Obligatio Erga Omnes of Rape as a *Ius Cogens* Norm: Examining the Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia, International Criminal Tribunal for Rwanda and the International Criminal Court

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A. Introduction and Statement of the Problem

This article argues that the crime of rape has risen to the level of *ius cogens*;[1] that constitutes *obligatio erga omnes*,[2] which are inderogable. A norm is considered *ius cogens* when it first becomes general international law – customary law or general principles of law pursuant to Article 38, paragraph 1 of the Statute of the International Court of Justice[3] and then may be elevated to *ius cogens* by the international community. The higher hierarchical status of *ius cogens* norms does not require a higher threshold for achieving that rank as opposed to the creation of 'ordinary' international rules. It would be enough if a very large majority did accept and recognize a rule as peremptory; that would mean that, if one State in isolation refused to accept the peremptory character of a rule, or if that State was

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1 *Ius cogens* means compelling or higher law. *See* Art. 53 of the Vienna Convention on the Law of Treaties. The *ius cogens* nature of rape will be thoroughly discussed under section D of this article.

2 A Latin expression, *erga omnes* means, "flowing to all or towards all". The term *omnes* can have either collective or a distributive connotation (*see* '*Omnis*', P. G. W. Glare (Ed), Oxford Latin Dictionary 1248-9 (1982)). As applied to the concept of obligations *erga omnes*, this double connotation raises the issue whether the international community as such can be bound by obligation *erga omnes* and be the bearer of the corresponding rights of protection. This issue however does not belong to this study, but one on international legal personality or on the enforcement of corresponding rights of protection of obligations *erga omnes*. Further discussion is dealt with in section D.I of this article.

3 *See* Art. 38 (1) of the statute of the International Court of Justice law at http://www.icj-cij.org/icjwww/ibasicdocuments/ibasictext/ibasicstatute.htm (last visited 8 January 2007).

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supported by a very small number of States, the acceptance and recognition of the peremptory character of the rule by the international community as a whole would not be affected.[4]

On this premise, it is the academic aim of this article to show that sufficient legal basis exists to reach the conclusion that a very large number of States accept and recognize rape as a rule peremptory in nature. This legal conclusion is based on the following *raison d'être* (1) international pronouncements, or what is called international *opinio juris*, reflecting the recognition that rape is deemed part of general customary law,[5] (2) language in preambles or other provisions of treaties applicable to rape which indicates that it is a crime of higher status in International law;[6] (3) the large number of States which have ratified treaties related to this crime;[7] (4) the *ad hoc* international investigations and prosecutions of perpetrators of the crime of rape;[8] and (5) Rape is also included as a constituent element of every accepted peremptory norm.[9] Taken together, these sources confirm that rape is now the most serious international crime, satisfying the custom prong of source of international law. Significantly, the universality of this general norm regarding the prohibition of rape elucidates the existence of a widespread rule and practice ingrained in the legal conscience of the international community.[10]

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4 Comments by Yasseen the Iraqi Chairman of the Drafting Committee at the United Nations Conference on the Law of Treaties, Official Records, First session, 26 March – 22 May 1968, Summary Records (A/CONF.39/11), p. 472, para. 12.

5 *See* M. Ackehurst, *Custom as a Source of International law*, 1974 Brit. Y.B. Int'l. L. 1.

6 *See for example*, Art. 27 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, adopted 12 August 1949, which applies to international armed conflicts. *See also* Art. 3 (common to the Geneva Convention) Article 76(1) of Protocol I. *See also* K. D. Askin, *Prosecuting Wartime Rape and other Gender-Related Crimes under International Law: Extraordinary Advances, Enduring Obstacles*, 21 Berkeley Journal of International Law 288, at 349 (2003) (observing that this evidence "supports the assertion that sexual violence, at the very least rape and sexual slavery, has risen to the level of a *ius cogens* norm").

Noting that many forms of sexual violence constitute forms or instruments of genocide, slavery, torture, war crimes, and crimes against humanity, making them subject to universal jurisdiction when they meet the constituent elements of these crimes.

7 *See* M. Ch. Bassiouni, International Criminal Law Conventions (1997). *Also see* the number of States party members to the Rome Statute at http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty11.asp (last visited 6 July 2006).

8 The landmark jurisprudence of the Yugoslav and Rwanda Tribunals recognizing [and prosecuting] sexual violence as war crimes, crimes against humanity, and instruments of genocide [and torture], the inclusion of various forms of sexual violence in the ICC Statute (including crimes that had never before been formally articulated in an international instrument) that will be discussed in section D of this study. *Also see* M. Ch. Bassiouni, *From Versailles to Rwanda: The Need to Establish a Permanent International Criminal Court*, 10 Harv. Hum. Rts. J. 11 (1997).

9 Noting that many forms of sexual violence constitute forms or instruments of genocide, slavery, torture, war crimes, and crimes against humanity, making them subject to universal jurisdiction when they meet the constituent elements of these crimes.

10 Every State outlaws rape, *see e.g.,* Section 130 Tanzania Penal Code (as amended by the Sexual Offences Special Provisions Act, 1998); Model Penal Code (US) §213.1 (1980); Section 361(2) of the Chilean Code, Código Penal del Chile, Biblioteca del Congreso Nacional, COD-18742 (2001); Art. 236 of the Chinese Penal Code (1997); Art. 177 of the German Penal Code (StGB); Art. 177 of the Japanese Penal Code, *translated in* Th. L. Blakemore (trans.), The Criminal Code of Japan

Therefore, this article concludes that rape is a norm of *ius cogens* and has created an obligation upon States to define and prosecute rape under international criminal law standards set by the *ad hoc* Tribunals of Yugoslavia and Rwanda and the according to the International Criminal Court jurisprudence. Such an understanding will necessitate universal jurisdiction which, permits a court in any state to try someone for rape committed in another state not linked to the forum state by the nationality of the suspect or victim or by harm to its own national interest.

I. Objectives and Aims

The objective is to examine rape as a source of law and evaluate whether the rape is *ius cogens* norm that has created *obligatio erga omnes* and hence binding upon domestic jurisdictions. The second objective is to examine the jurisprudence of the ICTY, ICTR and ICC on rape to evaluate how the crime has been legally treated. This will be done by analyzing and evaluating their decisions relevant to this article and the future role these precedents and the provisions of the statute of the ICC is playing in harmonizing criminal law as far as the crime of rape is concerned.

At the end we intend:

i) To affirm that rape is a *ius cogens* norm and hence *obligatio erga omnes* to all domestic jurisdictions.

ii) To evaluate the case law and rules of procedure and evidence promulgated by international courts and conclude that the rules are not contrary to the general principles of Criminal Law as evidence of a source of international criminal law.

iii) To conclude that rape as a *ius cogens* norm that has created *obligatio erga omnes* and should be prosecuted under the universal jurisdiction principle of International Law.

II. Scope

The article explores the jurisprudence of rape of the International Criminal Tribunals of Yugoslavia and Rwanda and the International Criminal Court statutes. It analyzes the jurisprudence of these international courts on rape to conclude that the treatment of rape by these courts is clear evidence that rape is *ius cogens*.

(1954); Art. 179 of the Socialist Federal Republic of Yugoslavia Penal Code; §132 of the Zambian Penal Code, *reprinted in* Laws of the Republic of Zambia (Revised) 7 1995; Art. 201 of the Austrian Penal Code (StGB); French Code Pénal Arts. 222-22; Art. 519 of the Italian Penal Code *reprinted in* Italian Penal Code (1978); Cód. Pen. Art. 119 (Arg.). Pen. Code §375 (Pak.). Pen. Code Art. 375 (India). Pen. Code §117 (Uganda). Pen. Code Art. 242 (Neth.). Crim. Code Ch. XXXII, Art. 297 (S. Korea); Crim. Code Ch. 24, Art 216(1) (Den.); Crim. Code §271-73 (Can.); Crimes Act of 1961 §128 (N.Z); Cód. Pen. Art. 195 (Nicaragua).

III. Roadmap of Article

This article comprises of six sections. The first section gives an introduction and general statement of the problem. The second section explains the harm of rape and the experiences of victims in the Yugoslavia, Rwanda and Darfur (Sudan). The third section examines the historical treatment of rape. The fourth section examines the concept of *ius cogens* and *obligatio erga omnes* of rape and the examination of the jurisprudence of the ICTY, ICTR and ICC. The fifth section discusses the principle of Universal jurisdiction and how rape should be prosecuted under the doctrine. The sixth section is the conclusions and recommendations.

