby binding non-signatory states. Notwithstanding a countries' intent to be bound and binding authority in the absence of said intent to be bound, widespread rape still remains prevalent.

Alternatively, as posited by Prof. Hathaway, the adoption of legal instruments may inevitably lead to the increased violation of human rights.[206] Thus, consistent with her emerging theory, these instruments fail to protect against the human rights abuses which they intend to address.

In any event, one cannot avoid the conclusion that protections at international law inadequately defend women from widespread rape. Thus, classifying widespread rape as a *jus cogens* represents the most logical and prudent step towards affording women adequate protection under international law.

206. Hathaway, *supra* note 40.

ii. Rape as a Unique Crime Requiring Unique Attention

Rape is a unique crime targeting women almost exclusively. In addition to its devastating physical effect, rape victims often suffer equally destructive psychological effects. In fact, rape victims typically suffer severe negative mental health effects over prolonged periods including, but not limited to, post-traumatic stress disorders, guilt, self-blame, fear, and anxiety.[207]

The ICTR acknowledged the unique nature of the crime and its physical and psychological impacts, stating:

> The physical and psychological health of many female detainees seriously deteriorated as a result of these sexual assaults. Some of the women endured complete exhaustion . . . The detainees lived in constant fear. Some of the sexually abused women became suicidal. Others became indifferent as to what would happen to them and suffered from depression.[208]

The ICTR continued: "Many women suffered permanent gynecological harm due to the sexual assaults. At least one woman can no longer have children. All the women who were sexually assaulted suffered psychological and emotional harm; some remain traumatized."[209]

The devastating nature of this crime, coupled with the subservient role of women in societies, warrants providing the maximum protections available at international law. To this end, although certainly not guaranteed to abolish the crime, *jus cogens* represents the appropriate level of prohibition.

5. Binds States without Consent

Arguably the paramount enabling mechanism of *jus cogens* is its ability to bind states regardless of whether the state is a party to any international legal instrument.[210] Unlike customary international law, a country may not take reservation to a *jus cogens* or designate itself as a persistent objector.[211] In addition, the preemptory nature of *jus cogens* effectively acts to control state conduct in so far as the conduct may be

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207. Dr. Rebecca Campbell, *Mental Health Services for Rape Survivors: Current Issues in Therapeutic Practice* (Oct. 2001), *available at* http://www.vaw.umn.edu/documents/commissioned/campbell/campbell.html (last visited Nov. 1, 2004).

208. *Kunarac*, *supra* note 94, ¶ 6.5.

209. *Id.* ¶ 7.7

210. Vienna Convention, *supra* note 1.

211. Richard J. Wilson, *International Law Issues in the Death Penalty Defense*, 31 HOFSTRA L. REV. 1195, 1206 (2003).

offensive to *jus cogens*. Therefore, the designation of widespread rape as *jus cogens* absolutely binds all states. Accordingly, states may not maintain immunity from widespread rape as they may presently, even when the conduct represents a violation of conventions to which a state may be a party and customary international law, as in Sierra Leone, Sri Lanka, Kenya, and Iraq.

6. Obligates States to Implement Efforts to Mitigate Widespread Rape

As indicated above, states maintain an affirmative duty to mitigate *jus cogens* violations.[212] The failure to mitigate *jus cogens* violations, in and of itself, amounts to a breach of a *jus cogens*.[213] Hence, designating widespread rape as a *jus cogens* doubly protects against the crime in that it not only designates the conduct as offensive to the international community, but it also places an affirmative duty on the host state to mitigate the crimes. This affirmative duty, a duty arguably absent in customary international law, will cause states to mitigate instances of widespread rape.

7. Advances the Principle of State Responsibility

Over the past fifty years, the international community has progressed from relative isolationism to a marked increase in the responsibility of states for wrongful acts. For instance, in 1969, the U.N. International Law Commission commenced to take action creating state responsibility through the Draft Articles on State Responsibility. The goal of the Commission was to determine when a state breaches an international obligation and what the legal consequences are for such a breach.[214] Ultimately, in 2001, the U.N. General Assembly accepted the Commission's Draft Articles, codifying the principles of state responsibility in its Resolution 56/83.[215] Through its adoption, the General Assembly, and conceptually the world as a whole, objectively evidenced its intention to hold states responsible for internationally wrongful acts. Therefore, elevating widespread rape to a *jus cogens* ultimately advances this fundamental intention in a manner consistent with the General Assembly's view toward state responsibility.