B. The Harm of Rape

Rape is a crime where the victim is forced into sexual activity, in particular sexual penetration, against his or her will. The word originates from the Latin *rapere*: to seize or take by force. The Latin term for the act of rape itself is *raptus*.[11]

The concept of rape, both as an abduction and in the sexual sense, makes its first appearance in early religious texts. In Greek mythology, rape of women, as exemplified by the rape of Europa, and male rape, found in the myth of Laius and Chrysippus, were mentioned. Different values were ascribed to the two actions. The rape of Europa by Zeus is represented as an abduction followed by consensual lovemaking, similar perhaps to the rape of Ganymede by Zeus, which went unpunished. The rape of Chrysippus by Laius, however, is represented in darker terms, and was known in antiquity as 'the crime of Laius', a term which came to be applied to all male rape. It was seen as an example of *hubris* in the original sense of the word, i.e. violent outrage, and its punishment was so severe that it destroyed not only Laius himself, but also his son, Oedipus.[12]

In antiquity and until the late Middle Ages, rape was seen in most cultures less as a crime against a particular girl or woman than against the male figure she 'belonged'. Thus, the penalty for rape was often a fine, payable to the father or the husband whose 'goods' were 'damaged'. That position was later replaced in many cultures by the view that the woman, as well as her lord, should share the fine equally.[13]

Rape, in the course of warfare, also dates back to antiquity, ancient enough to have been mentioned in the Bible.[14] The Greek, Persian and Roman troops would routinely rape women and boys in the conquered towns. Rape, as an adjunct to

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[11] Black's Law Dictionary, 8th edition.

[12] W. Burkert, Greek Religion (1985), *also* K. Kerenyi, The Gods of the Greeks (1951).

[13] The Middle Ages formed the middle period in a traditional schematic division of European history into three 'ages': the classical civilization of Antiquity, the Middle Ages, and Modern Times. The Middle Ages of Western Europe are commonly dated from the end of the Western Roman Empire (5th century) until the rise of national monarchies, the start of European overseas exploration, the humanist revival, and the Protestant Reformation starting in 1517. These various changes all mark the beginning of the Early Modern period that preceded the Industrial Revolution.

[14] *See* Deuteronomy 22:25-27, Judges 19:22-30; 20:35.

warfare, was prohibited by the military codices of Richard II and Henry V (1385 and 1419 respectively). These laws formed the basis for convicting and executing rapists during the Hundred Years War (1337-1453).[15]

Historically, rape laws have had blatant sexist assumptions and standards that raise serious questions about the law's objectivity or fairness. The two problems that arise is that first, the laws protected men's interests in sexual access and against prosecution. Second, the statutes and the courts employed assumptions and standards about rape, consent, force, reasonable belief, and resistance that failed to account for the perspective of women.[16]

The 18th century definition of rape in the acclaimed commentaries on the Law of England was "carnal knowledge [by a man not her husband] of a woman forcibly and against her will."[17] Debra Rhode, a theorist argues in one of her literatures that historically, rape has been perceived as a threat to male as well as female interests; it has devalued wives and daughters and jeopardized patrilineal systems of inheritance. But too stringent constraints on male sexuality have been equally threatening to male policymakers. The threat of criminal charges based on female fabrications has dominated the history of rape law.[18]

To fully appreciate the historical Treatment of rape as elucidated, we will now examine the conflicts in Yugoslavia, Rwanda and Darfur and the ramifications of rape to the victims and how the perception of rape has contributed to impunity and increase violation of this crime.

I. Rape in the Former Yugoslavia

Yugoslavia was a country of about 23 million people located in southeastern Europe, across the Adriatic sea from Italy. More than 15 ethnic groups lived in the former Yugoslavia. The majority of the population, however, belonged to one of six related Slavic groups: Serbs, Croats, Slovenes, Bosnian Muslims, Macedonians, and Montenegrins. The Croats, Serbs, Muslims, and Montenegrins speak a common language, referred to as 'Serbo-Croatian'. But religious and other cultural differences, which have resulted from separate historical experiences, have divided these Slavic groups.

During the World War II, Germans and Italians occupied Yugoslavia. A Communist, Josip Broz (Tito), organized a large resistance force known as the Partisans. He wanted to throw out the enemy occupiers and transform Yugoslavia into a socialist state.

After Wold War II, Tito became the supreme ruler of the new Yugoslavia. The country was divided into six republics: Slovenia, Serbia, Croatia, Bosnia-Herzegovina, Montenegro (Crna Gora) and Macedonia. Each republic corresponded to one of the six South Slav ethnic groups, but all had minorities.

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15 *See* D. Seward, The Hundred Years War. The English in France 1337-1453 (1999).

16 J. McGregor, Is it Rape?: On Acquaintance Rape and Taking Women's Rape Seriously 27-28 (2005).

17 *Id*. at 28.

18 *Id*. at 29.

The death of the Yugoslav 'strong man' Tito in 1980 and the secession of all the six republics thereafter threw the country into civil unrest. In April 1990, Slovenia, one of the republics of the former Yugoslavia, held free elections. The Croats followed suit. The Communists were swept from power. In June 1991, the two republics declared their complete independence.

In the fall of 1992, reports began emerging of rape being used as a weapon of war on a massive scale.[19] All sides of the conflict committed rapes. The Bosnian Serb forces used rape and other forms of gender violence on the largest scale, principally against Bosnian Muslim women, children and men.[20] The available evidence shows that rape was used as a tool of humiliate victims in order to humiliate their communities. Most of the time rape was committed in front of others, i.e. neighbors or close relatives, such as parents and children. A team of medical experts that investigated allegations of rape at the request of the UN Special Rapporteur on the situation of Human Rights in the Territory of the former Yugoslavia cites the following pattern in Vukovar, Croatia to illustrate this strategy:

> Serb paramilitary units would enter a village. Several women would be raped in the presence of others so that word spread throughout the village and a climate of fear was created. Several days later, Yugoslav Popular Army … officers would arrive at the village offering permission to the non-Serb population to leave the village. Those male villagers who had wanted to stay then decided to leave with their women and children in order to protect them from being raped …[21]

Rapes also occurred in places of detention. Special detention places set for rape and sexual abuse against women called bordello camps were notorious in committing this crime.[22] Rape survivors state that they were subjected to forced pregnancy and forced maternity. In general, these accounts indicate that rape survivors who became pregnant were deliberately detained by their Bosnian Serb captors beyond the time when they could obtain a legal abortion. Numerous accounts of rapes indicate that Bosnian Serb perpetrators have taunted their victims with words to the effect, "Now you will have a Serb baby."[23]

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[19] *See* R. Gutman, *Bosnia Rape Horror*, Newsday, 9 August 1992, at 5; R. Gutman, *Mass Rape*, Newsday, 23 August 1992, at 5; R. Gutman, *Victims Recount Nights of Terror at Makeshift Bordello*, Newsday, 23 August 1992, at 37. *See also* Report on the situation of Human Rights, 12 UN Doc S/24809 (1992) ("rape is deliberately practiced as yet another method of expressing contempt and hatred for the ethnic group which the unfortunate victims are made to symbolize").

[20] J. Laber, *Bosnia: Questions of Rape*, 40(6) N.Y. Rev. of Books, at 4 (1993). The reported cases seem to suggest that rape cases were against female victims – ranging from young children to elderly women – there is evidence that Serb forces have also subjected Muslim men to various sexual assaults including rape.

[21] UN Res. 808 (1993), *reprinted in* 4 U.S. Dept of State Dispatch No.12 (1993); Report on the situation of human rights in the former Yugoslavia, UN Doc. E/CN.4/1993/50 referred to as the Medical Mission report.

[22] Amnesty International, Bosnia-Herzegovina: Rape and Sexual Abuse by Armed forces 4-5 (1993). *See also* Gutman, *Victims Recount Nights of Terror at Makeshift Bordello*, *supra note* 20.

[23] *See* Medical Mission Report, *supra note* 20, at para. 41; *see also*, *Rape as 'Ethnic Cleansing': Serbian Forces Use Torture, Terror Systematically*, Boston Globe, 10 January 1993, at 74; A. Oyog, *Bosnia-Herzegovina: Women Demand End of 'Rape Camps'*, Inter-Press Service, 6 January 1993.

In response the UN Security Council in February 1993, acted to enforce the international community's duty to punish those responsible for grave violations of physical integrity by authorizing the creation of an international tribunal to prosecute the crimes committed in the Former Yugoslavia,[24] the International Criminal Tribunal for the Former Yugoslavia (ICTY) which will be dealt with in depth in section D.

II. Rape in Rwanda

Rwanda a country located in central Africa was Germany colony from 1894 to 1916.[25] During First World War the Belgians took control of Rwanda until its independence in 1962. The Belgian colonial rulers, like all other colonial powers, implemented a strategy that purposefully exacerbated ethnic division in order to manufacture a ruling class that could be more easily controlled by them. Prior to colonial rule, the Tutsi minority controlled the Rwandan aristocracy; however, there was seemingly little evidence of ethnic hostility. In order to pursue an efficient means of control, and consistent with emerging theories in the biology of race of that time, the Belgians used the Tutsi's more 'European' physical characteristics as the basis for maintaining their racial, and thus moral and intellectual superiority.[26]

After the Second World War the Tutsi aristocracy led the way to independence and hence causing the Belgian colonizers to shift favoritism to the majority Hutus, which resulted in the killing of thousands of Tutsi and a mass exodus of Tutsi into neighboring countries of Uganda, the Democratic Republic of the Congo (former Zaire) and some to Tanzania. Under President Juvenal Habyarimana, who took power in 1973, many Tutsi who remained in Rwanda lost their property and political power. Exiled Tutsi in Uganda formed a rebel group – the Rwanda Patriotic Front (RPF) in order to overthrow the Hutu-controlled government in Rwanda. The RPF then seized control of the northeast of Rwanda in 1990 and continued attacks until 1993, when Habyarimana agreed to a power sharing deal. Tensions around this power-sharing deal appear to have paved way to the beginnings of a plan in 1992 for a solution to the 'Tutsi problem'. The 6 April assassination of President Habyarimana and his Burundi counter-part from Dar-Es-Salaam, Tanzania peace negotiating meeting, was the genesis of the bloody civil war.