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212. RESTATEMENT, *supra* note 16, § 702.
213. *Id.*
214. Daniel Bodansky & John R. Crook, *Symposium: The ILC's State Responsibility Articles*, 96 AM. J. INT'L. L. 773, 773–74 (2002).
215. G.A. Res. 56/83, U.N. GAOR, 56th Sess., U.N. Doc. A/RES/56/83 (2002).

8. Eliminates the Relationship between Human Rights Treaties and Increasing Human Rights Violations through Widespread Rape

As discussed above in Part IV.A.6, state acceptance of human rights treaties arguably correlates to increased human rights abuses. While some may argue against classifying widespread rape as a *jus cogens* based on the rationale utilized by Prof. Hathaway and other international legal scholars adopting her view (correlating increased human rights abuses within countries to adopting enumerated human rights protections), this argument fails in this context because, as she indicates, a pure quantitative analysis neglects the qualitative aspects of human rights instruments.[216] Perhaps the most profound qualitative benefits demonstrating a positive qualitative result of said classification are increased global attention and sensitivity towards prohibitions of the egregious crime against women and the shame attendant those countries hosting incidents of widespread rape.

Classifying the prohibition of widespread rape as a *jus cogens* arguably escapes Prof. Hathaway's analysis because that classification externalizes the prohibition, removing it as a multivariate factor, whereas the adoption of human rights treaties internalizes human rights enforcement. In other words, as demonstrated *supra* Part VI.A.3, violations of *jus cogens* invite intervention by the international community. Thus, rather than maintaining an internal duty based on the absence of an international enforcement mechanism within the human rights treaty, the state owes an affirmative obligation to the entire international community to refrain from permitting widespread rape within its borders. This external duty, beyond that enveloped by human rights instruments and/or customary international law, will suppress the occurrence of widespread rape.

Additionally, the rationale utilized by Prof. Hathaway actually favors classifying widespread rape as a *jus cogens*.[217] While such classification,

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216. Hathaway, *supra* note 40, at 1939.

217. Although facially, it would appear that Prof. Hathaway's position is defeated because states do not adopt *jus cogens*; rather, the principles are imposed on states. Thus, it would seem that the author's position avoids Ms. Hathaway's argument. However, it is important to note that Ms. Hathaway also analyzes human rights abuses involving torture and genocide, both of which are prohibited as a matter of *jus cogens*. *See* Hathaway, *supra* note 40, at 1968–72. Therefore, merely asserting Ms. Hathaway's argument is inapplicable based on the fact that the author's suggestion does not require

consistent with Prof. Hathaway's empirical data, may result in increased reports of widespread rape, these increased reports may be a positive effect of the classification. Particularly, as discussed above, rape allegations often result in the castigation of victims which, in turn, results in massive under reporting. Thus, increased reports may demonstrate increased awareness with respect to a woman's fundamental right to remain free from rape. Ultimately, these reports should abate as instances of widespread rape subside through the prohibition of the same as a matter of *jus cogens*.

9. Permits Victims' Actions under the Alien Tort Claims Act

Established in 1789, the Alien Tort Claims Act (ATCA) was designed as a mechanism to confer United States court jurisdiction over international wrongful acts in foreign countries.[218] The courts narrowly apply the ACTA to only those torts considered *jus cogens*.[219] Classifying widespread rape as a *jus cogens* will provide victims (albeit only those with access to the United State court system) a compensatory mechanism whereby each may maintain an action in tort against their aggressor—a mechanism not otherwise available to them under the present classification.

B. Disadvantages to Classifying Widespread Rape as a Jus Cogens

Virtually any activity prohibited by *jus cogens* will cause controversy. Given the unique nature of the instant crime, one may reasonably assume that prohibiting widespread rape as a *jus cogens* will cause complications. Such prohibition may infringe upon state sovereignty and might be used as a political tool. The classification may also inappropriately provide a legal remedy to a cultural problem, and states may choose to ignore the *jus cogens* prohibition altogether.