The one hundred days that marked the killing of Tutsi and moderate Hutu, thousands of women and girls were raped. The 1996 report of the United Nations Special Rapporteur on Rwanda, René Degni-Segui, found that "rape was the rule and its absence the exception."[27] Rape was used as a weapon by the perpetrators. As a result a number of victims contracted HIV-AIDS, unwanted pregnancies,

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[24] UN Doc. S/RES/808 (1993).

[25] G. Prunier, The Rwanda Crisis: History of a Genocide 23-25 (1995).

[26] S. Power, A problem from Hell: America and the Age of Genocide (2002).

[27] UN Commission on Human Rights, Report on the situation of Human Rights in Rwanda Submitted by Mr. René Degni-Segui, Special Rapporteur of the Commission on Human Rights, under para.h 20 of Resolution S-3/1 of 25 may 1994, S/CN.4/1996/68, 29 January 1996, para. 16

humiliation and degradable feelings that remain in their lives to date. The Degni-Segui report estimated that 100 cases of rape gave rise to one pregnancy and on the basis of an estimated number of pregnancies caused by rape of between 2,000 and 5,000 that in between 25,000 to 500,000, Rwandan women and girls had been raped.[28] Anti-Tutsi propaganda, newspapers also printed cartoons in which Tutsi women and moderate Hutu Prime Minister Agathe Uwilingiyimana, were portrayed as sexual objects.[29] There were also rapes that were directed against women and girls regardless of ethnicity or affiliation with the Tutsi population, and others directed against young or beautiful women.[30]

As part of the international community's response, on 17 May 1994, the UN Security Council passed Resolution 918. This resolution demanded a cease-fire and imposed an arms embargo on both sides of the conflict.[31] The UN acting under Chapter VII of the UN Charter established the International Criminal Tribunal for Rwanda (ICTR) in 1994 and reaffirmed the Tribunal in 1998 through resolution 1165.[32] Much further in-depth discussion on the ICTR's will be done under section D.

III. Rape in Darfur (Sudan)

The similar trend that was witnessed in the former Yugoslavia and Rwanda is being witnessed today in the Darfur region of Sudan. History tells that Darfur until 1874 was an independent state; she was conquered by the slave-trader al-Zubayr Pasha (d. 1913), who was cheated out of his conquest when the Egyptians marched in on al-Zubayr's heels and briefly occupied the country for some years (1874-1883).[33] Between 1874 and 1898, a period remembered in Darfur as Um Kwakiyya, best translated by an Irishman as 'the troubles', Darfur experienced more or less what it is experiencing today: drought, rape, and rapine, and warlordism. Many fled, as they did in 2003, as refugees to what is now Chad. In 1898, the then sultan, Ali Dinar, brought the 'troubles' to an end; his methods were rough but effective and the British simply inherited his state. In between 1916 and 1956, the British ruled Darfur, but their control was minimal, there was virtually no development and the people were left more or less to their own devices. The same reality continued after the British left and Darfur was part of independent Sudan.[34]

The discussion on the on-going Darfur crisis is important to show how the state of impunity for offenders of rape is prevalent, despite the ICTY/R prosecutions. The victims of violence in Darfur have suffered serious physical harm as

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[28] *Id.*

[29] A.-M. L. M. de Brouwer, Supranational criminal prosecution of sexual violence: The ICC and the practice of the ICTY and the ICTR 13 (2005).

[30] *Id.*

[31] http://www.nationsencyclopedia.com/United-Nations/The-Security-Council-MAINTAINING-INTERNATIONAL-PEACE-AND-SECURITY.html.

[32] http://www.un.org/ictr/english/Resolutions/1165e.html.

[33] R. S. O'Fahey, *Does Darfur have a future in the Sudan*, 30(1) Fletcher F. of World Aff. 27, at 28 (2006).

[34] *Id.*

documented abuses against members of Darfur's non-Arab communities of rape, beatings, ethnic humiliation, and destruction of property.[35] Several reports show that women and young girls of the native African ethnicity have been raped. A thirty-five-year-old Fur woman and mother of five children, from Krolli village, South Darfur, explains the nature of the atrocities,

> Janjaweed would pass their hands touching the heads and legs of women, if a woman has long hair and fat legs and silky skin she is immediately taken away to be raped. There was panic among all of us and we could not move. They took girls away for long hours and brought them back later. Girls were crying, we knew they raped them. Some of us were raped in front of the crowd … I was sitting with the others on the bare floor, very exhausted, thirsty and scared … Two of them came to me, I resisted them and told them I did not want them but they did not like that. They hit me and decided to rape me in front of others; one of them came to me from the back and started raping me … I could not move after that. Some young men tried to protect us from [rape], they received shots in both their legs.[36]

In these cases it is also fair to state that the government of Sudan is not taking any action.

As noted above in the Yugoslavia and Rwanda conflicts, perpetrators of rape have frequently abused the women and girls with vitriolic racial and ethnic slurs during or after the rapes, calling women "slaves", "dirty black Nuba", and other epithets. A Fur woman who was raped by three men during an attack on her village, near Kass town, was told by her attackers,

> You Fur women of 111 [referring to the pattern of scarification popular among Fur women: three parallel lines on the upper cheeks] are needed. For each '1' on your face you have a job. The first '1' is to bake kisra (a Sudanese staple food) for [Sudan president] Omar el Bashir, the second '1' is to be the slave of el Bashir, the third '1' is to do whatever el Bashir wants from you.[37]

C. The Historical Treatment of Rape

The previous section dealt with the harm of rape as a crime and the outcomes of the commission of the crime as committed in the territories of the former Yugoslavia, Rwanda and presently in Darfur, Sudan. The task of this section is to evaluate historical treatment of rape[38] and discuss emerging elements of the same to pave way for our section D where we will engage in a legal analysis of the concept of *ius cogens* and *obligatio erga omne*s of rape and an examination of the jurisprudence of the ICTY, ICTR and the ICC on this heinous crime.

As we have stated earlier, the harm of rape can be traced from the past development of the crime itself.[39] This treatment of the crime is based on human

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35 *See* the US State Department report at http://www.state.gov/g/drl/rls/36028.htm.

36 *See* http://www.survivorsunited.com/womenindarfur3.html (last visited February 2006).

37 http://hrw.org/backgrounder/africa/darfur0505/darfur0405.pdf Human Rights Watch interview, displaced persons camp, South Darfur, February 2005.

38 By historical treatment of rape traces this development beginning from the 20th century.

39 *See* section B.

rights views and as a gender-based violence, which contravene international human rights and humanitarian law, namely the right to dignity, the right to bodily integrity and the right to be free from torture or other cruel, inhuman, or degrading treatment. This fact alone necessitates the international community to seek full accountability for rape.

In trying to develop the modern elements of the crime of rape, as this article will point out, the definition under international law on rape emerges solely from the traditional elements and definition of rape, i.e., national law.[40] We will note on the outset that the struggle of a definition is explicitly envisaged when the ICTY Trial Chamber stated:

> … Forced penetration of the mouth by the male sexual organ constitutes a most humiliating and degrading attack upon human dignity. The essence of the whole corpus of international humanitarian law as well as human rights law lies in the protection of the human dignity of every person, whatever his or her gender. The general principle of respect of human dignity is the basic underpinning and indeed the very raison d'etre of international humanitarian law and human rights law; indeed in modern times it has become of such paramount importance as to permeate the whole body of international law. This principle is intended to shield human beings from outrages upon their personal dignity, whether such outrages are carried out by unlawfully attacking the body or by humiliating and debasing the honor, the self-respect or the mental well being of a person. It is consonant with this principle that such an extremely serious sexual outrage as forced oral penetration should be classified as rape.[41]

In the exercise of understanding the historical treatment of rape, some scholars have conceptualized rape as a social construct because it is a social act that has been designed a certain meaning. When X is accused of rape, it implies that X has done something specific to Y, and hence to use the word rape describes that which has occurred to Y is an act with intent to hurt, disable, destroy or decimate. It may be done to accomplish all of these at once. Therefore rape is an action with a designed outcome. It is a violent means designed to accomplish a certain end. Thus, rape in itself is always an act of violence and a social act; and to describe an act as rape is to engage in discourse about its meaning which will reflect the social values of the society.

There are two aspects of the element of the crime of rape that we will try to examine and to explain the genesis of development of the law. The first is the role of force or violence as it pertains to issues of consent on the part of the victim. The second is the definition of rape comparing domestic and the international judgments and statutory definitions. The role of force and coercion as well as consent started changing in the United States in the middle of 1970 when the State of Michigan enacted the first set of Criminal Sexual Conduct laws[42]. Historically,

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[40] Further discussion on the same will be dealt with in section D.