1. Infringes upon State Sovereignty

The principle of state sovereignty likely represents the most fundamental objection to *jus cogens* or, for that matter, any international legal obligation.

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affirmative state action; instead, imposing an obligation on the state would inadequately address the phenomenon cited by Ms. Hathaway.

218. 28 U.S.C. § 1350 (1994) (providing: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States").

219. Mary Elliot Rolle, *Unraveling Accountability: Contesting Legal and Procedural Barriers in International Toxic Tort Cases*, 15 GEO. INT'L ENVTL. L. REV. 135, 155 (2003).

As indicated above, self-determination is, in and of itself, a *jus cogens*. One may reasonably argue that additional preemptory norms unnecessarily infringe upon state sovereignty by binding states without consent.[220] Although discussed above as an advantage to classifying widespread rape as a *jus cogens*, the same also represents a disadvantage. Classifying widespread rape as a *jus cogens* invites the international community to adjudicate such matters in accordance with the standards established by the appropriate tribunal.[221] Consequently, a state may lose its ability to adjudicate allegations of widespread rape in a manner it deems appropriate. To that extent, its right to self-determination is infringed.

2. *Potential Misuse as a Political Tool*

Jus cogens is an incredibly powerful tool.[222] In fact, many states create significant changes to international law through *jus cogens*.[223] Therefore, given the preemptory nature of *jus cogens* and the lack of a clear system creating the same, states may attempt to effectuate political change over domestic or foreign governments utilizing instances of widespread rape as a *jus cogens* to meet political ends unrelated to the crime.

For example, one state mindful of widespread rape in a neighboring state may seek to change the political structure of the neighboring state by enforcing the recommended *jus cogens* prohibition of widespread rape. The state seeking change may have no interest in protecting women's rights; rather, the state may be interested solely in changing the political structure of the offending state. Then, following replacement of the government, the offending state may revert back to mistreating women with no objection from the state seeking the change in the first instance.

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220. Vienna Convention, *supra* note 1; *Siderman*, 965 F.2d 699, 714–15; *see generally* BROWNLIE, *supra* note 8.

221. The author assumes the host country would adjudicate the matter. In the event the country would not pursue offenders, such as was the occurrence in Rwanda and the Bosnia-Herzegovina, the author views the binding nature of *jus cogens* absent state consent as a benefit, not a disadvantage.

222. Gennady M. Danilenko, *International Jus Cogens: Issues of Law Making, Human Rights Watch* (undated), *available at* http://www.ejil.org/journal/Vol2/No1/art3.html#TopOfPage (last visited Jan. 12, 2003).

223. *Id.*

3. *Presents a Legal Solution to a Cultural Problem*

As discussed above, on a continuum of human rights abuses, widespread rape may be more culturally accepted given the subservient view of women in many societies. Additionally, many governments, such as Iraq, consider women inferior and subservient to men.[224] These cultural norms arguably contribute to the mistreatment of women. Therefore, opponents to classifying widespread rape as a *jus cogens* may forcefully argue that rape is a cultural, rather than a political, problem and that sufficient legal authority presently exists to criminalize widespread rape in the international forum, with additional legal authority doing little to alleviate the problem.

4. *Some States will not Comply*

Practically speaking, some states will violate international law regardless of its classification. Further, as illustrated in Sierra Leone, Sri Lanka, Kenya, and Iraq, states will hold themselves out as proponents of human rights while simultaneously violating international legal obligations. Similarly, as shown by the independent tribunals in Rwanda and the former-Yugoslavia, offenders will go unpunished for crimes. Finally, as demonstrated by those that openly avoid ICTY prosecution, unpunished offenders will flaunt their avoidance of international criminal procedures. The classification of widespread rape as a *jus cogens* may similarly result in instances of widespread rape that do not result in justice for the victims and offenders. This lack of recognition of *jus cogens* ultimately leads to the diminution of international law as a whole. Consequently, opponents will argue that classification of widespread rape as *jus cogens* will actually worsen the position of its victims because an open unpunished breach constitutes the erosion of international law as a whole.

Additionally, as discussed *supra*, human rights instruments often do not lead to the anticipated reduction in human rights abuses.[225] Thus, classifying the prohibition of widespread rape as a *jus cogens*, while a laudable attempt to reduce or eliminate widespread rape, may have no practical effect on reducing the atrocity. Instead, classifying widespread rape as a *jus cogens* will result in mere government lip service to the international community, thereby creating an environment more conducive to human rights abuses. Notably, dissenters adopting this position

224. Until recently, Iraqi law required women to be subservient to men. Although many discriminatory laws were recently repealed by Iraq's present Governing Council, women are still viewed as second class citizens. *See* Amir Taheri, *Why Iraq Polls Should Come as Early as Possible*, Arab View (2003), *at* http://www.arabview.com/articles.asp?article=404 (last visited Oct. 19, 2004).

225. *See* discussion *supra* Part IV.A.6 and notes 68–76.

would likely reference Prof. Hathaway's empirical results regarding genocide and torture, two crimes prohibited as a matter of *jus cogens*, and her empirical date showing a correlation between a state's adoption of regional mechanisms protecting against these atrocities and increased human rights abuses. To this end, opponents will argue that recognition of the prohibition of widespread rape as a *jus cogens* will, at a minimum, cause no appreciable reduction in the instances of widespread rape, while, at a maximum, lead to increased instances of widespread rape.

Similarly, although the prohibition of widespread rape as a *jus cogens* invokes additional procedural safeguards, opponents will argue that countries willing to accept the expressive function of the human rights protection will summarily reject super-national legal judgments.[226] Thus, invoking independent tribunals such as the ICTR or the ICTY to prosecute the perpetrators of widespread rape, or invoking the ICJ in addressing government acquiescence to the same, will simply result in an order that a country will accept in rhetoric but reject in substance.

C. Prohibiting Widespread Rape as Jus Cogens *Yields a Net Benefit*

Classifying widespread rape as a *jus cogens* will not adequately protect every woman worldwide. As demonstrated herein, however, existing legal mechanisms fail to provide adequate protection. Given the unique characteristics of *jus cogens* and all of its attendant preemptory protections, classifying widespread rape as such focuses international attention on the crime in a manner that will reduce its frequency. Specifically, such classification will create a legally sufficient anchor for authorization of independent tribunals. Alternatively, it defeats jurisdictional complications that prevent states from bringing claims before the ICJ, thereby permitting an existing adjudicatory body to address the matter. It likewise creates alternative pressures, such as public disdain, to encourage compliance by the offending state. Additionally, given the failure of existing protections and the unique nature of the crime, policy reasons further warrant classification as a *jus cogens*. Further, it binds states, irrespective of consent, and creates an affirmative duty to prevent widespread rape. Finally, classifying widespread rape as a *jus cogens* advances the fundamental principle of state responsibility while providing

226. Claire R. Kelly, *Realists Theory and Real Constraints*, 44 VA. J. INT'L L. 545, 559 (2004).

victims a forum, absent others, to potentially recover damages under the ATCA.

Despite its disadvantages, prohibiting widespread rape as a *jus cogens* remains the best alternative. In fact, the opponents' most forceful arguments against prohibiting widespread rape as *jus cogens* are overcome by said prohibition. For instance, although said classification infringes upon state sovereignty, it does so in a manner simply to address a heinous atrocity that existing protections clearly fail to address. While the classification may be used as a political tool to effectuate change in one country, use of *jus cogens* to effectuate the change will only operate should the host state fail to mitigate the rape. Thus, the threat of use as a political tool actually favors such prohibition because the offending nation may avoid political upheaval by eliminating widespread rape.

Similarly, the binding nature of *jus cogens* represents both an advantage and disadvantage to such classification of widespread rape. The disadvantages, however, when taken in totality, lack merit. Specifically, the core of the argument in opposition to the binding nature of the *jus cogens* is a state's fundamental right to self-determination. As discussed above, though, several other offenses retain the character of *jus cogens*. Thus, these offenses represent acceptable intrusions to the state's right to self-determination. Like these existing intrusions, a woman's right to remain free from widespread rape does not unreasonably intrude on a state absent its consent.