[41] Prosecutor *v*. Anto Furundzija, Judgment, Case No. IT-95-17/1-T, T.Ch. II, 10 December 1998, at para. 181

[42] *See* Michigan Criminal Sexual Conduct Code, Mich. Comp. Laws. §§750.520a-750.520m (2003), *also see* State in Interest of M.T.S., 609 A.2d 1266 (1992) (explaining the history of New Jersey's sexual assault statute).

a woman was expected to cry out, to resist to the up most, even unto death.[43] Anything less, was considered as strong evidence that she had consented to the violation. However, it has long been recognized that when a serious threat of force was used, that it may have been impossible for a woman to resist or cry out.[44]

The ICTY in *Prosecutor v. Kunarac, et al*[45] the Appeals Chamber affirmed the interpretation of the Trial Chamber relative to the type of force which makes the crime of rape, concurring with the Trial chamber's definition of what constitutes the element which had been described as being an act done "without the consent of the victim."[46]

In developing this premise the Appeals Chamber rejected a "resistance" requirement and found that the appellants "offered no basis [for this idea] in customary international law," and that the idea of continuous resistance is "wrong on the law and absurd on the facts."[47] Second, with regard to the role of force in the definition of rape, the Appeals Chamber noted that the Trial Chamber appeared to depart from the Tribunal's prior definitions of what force constituted rape.[48] In explaining its focus on the absence of consent as the *conditio sine qua non* of rape, the appeals chamber found that the Trial Chamber did not disavow the Tribunals earlier jurisprudence on consent, but instead sought to explain the relationship between force and consent.[49]

The Appeals Chamber hence stated that " [f]orce or threat of force provides clear evidence of non-consent, but force is not an element per se of rape."[50] It added "the Trial Chamber wished to explain that there are "factors [other than force] which would render an act of sexual penetration non-consensual or non-voluntary on the part of the victim."[51]

The appellate court noted "[a] narrow focus on force or threat of force could permit perpetrators to evade liability for sexual activity to which the other party had not consented by taking advantage of coercive circumstances without relying on physical force.[52]

The Appeals Chamber noted when comparing its finding with some domestic jurisdictions that neither the use of a weapon nor the physical overpowering of a victim is necessary to demonstrate force.[53] "A threat to retaliate 'in future against

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43 *See* J. Dressler, Understanding Criminal Law, ch. 33, 534-535 (1995).

44 *Id*. at 538-539.

45 Case No. 96-23/1, 12 June 2002 [hereinafter Foca trial] http://www.un.org/icty/kunarac/appeal/judgement/index.htm (last visited February 24, 2006).

46 *Id.*

47 *Id*. at Part V, subpart B, sec. 2, para. 128

48 *Id*. at Part V, subpart B, sec. 2, para. 129 a thorough discussion of this will be dealt with in chapter four as we will be discussing the legal analysis of international jurisprudence on rape.

49 *Id.*

50 *Id.* at para. 129.

51 *Id.*

52 *Id.*

53 Part V of the Kunarac judgment, *supra note* 46, at Part V, subpart B, sec. 2, para. 130 (quoting California Penal Code 1999, Title 9, s. 26(a)(6). The section also lists, among the circumstances transforming an act of sexual intercourse into rape, "where it is accomplished against a person's

the victim or any other person' is sufficient indicia of force so long as 'there is a reasonable possibility that the perpetrator will execute the threat.' "[54] The court reasoned thus,

> While it is true that a focus in one aspect gives a different shading to the offence, it is worth observing that the circumstances giving rise to the instant appeal and that prevail in most cases charged as either war crimes or crimes against humanity will be most universally coercive. That is to say, true consent will not be possible.[55]

The Appeals Chamber noted that German substantive law penalizes sexual acts with prisoners and persons in custody of public authority,[56] and the absence of consent is not an element of the crime either there or "increasingly" in the state and national laws of the United States.[57]

The reasoning in the *Foca case* is consistent with the *Akayesu* case where the chamber held that what must be shown is that the sexual act must be done under "circumstances, which are coercive."[58]

As we shall see in the coming section, the Rome Statute's definition of rape does not incorporate the resistance prong, stating instead that it is rape if the act is done by "force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, or by taking advantage of a coercive environment or the invasion was committed against a person incapable of giving genuine consent."[59]

It is therefore fair to state that there is consistency on the definition of rape as to the factors indicating coercion in domestic law and in that of international jurisprudence, which this study avers is evidence that the norm is *ius cogens* that creates *obligatio erga omnes*.

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will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the person of another." (Section 261(a)(2)). Consent is defined as "positive cooperation in act or attitude pursuant to an exercise of free will" (Section 261.6). Kunarac, Part V, subpart B, sec. 2, para. 130, note 161.

[54] *Id*.

[55] *Supra note* 45. Part V, subpart B, sec. 2, para. 130

[56] *Id*. at para. 131, note 162.

> Indeed, a more recently enacted German Criminal Code (*Strafgesetzbuch*), Chapter 13, Section 177, which defines sexual coercion and rape, recognizes the special vulnerability of victims in certain situations. It was amended in April 1998 to explicitly add "exploiting a situation in which the victim is unprotected and at the mercy of the perpetrator's influence" as equivalent to 'force' or 'threat' of imminent danger to life or limb.

[57] *Id*. at para 131.

[58] Prosecutor *v*. Jean-Paul Akayesu, Judgment, Case no. ICTR-96-4-T, Appeals Chamber, 1 June 2001 (www.ictr.org select English, Cases, Status of Cases, Completed Cases, AKAYESU, Jean-Paul (ICTR-96-4), Judgment and Sentence, 2 September 1998 judgment (last visited 24 February 2006)).

[59] Article 7(1)(g)-1(2) of the Rome Statute, also found at www.icc-cpi.int, basic documents, elements of crime (last visited 24 February 2006).

D. The Concept of *ius cogens* of Rape

This article emphasizes the importance of rape to be elevated to a *ius cogens*. This will serve as (1) an existence of a legal concept exemplifying that the domestic rape laws of sovereign States are no aim in itself, but a means for the safeguard of human values and interests; (2) it relativizes domestic rape laws, but ties this relativization to certain community goals rather than individual State interests; (3) this collective decision making on the basic elements of rape will define and constrain the individual exercise of power out of the most basic common values minimum communal sphere, for example – rape as a *ius cogens* norm takes away the shield of perpetrators and protect human rights by creating universal jurisdiction of the law.

Ius cogens is defined under Article 53 of the Vienna Convention on the Law of Treaties. This definition suggests a two-pronged test:

i) A proposed international rule (arising from lesser customs or treaties) must exist;

ii) Universal acceptance of that rule should exist by an overwhelming majority of States, and such States must cross ideological and political divides. This universal acceptance, however, should ensure that a minority of States are not thrust into the demands of a powerful majority.

This legally means that, first; no State shall recognize as lawful a 'serious breach' of a peremptory norm. Second, certain 'reservations' that offend a rule of *ius cogens* may be unlawful, and State conduct that violates a rule of *ius cogens* may not enjoy a claim of state immunity. Third, the relief which [the UN Charter] may give the Security Council in case of conflict between one if its decisions and an operative treaty obligation cannot – as a matter of simple hierarchy of norms – extend to a conflict between a Security Council resolution and *ius cogens*.

The concept of *ius cogens* is a concept that was recognized and established in the early 19th century.[60] It can be traced back through the doctrines of natural law, which maintained that states cannot be absolutely free in establishing their contractual relations but were obligated to respect certain fundamental principles deeply rooted in the international community.[61] In *US v. Matta Ballesteros*,[62] the court noted that *ius cogens* norms, which are non-derogable and peremptory, enjoy the highest status within customary international law, are binding on all nations, and cannot be preempted by treaty. Professor Oppenheim an eminent scholar while talking about *ius cogens* submitted a premise that there are a number of "universally recognized principles" of international law that rendered any conflicting treaty void, and therefore, the peremptory effect of such principles was itself a "unanimously recognized customary rule of International law."[63]

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60 Oppenheim's International law Vol. 1 Peace, Introduction & part 1 (1992).

61 G. M. Danilenko, *International Ius Cogens: Issues of Law-Making*, 2 Eur. J. Int'l L. 42, 44 (1991) also found at http://www.ejil.org/journal/Vol2/No1/art3.html (last visited 13 March 2006).

62 71 F.3d 754, 9th Circuit (1995).

63 *Id.* note 62 at 528.

This concept has also found favor in judicial context as early as the 1928 *Pablo Najera* a decision of the French-Mexican Claims Commission, and the PCIJ in 1934 case of *Oscar Chinn*. Judges of the ICJ have made similar references to this concept of *ius cogens* like in the case of Bosnia where Judge Lauterpacht opined the possibility that the Security Council had violated the genocide prohibition and therewith alleged *ius cogens* when imposing an arms embargo on both Serbia and Bosnia.[64]

The fundamental principle behind *ius cogens* is therefore that certain rights and customs that are so ingrained in the international order that they become peremptory norms that is, norms of higher status under international law than general custom which sets the bedrock of the international legal system.[65] *Ius cogens* consist of both rights and responsibilities.[66] First, promotes certain activities such as self-determination,[67] and second, 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"[68] Traditional *ius cogens* norms have been slavery, piracy, apartheid, genocide, aggression, crimes against humanity, war crimes and torture. This article argues rape has become *ius cogens* because sufficient legal basis exist to reach this conclusion.[69]

Rape is *ius cogens* because has affected the interest of the world community as a whole and because it threatens the peace and security of humankind, and second because it shocks the conscience of humanity.[70] These two elements if present in a crime it can be legally concluded that it is part of *ius cogens*.

In discussing this premise we shall cite two cases to affirm our hypothesis. The cases of *Kardic v. Karadzic*[71] and *Hwang Geum Joo, et al v. Japan*[72] established that rape is a *ius cogens* norm.

In *Karadzic* a claim was brought under Alien Tort Claims Act (ATCA)[73] alleging various atrocities, including brutal acts of rape, and other serious crimes. In its judgment, the US District Court (2nd circuit) held that "acts of murder, rape, torture, and arbitrary detention (slavery) have long been recognized as violations

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64 K. Hossain, *The Concept of Ius Cogens and the Obligation Under The UN Charter*, 3 Santa Clara J. Int'l L. 72, at 75 also at http://www.scu.edu/scjil/archive/v3_HossainArticle.pdf (last visited 13 March 2006).

65 *See* M. W. Janis, *The Nature of Ius Cogens*, 3 Conn. J. Int'l. L. 359, at 362 (1988).

66 I. Brownlie, Principles of Public International Law 513 (1990).

67 *See* Conference on Yugoslavia Arbitration Commission, Opinion No. 2, 31 I.L.M. 1498 (1992).

68 M. Ch. Bassiouni, *Sources and Theories of International Criminal Law*, *in* M. Ch. Bassiouni (Ed.), 1 International Criminal Law 42 (1999).

69 *Id.*

70 Threats to peace and security are essentially political judgments and the UN Charter gives that function under Chapter VII to the Security Council of the United Nations. The conflicts in Yugoslavia and Rwanda and currently in Darfur, Sudan where millions of women and children have been raped has necessitated the United Security Councils intervention and hence the establishment of the *ad hoc* tribunals, UNSC resolutions 827/1993 and 955/1994 respectively.

71 70 F.2d 22 (2d Cir. 1995).

72 172 F. Supp. 2d 52 (D.D.C. 2001).

73 28 U.S.C. §3150.

… and direct violations of international law."[74] The court does not directly address the issue whether rape is a *ius cogens* norm but points out the victims' accounts of the violent sexual crimes committed against them as a violation of international law and importantly shows the effects of rape as a *ius cogens* norm.[75]

In the second case of *Hwang Geum* Joo[76] fifteen Asian women filed a class action in the US District Court alleging that along with approximately 200,000 other women and girls were forced into sexual slavery where they were repeatedly raped by as many as thirty or forty Japanese soldiers a day. They were also mutilated and sometimes killed. Again the US District Court for the District of Columbia did not directly address the *ius cogens* nature of rape, however, Judge Henry H. Kennedy Jr, held thus,

> In light of the binding precedent of the D.C. Circuit, the court concludes that Japan's *ius cogens* violations do not constitute an implied waiver under § 1605 (a) (1)[77]

The Court holds affirmatively that rape violates *ius cogens*, which means that the misconduct of rape constitutes an existing *ius cogens* norm. The fact that a domestic court (US federal court) entertained such suits confirms a non-derogable legal obligation to civilly prosecute and establish the exercise of jurisdiction over rape cases as a universal crime. This clearly shows the international disapproval of violent sexual acts is so compelling that the prohibition amounts to a *ius cogens* rule. It is evident from domestic law and practice that the misconduct of rape establishes a general norm of international law, which provides further justification for asserting that rape is a norm of peremptory nature.[78]

I. *Obligatio Erga Omnes* of Rape

The term *obligatio erga omne*s concerns the legal implications of a crime's characterization as *ius cogens*.[79] Since we have affirmed that rape is a *ius cogens* norm it follows that States have limited choices if a person suspected of the crime is found in their territory. It is logical to assume that if a person is

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74 *Id*. note 78 at 243.

75 Though this case was a civil case resulting into damages awarded to the plaintiff, it signifies the seriousness of the alleged crime and may eventually be used to criminally punish offenders in extreme cases in national jurisdictions. Similar actions have been filed against corporations and their executives for violations of human rights including rape. *See John Doe I v. Unocal Corp*., 395 F. d 92 (9th Cir. 2002).

76 I*d.* note 79.

77 172 F. Supp. 2d at 52.

78 *See* D. Mitchell, *The Prohibition of Rape in International Humanitarian Law as a Norm of ius cogens: Clarifying the Doctrine*, 15 Duke Journal of Comparative and International Law 219, at 228 (2005).

79 *See* Brownlie, *supra note* 66, at 514-517 (1998); P. Malanczuk, Akehurst's Modern Introduction to International Law 58–60 (1997); I. A. Shearer, Starke's International Law 48-50 (1994); M. C. Bassiouni, *International Crimes: Ius Cogens and Obligatio Erga Omnes*, 59(4) Law and Contemporary Problems 63 (1996); Th. Meron, Human Rights and Humanitarian Norms as Customary Law 188-197 (1989); C. Annacker, *The Legal Régime of Erga Omnes Obligations in International Law*, 46 Austrian Journal of Public and International Law 131 (1994).

found in the territory or jurisdiction of a state suspected of rape, the state must either investigate and, if there is sufficient admissible evidence, prosecute the suspect or to cooperate in the detection, arrest, extradition and punishment of individuals responsible for the crime, wherever they have occurred, just as they must with regard to war crimes, crimes against humanity and the like crimes that are *ius cogens* norms. Sheltering them from justice by failing to initiate criminal investigations or failing to extradite them to a state able and willing to exercise jurisdiction would be inconsistent with the *erga omnes* obligation.

The contemporary genesis of the concept *obligatio erga omnes* for *ius cogens* crimes can be traced from the ICJ advisory opinion on Reservations to the Convention on the Prevention and Punishment of Genocide when the court stated thus,

> The origins of the Convention show that it was the intention of the United Nations to condemn and punish genocide as 'a crime under international law' involving a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses to humanity, and which is contrary to moral law and to the spirit and aims of the United Nations (Resolution 96 (I) of the General Assembly, December 11th 1946). The first consequence arising from this conception is that the principles underlying the Convention are principles, which are recognized by civilized nations as binding on States, even without any conventional obligation. A second consequence is the universal character both of the condemnation of genocide and of the co-operation required 'in order to liberate mankind from such an odious scourge' (Preamble to the Convention). The Genocide Convention was therefore intended by the General Assembly and by the contracting parties to be definitely universal in scope. It was in fact approved on December 9th, 1948, by a resolution, which was unanimously adopted by fifty-six States.[80]

In the famous obiter dictum in the *Barcelona Traction* case, the ICJ stated that an obligation arising from *erga omnes* is the obligation of a State towards the international Community as a whole. The court further stated,

> [A]n essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising *vis-à-vis* another State in the field of diplomatic protection. By their nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.[81]

The dictum in this case identifies two characteristics features of *obligatio erga omnes*. The first one is universality, in the sense that *obligatio erga omnes* are binding on all States without exceptions.[82] The second one is solidarity, in the sense that every State is deemed to have a legal interest in their protection. Of these two characteristics, the second one – solidarity is linked with wider issues of enforcement and legal standing in international law. This characterization finds

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[80] 1952 ICJ REP. 15 (May 28) at 7 of the opinion; *also see* G. Christenson, *The World Court and Ius Cogens*, 81 Am. J. Int'l L. 93 (1987).

[81] 1970 ICJ 3, 32.

[82] Universality, in the sense that *obligatio erga omnes* raises complex theoretical problems. It is difficult to reconcile this element with the structure of an international society composed of independent entities, in which legal relations, as a rule, arise only on a consensual basis.

merit with different scholars that *obligatio erga omnes* is therefore a consequence of a given international crime having risen to the level of *ius cogens*.[83] Professor Bassiouni also stated that "*ius cogens* refers to the legal status that certain international crimes reach, and obligation *erga omnes* pertains to the legal implications arising out of a certain crime's characterization as *ius cogens* …"[84] This concept also finds support in other ICJ precedents, the South West Africa cases.[85]

The Restatement (Third) of the Foreign Relations Law of the United States,[86] adopted by the American Law Institute mentions a few other obligations other than those listed by the ICJ, i.e., the murder of or causing the disappearance of individuals; torture or other cruel, inhuman or degrading treatment or punishment; prolonged arbitrary detention; and a consistent pattern of gross violations of internationally recognized human rights. This list suggests that the very obligation of States to ensure the protection of human rights is an *obligatio erga omnes*. As Judge Meron pointed out, this is more consistent with the inherent value orientation of such obligations and accurately reflects the present reality of *obligatio erga omnes*. The dictum in the *Barcelona Traction* case made a distinction between basic and other human rights, which is no longer acceptable because international practice and scholarly opinion has moved well beyond this distinction. In contemporary international law, human rights are the direct expression and one of the constitutive elements of the value of the dignity of the human person as proclaimed in the United Nations Charter and in the Universal Declaration of Human Rights.[87]

It is therefore certain from this discussion that the inclusion of a crime in the *ius cogens* category in International Criminal Law creates rights, non-derogable duty *erga omnes*. The Rome Statute a multilateral treaty that establishes the permanent international criminal court has clearly included rape as part of *ius cogens* and that obligations *erga omnes* to prosecute or extradite flow from it.[88] As of 14 November 2005, 100 countries are States Parties to the Rome Statute of the International Criminal Court. Out of them 27 are African States, 12 are Asian States, 15 are from Eastern Europe, 21 are from Latin America and the Caribbean, and 25 are from Western Europe and other States.[89]

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[83] *See* Th. Meron, Human Rights and Humanitarian norms as Customary Law (1989); *see also* C. Annacker, *The Legal Regime of "Erga Omnes" Obligations and International Law*, 46 Austrian J. Pub. Int'l L. 131 (1994); Th. Meron, *On a Hierarchy of International Human Rights*, 80 Am. J. Int'l L. 1 (1986).