Further, this comment attempts to address solely the legal implications of classifying widespread rape as a *jus cogens*. It also recognizes, though, that rape, in some instances, may be more culturally accepted than other human rights abuses. Thus, any attempt to eradicate widespread rape must be accompanied by efforts to acculturate all societies to recognition of women's rights. Further, prohibiting widespread rape as a *jus cogens* will not reach its full mitigating potential until all cultures recognize women as equal to men. While the *jus cogens* designation will not eliminate cultural factors, it will influence those factors to a certain degree in opposition to the rape of women. Further, it essentially takes the prohibition of widespread rape to the greatest degree possible, an extent necessary given the unique nature of the crime and its unique class of victims.

Additionally, as demonstrated through the examples in Rwanda and Yugoslavia, international tribunals, while not perfect mechanisms, do have the practical effect of moving towards eradication of human rights abuses. Presumably, classifying widespread rape as a *jus cogens* will have a similar practical effect, resulting in the creation of independent international tribunals to adjudicate allegations of widespread rape, ultimately leading to suppression of the atrocity.

Finally, widespread rape occurs with sufficient frequency in the modern international community so as to justify additional protections. Existing protections, as evidenced by contemporary instances, clearly fail to appropriately address this important problem. Classifying widespread rape as a *jus cogens* will not eliminate all future instances of the crime, however, it will significantly move the world towards the fundamental right of a woman to remain free from rape.

VIII. CONCLUSION

Widespread rape, a unique crime targeting a unique class, offends international law at several levels. Namely, the crime violates several existing international legal instruments, customary international law, and, through correlation to torture and genocide, existing *jus cogens*. Yet, despite attempts to prevent this crime, as evidenced by Sierra Leone, Sri Lanka, Kenya, Iraq, Rwanda, and Bosnia-Herzegovina, widespread rape remains common in contemporary society. In fact, as demonstrated by these countries, the crime occurs even amidst the acceptance of several treaties affirmatively prohibiting the widespread rape.

Given the failure of these attempts to prevent widespread rape, the crime must be prohibited as a matter of *jus cogens*. Prohibiting widespread rape as a matter of *jus cogens* offers several benefits unavailable via the existing prohibitions. Specifically, the prohibition would result in the creation of international legal tribunals to adjudicate allegations of widespread rape, defeat existing jurisdictional complications preventing the ICJ from adjudicating claims against host countries, and shame host countries before the international community, ultimately leading to the isolation of the host country from the global economy. Prohibiting widespread rape as a *jus cogens* also satisfies significant policy considerations by applying a unique level of protection to a unique crime targeting a unique class. Additionally, the prohibition binds states, with or without consent, and obligates states to initiate efforts to suppress widespread rape, while also advancing the fundamental notion of state responsibility. Finally, for those with access to the United States judicial system, victims may bring actions under the Alien Tort Claims Act and potentially receive appropriate compensation from aggressors.

Despite the compelling reasons for prohibiting widespread rape as a *jus cogens*, the change would be met with resistance. As a competing matter of *jus cogens*, opponents would argue that prohibiting widespread rape as *jus cogens* offends the state's fundamental right to self-determination.

Further, opponents would assert the potential political use of the prohibition and the legal repair to a cultural problem fail to properly address widespread rape. Finally, opponents would contend that several states would not recognize the *jus cogens* prohibition of widespread rape, thereby compromising the foundation of international law.

These arguments, however, lack merit. Specifically, international law balances a state's right to self-determination with its responsibilities. Ensuring women freedom from rape appropriately implicates the state's responsibility and only minimally invades its right to self-determination. While widespread rape may represent a larger cultural issue, implementing a strong legal standard, while appropriately addressing the crime, also offers a unique catalyst to achieve gender equality. Finally, although initially states might not recognize the prohibition of widespread rape, offending states would be quickly brought into line through international legal tribunals and/or actions before the ICJ correcting the actions of the host country.

Given the prevalence of widespread rape in contemporary society, coupled with the failure of existing protections in guarding a woman's fundamental right to remain free from rape, the international community must adopt a firm position in opposition of widespread rape while also acquiring the ability to enforce this position. Prohibiting widespread rape as a *jus cogens*, with its attendant benefits, represents the most appropriate alternative in reducing—and ultimately eradicating—widespread rape.

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