[84] M. Ch. Bassiouni, *International Crimes: Ius Cogens and Obligatio erga omnes*, 59(Autumn) Law & Contemp. Prob. 63, at 68 (1996).

[85] South West Africa Cases (Ethiopia *v.* South Africa; Liberia *v.* South Africa), Preliminary Objections, 21 December 1963, 1963 ICJ Rep. 319. These cases dealt inter alia with human rights violations and not international crimes stricto sensu (Bassiouni, *supra note* 84, at 63).

[86] §702 (1987).

[87] Meron (1989), *supra note* 83.

[88] The discussion on the inclusion of rape in the Rome Statute will be dealt with in the next part when we will be examining the international jurisprudence.

[89] *See* http://www.icc-cpi.int/asp/statesparties.html (last visited 26 July 2006).

II. Examining the International Jurisprudence

This section of the article discusses the jurisprudence of international courts as a legal basis for our premise that rape is *ius cogens* that creates *obligatio erga omnes*.

Rape has been investigated and prosecuted by ad hoc international tribunals and the perpetrators convicted of the same.

Rape is explicitly prohibited under international law. Article 27 of the Fourth Geneva Convention[90] provides, in pertinent part, that women shall be especially protected against any attack of their honor, in particular against rape, enforced prostitution, or any form of indecent assault.

The establishment of the ICTY and ICTR brought about a number of significant developments with regard to addressing this serious crime through international criminal law. The statutes for the ICTY/R have incorporated gender-based violence in a relatively limited way: they included rape as a crime against humanity only and not as a war crime. The tribunals also did not expressly list any other form of gender-based violence. However, both tribunals made progress in expanding the definition of rape and developing procedures for the prosecution of the same through jurisprudence. The Prosecutors for both Tribunals have prosecuted rape as elements of genocide, torture and other inhumane acts. The experience of the ICTY/R has been influential in the drafting of the Rome Statute that established the ICC in July 1998. The Rome Statute provides that the court can investigate and prosecute individuals accused of international crimes,[91] when national courts are unable or unwilling to do so.[92]

In this chapter we will conduct a legal analysis of the jurisprudence of these international courts on their jurisprudence on rape.

1. The International Criminal Tribunal for Rwanda (ICTR)

The Landmark case of *Akayesu* invoked a vibrant new understanding of the crime of rape, which constitutes an egregious violation of humanity and conjures up images of violence, hate and atrocity. It was a first international decision on this heinous crime ever pronounced by an international court since Nuremberg.

Jean Paul Akayesu was a schoolteacher and an inspector before becoming Mayor of the commune of Taba in the Gitarama district of Rwanda in April 1993. He is a married man with five children; he held the position of Mayor until June of 1994 when he fled from Rwanda. He was arrested in Zambia on 10 October 1995 and indicted by the ICTR on 16 February 1996.[93] On 10 January

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[90] 1949.

[91] The ICC has jurisdiction over four categories of crimes: genocide, crimes against humanity, war crimes and aggression. Art. 5 describes these as, "the most serious crimes of concern to the international community as a whole."

[92] Art. 17(1)(a)(b) of the ICC statute, http://www.un.org/law/icc/statute/romefra.htm.

[93] *Historic judgment Finds Akayesu Guilty of Genocide* at http://www.un.org/ictr/english/pressrel/prl38.html.

1997, Akayesu was the first person tried for genocide before the ICTR.[94] Two thousand Tutsis died under his watch as Mayor of Taba.[95] Rape was not included in the initial indictment against Akayesu.[96] A Tutsi woman testified in front of the Tribunal that three Hutu soldiers raped her six-year-old daughter when they came to kill her husband. The same witness, referred to as witness J, also testified that she heard of young girls raped at the communal. Witness H testified that she did not know if Akayesu knew about the abuse. Moreover, Witness H testified that the rapes were not committed through orders.[97] After hearing witness testimony regarding sexual assaults, Judge Navanethem Pillay amended the indictment to include the crime of rape as genocide. Judge Pillay was the only woman on the panel.[98]

The Trial Chamber in *Akayesu* articulated a definition of rape as " a physical invasion of a sexual nature, committed on a person under circumstances which are coercive."[99] Two elements of its definition were unprecedented and in our view carrying a legal weight. Reasoning from the domestic rape definition point of view, the Chamber incorporated a broad consent paradigm that and asked itself whether the circumstances of the alleged rape were coercive, rather than whether the victim actually consented. The Chamber substituted the consent element to coercive recognizing a fact that consent is legally not possible where a victim is under coercion, which practically removes the ability to consent. The Chamber reasoned by looking at domestic laws[100] that narrowly defined rape as "non-consensual intercourse" did not suit the facts in Rwanda. The Chamber recognized that the notion of victim consent has a little place when a soldier uses rape as a form of torture "for such purposes as intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person."

The same can be said of an armed robber who intends to commit robbery in a dwelling place, and at the same time rapes a victim (be it a man or a woman) has the same *mens rea*, that is, intent to commit the crimes by intimidating, degrading, humiliate the victim before or after committing the offence.

In *Aydin v. Turkey*[101] The European Court of Human Rights held that the rape of a person in custody by an official of the State must be considered to be an especially grave and abhorrent form of ill-treatment given the ease with which the offender can exploit the vulnerability and weakened resistance of his victim. The court went on to say that rape is a particularly serious form of torture because it leaves deep psychological scars on the victim, which does not respond to the

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94 The Prosecutor *v*. Jean-Paul Akayesu, Judgement, Case No. ICTR-96-4-T, T.Ch I, 2 October 1998.

95 D. M. Amann, *International Decisions: Prosecutor v. Akayesu*, 93 AJIL 195 (1999).

96 *Id*. at 196.

97 Prosecutor *v*. Jean-Paul Akayesu, *supra* note 94, at 71.

98 Amman, *supra* note 95, at 186.

99 Prosecutor *v.* Jean-Paul Akayesu, *supra* note 57, at 528.

100 Akayesu, *supra* note 57, at 596 "While rape has been defined in certain national jurisdictions as non-consensual intercourse, variations on the act of rape may include acts which involve the insertion of objects and/or the use of bodily orifices not considered to be intrinsically sexual."

101 *Aydin v. Turkey*, ECHR (1997) No. 300, at 83.

passage of time as quickly as other forms of physical and mental violence, and because the acute physical pain of forced penetration must leave the victim feeling debased.[102]

Torture was defined in the *Akayesu* as:

> The Tribunal interprets the word 'torture' … in accordance with the definition of torture set forth in the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or punishment.

The Chamber defines the essential elements of torture as:

> (i) The perpetrator must intentionally inflict severe physical or mental pain or suffering upon the victim for one or more of the following purposes:
> (a) to obtain information or a confession from the victim or a third person;
> (b) to punish the victim or a third person for an act committed or suspected of having been committed by either of them;
> (c) for the purpose of intimidating or coercing the victim or the third person;
> (d) for any reason based on discrimination of any kind.
> (ii) The perpetrator was himself an official, or acted at the instigation of, or with the consent or acquiescence of, an official or person acting in an official capacity."[103]

In *Prosecutor v. Alfred Musema*[104] The Chamber adopted the definition of rape and sexual violence set forth in *Akayesu*, and further stated that "variations on the acts of rape may include acts which involve the insertions of objects and/or the use of bodily orifices not considered to be intrinsically sexual."[105]

Concurring with the approach set forth in *Akayesu*, the Chamber stated that the "essence of rape is not the particular details of the body parts and objects involved, but rather the aggression that is expressed in a sexual manner under conditions of coercion." Since "there is a trend in national legislation to broaden the definition of rape" and an ongoing evolution and incorporation of the understanding of rape into principles of international law, "a conceptual definition is preferable to a mechanical definition of rape" because it will "better accommodate evolving norms of criminal justice."[106]

However in *Prosecutor v. Laurent Semanza*[107] the chamber stated thus,

> The *Akayesu* Judgement enunciated a broad definition of rape … The Appeals Chamber of the ICTY … affirmed a narrower interpretation defining the material element of rape … as the non-consensual penetration, however slight, of the vagina or anus of the victim by the penis of the perpetrator or by any other object used by the perpetrator, or of the mouth of the victim by the penis of the perpetrator. Consent for this purpose must be given voluntarily and freely and is assessed within the context of the surrounding circumstances." And went on to say, "While this mechanical style of defining rape was originally rejected by this Tribunal, the Chamber finds

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[102] *Id.*
[103] (Trial Chamber) 2 September 1998 para. 593-595, 681.
[104] Prosecutor *v.* Alfred Musema, Case No. ICTR-96-13-A, T.Ch., 27 January 2000, para. 220-221, 226-229.
[105] *Id.*
[106] *Id.*
[107] Prosecutor *v.* Laurent Semanza, Case No. ICTR-97-20-I, T.Ch., 15 May 2003, para. 344-345.

> the comparative analysis in *Kunarac*[108] to be persuasive and thus will adopt the definition of rape approved by the ICTY Appeals Chamber. The ICTR share the Appeals Chamber with the ICTY and hence the trial chamber respected the doctrine of stare-decisis though the neither the ICTY nor the ICTR formally has embodied this doctrine in their statutes. Stare decisis et non quieta movere is a vital rule of law that brings consistency in the adjudication process where there are settled points.

The *mens rea* of rape was stated as in the *Semanza* case as:

> The mental element for rape as a crime against humanity is the intention to effect the prohibited sexual penetration with the knowledge that it occurs without the consent of the victim.[109]

We however want to emphasize that trial chamber in *Semanza* did not however criticize its prior definition in *Akayesu*, instead, the court stated that it found a narrower definition set forth by the ICTY persuasive because it engaged in a "comparative analysis" of different national laws"[110] of different national laws. The ICTR's repudiation of its prior definition of rape decreases some of its value as precedent. However, the definition of rape in international law is by no means settled and therefore the decision remains valid precedent to be adopted.

2. The International Criminal Tribunal for the former Yugoslavia

The ICTY was the second court to come up with the definition of rape. The tribunal adopted a somewhat different definition from that found in the *Akayesu* decision[111] that was more similar to that of domestic rape law. This definition was based on a survey of domestic laws though not all elements of national criminal definition of rape were adopted into this definition.

Prosecutor v. Furundzija[112] was the first ICTY case to define rape. The Trial Chamber based its definition of the survey of domestic laws, although it declined to adopt every element of national criminal law definitions of rape, it held thus at para. 178;

> Whenever international criminal rules do not define a notion of criminal law, reliance upon national legislation is justified, subject to the following conditions: (i) unless indicated by an international rule, reference should not be made to one national legal system only, say that of common-law or that of civil-law States. Rather, international courts must draw upon the general concepts and legal institutions common to all the major legal systems of the world. This presupposes

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[108] Prosecutor v. Kunarac, Korac and Vukovic, Case Nos. IT-96-23, IT-96-23/1, 12 June 2002. The discussion of this decision will be dealt with in the next section.

[109] Bassioni, *supra* note 84, at 346. *See also* discussion of rape and sexual violence as causing serious bodily or mental harm to members of the group under Art. 2, Section (I)(d)(ii)(3), rape as torture under Art. 3, Section (II)(c)(vii)(2), sexual violence as other inhumane acts under Art. 3, Section (II)(c)(x)(1)(b), sexual violence as an outrage upon personal dignity under Art. 4, Section (III)(d)(v)(1), and rape as an outrage upon personal dignity under Art. 4, Section (III)(d)(v)(3), ICTR Digest.

[110] Prosecutor *v*. Laurent Semanza, *supra* note 107, at 345.

[111] Prosecutor *v*. Jean-Paul Akayesu, *supra* note 94.

[112] Prosecutor *v*. Furundzija, IT-95-17/1-T, T.Ch. 10 December 1998 also found at http://www.un.org/icty/furundzija/trialc2/judgement/ (last visited 2 March 2006).

> a process of identification of the common denominators in these legal systems so as to pinpoint the basic notions they share; (ii) since "international trials exhibit a number of features that differentiate them from national criminal proceedings",[113] account must be taken of the specificity of international criminal proceedings when utilizing national law notions. In this way a mechanical importation or transposition from national law into international criminal proceedings is avoided, as well as the attendant distortions of the unique traits of such proceedings.

Furundzija defined rape at para. 185 as,

> (i) The sexual penetration, however slight:
> (a) Of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or
> (b) Of the mouth of the victim by the penis of the perpetrator;
> (ii) By coercion or force or threat of force against the victim or a third person.[114]

In *Prosecutor v. Kunarac, et al*[115] defined rape as in *Furundzija*[116] and stated the mens rea of rape as "the intention to effect this sexual penetration, and the knowledge that it occurs without the consent of the victim"[117]

In *Prosecutor v. Delalic et al, (a.k.a Celebici case)*,[118] the Prosecutor charged Hazim Delic, a Serbian prison camp guard of raping two non-Serbian female prisoners, and these rapes amounted to torture, contrary to Articles 2 and 3 of the ICTY statute. Article 2(b) identifies 'torture or inhumane treatment' as grave breach of the Geneva Conventions. Article 3 of the ICTY Statute prohibits violations of the laws and custom of war, including torture. In concluding that the rape in *Celebici* rose to the level of torture, the ICTY Chambers stated that rape constitutes torture if it,

> (1) Causes severe pain or suffering, whether mental or physical, (2) which is inflicted intentionally, (3) and for such purposes as obtaining information or a confession from the victim, or a third person, punishing the victim for an act he or she or a third person has committed or is suspected of having committed, intimidating or coercing the victim or a third person, or for any reason based on discrimination of any kind, (4) and [is] committed by, or at the instigation of, or with the consent or acquiescence of, an official or other person acting in an official capacity.[119]

The ICTY jurisprudence has therefore expanded the legal definition of rape by articulating the following elements,

> (1) Sexual penetration, however slight
> (a) Of a vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator, or
> (b) Of the mouth of the victim by the penis of the perpetrator,
> (2) By coercion or force or threat of force against the victim or a third person.[120]

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[113] Prosecutor *v*. Drazen Erdemovic, Judgement, Separate and Dissenting Opinion of Judge Cassese, Case No. IT-96-22-A, 7 October 1997, at para. 5,
[114] *See* http://www.un.org/icty/furundzija/trialc2/judgement/
[115] Prosecutor *v*. Kunarac, Kovac and Vukovic, IT-96-23-T, IT-96-23/1-T, 12 June 2002, at para. 460.
[116] Prosecutor *v*. Furundzija, *supra* note 112.
[117] *Id.*
[118] Prosecutor v. Delalic et al IT-96-21, T.Ch, 16 November 1998.
[119] *Id.*
[120] Definition found in *Furundzija* and *Celebici* cases as explained in this section of the article.

3. International Criminal Court (ICC)

The ICC has defined rape in a similar way as the ICTY has in its body of statute as we have seen in the previous section. This definition can be found in the Statute of the ICC, the ICC Rules of Procedure and Evidence and the ICC EoC.[121] The ICC EoC defines rape as a situation where:

> (1) The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body
> (2) The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent."

The concept of invasion in (1) is intended to be broader enough to be gender-neutral, which implies men also may be victims of rape and not only women. The incapacity to give consent described in (2) may be affected by natural, induced or age related incapacity.[122]

In addition to elements of rape found in national laws, the ICTR and ICTY jurisprudence has significantly influenced the definition of the crime of rape in the EoC of the ICC[123] The adoption of this sort of definition reflects the type of cases that are going to be brought before the court in the future. The cases of *Akayesu*, and *Furundzija* heavily influenced the ICC delegates.[124]

The *actus reus* of rape centers on the concept of "invasion", such an invasion needs to be a result in the penetration of body parts by other body parts or objects. In putting together this definition on whether "penetration" or "invasion" should be included on the same, a number of delegates and NGO's favored "penetration" because "invasion" was considered to be vague and potentially incompatible with their national laws.[125]

And therefore the first part of the element refers to penetration of 'any part of the body of the victim or of the perpetrator with a sexual organ', and the second part refers to the penetration of the 'anal or genital opening of the victim with any object or any other part of the body.'

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[121] A document written by representatives of UN Member States. *Also see* K. Boon, *Rape and Forced Pregnancy under the ICC Statute: Human Dignity, Autonomy, and Consent*, 32 Colum Hum Rts L Rev 625, at 637-38 (2001).

[122] *See* International Criminal Court, Elements of Crimes, UN Doc. PCNICC/2000/1/Add.2 (2000) n. 15 & 16 of Art. 7(1)(g)(1) http://www1.umn.edu/humanrts/instree/iccelementsofcrimes.html.

[123] De Brouwer, *supra note* 30, at 130.

[124] Some Authors as Ruckert and Witschel (*see* W. Ruckert & G. Witschel, *Genocide and Crimes Against Humanity. The Elements of Crimes*, *in* H. Fischer, C. Kreß & S. R. Luder (Eds.), International and National Prosecution of Crimes Under International law: Current Developments, 59 (2001)) suggest that the ICC followed a more closely definition of rape as established by *Akayesu* judgment.

[125] Twenty-four States were recorded to favor the concept of "invasion", which they considered to be more neutral. A group of vocal states including France, the Netherlands, and the United States argued against its use and favored the concept of "penetration" *see* Boon, *supra note* 121.

The *mens rea* provided under Article 30 the ICC Statute applies to the two elements of the definition of rape[126] as "[p]erpetrator intended to invade the body of a person by conduct resulting to penetration, however slight …"

The ICTY and ICC definitions are based on domestic rape laws, which assume that consent is always a possibility. It is based on the understanding that individuals are able to make rational and informed decisions regarding their well-being and that they have the opportunity to do so in a non-coercive environment. Under the ICTR definition, the defendants would be limited to arguing that the circumstances in which the act occurred were not coercive or, if they were superiors far removed from the fighting, that they were not responsible for creating the coercive circumstances.[127]

4. Rules of Procedure and Evidence

In the aftermath of rape a victim is always confronted with the decision whether to testify against her perpetrator(s) in court. This is always the toughest thing to do because the victim is reminded of what the individual(s) did to him or her, bringing back the pain, anger and fear for as we have discussed in this study rape is a traumatizing experience and therefore victims are reluctant to speak about their experience.

For this reason International Tribunals have but in place suitable protection for the victims including protection from being battered by the defense council in court.

In this section we will spell out those provisions that are followed by the ICTR, ICTY and ICC when faced with this situation.

The relevant provisions are found in the Rule of Procedure and Evidence of the ICTY/R, Rules 69, 75 and 96,[128] and the ICC Rules 71, 72 and 87.[129] These rules are important because they protect the victims and witnesses provided that the measures are consistent with the rights of the accused and allow for in camera proceedings in certain instances during the criminal proceedings. These rules are extremely important because of the nature and severity of the crime of rape where the victims were raped and severely traumatized by their experiences. Rule 96 of the ICTY/R Rules of Evidence and Procedure states:

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[126] Rape as a crime against humanity. Rape is not a crime of its own in all the statutes of the ICTR, ICTY, ICC which is the argument that this study emphasizes that it should, because it is *ius cogens* and a norm of customary international law (satisfying state practice and *opinio juris*)

[127] Th. Hansen-Young, *Defining Rape: A Means to Achieve Justice in the Special Court for Sierra Leone*, 6 Chi. J. Int'l L. 479 (2005).

[128] Rules of evidence and procedure provided under the two statutes are verbatim. *Measures for the Protection of Victims and Witnesses* (Proceedings Before Trial Chambers). *See* http://65.18.216.88/ENGLISH/rules/260600/ (ICTR Rules of Procedure and Evidence), http://www1.umn.edu/humanrts/icty/ct-rules7.html (ICTY Rules of Procedure and Evidence).

[129] ICC Rules of Procedure and Evidence. *See* http://www1.umn.edu/humanrts/instree/iccrulesofprocedure.html.

> In cases of sexual assault:
>
> (i) Notwithstanding Rule 90 (C), no corroboration of the victim's testimony shall be required
> (ii) Consent shall not be allowed as a defense if the victim:
> (a) Has been subjected to or threatened with or has had reason to fear violence, duress, detention or psychological oppression; or
> (b) Reasonably believed that if the victim did not submit, another might be so subjected, threatened or put in fear;
> (iii) Before evidence of the victim's consent is admitted, the accused shall satisfy the Trial Chamber in camera that the evidence is relevant and credible;
> (iv) Prior sexual conduct of the victim shall not be admitted in evidence or as defence."

The ICC Rules of Procedure and Evidence provides the same spirit of the law behind the ICTY/R rules, however in a different format. Rule 71 provides:

> In the light of the definition and nature of the crimes within the jurisdiction of the Court, and subject to article 69, paragraph 4, a Chamber shall not admit evidence of the prior or subsequent sexual conduct of a victim or witness.

Rule 72 provides for In camera procedure to consider relevance or admissibility of evidence, it reads:

> 1. Where there is an intention to introduce or elicit, including by means of the questioning of a victim or witness, evidence that the victim consented to an alleged crime of sexual violence, or evidence of the words, conduct, silence or lack of resistance of a victim or witness as referred to in principles (a) through (d) of rule 70, notification shall be provided to the Court which shall describe the substance of the evidence intended to be introduced or elicited and the relevance of the evidence to the issues in the case.
> 2. In deciding whether the evidence referred to in sub-rule 1 is relevant or admissible, a Chamber shall hear in camera the views of the Prosecutor, the defense, the witness and the victim or his or her legal representative, if any, and shall take into account whether that evidence has a sufficient degree of probative value to an issue in the case and the prejudice that such evidence may cause, in accordance with article 69, paragraph 4. For this purpose, the Chamber shall have regard to article 21, paragraph 3, and articles 67 and 68, and shall be guided by principles (a) to (d) of rule 70, especially with respect to the proposed questioning of a victim.
> 3. Where the Chamber determines that the evidence referred to in sub-rule 2 is admissible in the proceedings, the Chamber shall state on the record the specific purpose for which the evidence is admissible. In evaluating the evidence during the proceedings, the Chamber shall apply principles (a) to (d) of rule 70.

The *Tadic*[130] case will illustrate this preposition. The Trial Chamber while discussing the impact of rape to its victims the court stated that:

> A fair trial means not only fair treatment to the defendant but also to the prosecution and to the witnesses. A fair trial requires the opportunity to fairly prove the guilt as much as the innocence of the accused. A trial, which retraumatizes witnesses and prevents a proper presentation of inculpatory evidence, is just as unfair as a trial

[130] Prosecutor *v.* Dusko Tadic, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, Case no. IT-94-1-T, 10 August 1995, para. 46.

> in which the accused is prevented from putting forward a proper defense. While the accused is facing imprisonment, potentially for the rest of his or her life, the victim or witness may be facing retraumatization and retaliation, including death, by participating in the judicial process. Both articles 67 and 68 are designed to achieve a fair trial in the full sense of the term.[131]

When all the provisions are looked at together, it is clear that a balance must be struck between the rights of the accused and the interests of victims and witnesses, but with emphasis placed on the rights of the accused. The Statute embodies the highest standards of defendants' rights as derived from the International Covenant on Civil and Political Rights,[132] while balancing these rights against the interests of victims and witnesses. In general, the balance struck in the ICC Statute will provide a good basis for preserving the integrity of the proceedings while ensuring that witnesses come forward to testify a *sine qua non* for the functioning of any justice system.

These rules as articulated above are consistent with the general principles of Criminal Law. However, they ensure more protective and dignifying trial procedures.

E. Prosecution of Rape Under the Universal Jurisdiction Principle

This section will examine the Universal jurisdiction and the *aut dedere aut judicare* rule, and the rationale of prosecuting rape under this principle.

Universal jurisdiction has two important related, but conceptually distinct rules of international law. Universal jurisdiction is the ability of the court of any state to try persons for crimes committed outside its territory which are not linked to the state by the nationality of the suspect or the victims or by harm to the state's own national interests.[133] Sometimes this rule is called permissive universal jurisdiction. This rule is now part of customary international law, although it is also reflected in treaties, national legislation and jurisprudence concerning crimes under international law, ordinary crimes of international concern and ordinary crimes under national law. As explained above, when a national court is exercising jurisdiction over conduct amounting to crimes under international law or ordinary crimes of international concern committed abroad, as opposed to conduct simply amounting to ordinary crimes, the court is really acting as an agent of the international community enforcing international law.

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131 *Id*. at para. 55

132 *See* Art. 14 of the ICCPR, 1976.

133 Other definitions are similar. *See, for example*, M. T. Kamminga, *Final Report on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences*, Committee on International Human Rights Law and Practice, International Law Association, London Conference 2000 (Final ILA Report) 3 ("Under the principle of universal jurisdiction a state is entitled or even required to bring proceedings in respect of certain serious crimes, irrespective of the location of the crime, and irrespective of the nationality of the perpetrator or the victim.")

Under the related *aut dedere aut judicare* (extradite or prosecute) rule, a state may not shield a person suspected of certain categories of crimes. Instead, it is required either to exercise jurisdiction (which would necessarily include universal jurisdiction in certain cases) over a person suspected of certain categories of crimes or to extradite the person to a state able and willing to do so or to surrender the person to an international criminal court with jurisdiction over the suspect and the crime.[134] As a practical matter, when the *aut dedere aut judicare* rule applies, the state where the suspect is found must ensure that its courts can exercise all possible forms of geographic jurisdiction, including universal jurisdiction, in those cases where it will not be in a position to extradite the suspect to another state or to surrender that person to an international criminal court.[135]

The International Law Commission which, has incorporated the *aut dedere aut judicare* rule in the 1996 Draft Code of Crimes against the Peace and Security of Mankind (1996 Draft Code of Crimes) has explained the principle and its rationale as follows:

> The obligation to prosecute or extradite is imposed on the custodial State in whose territory an alleged offender is present. The custodial State has an obligation to take action to ensure that such an individual is prosecuted either by the national authorities of that State or by another State which indicates that it is willing to prosecute the case by requesting extradition. The custodial State is in a unique position to ensure the implementation of the present Code by virtue of the presence of the alleged offender in its territory. Therefore the custodial State has an obligation to take the necessary and reasonable steps to apprehend an alleged offender and to ensure the prosecution and trial of such an individual by a competent jurisdiction. The obligation to extradite or prosecute applies to a State, which has custody of 'an individual alleged to have committed a crime.' This phrase is used to refer to a person who is singled out, not on the basis of unsubstantiated allegations, but on the basis of pertinent factual information.[136]

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[134] *See generally* M. Henzelin, Le Principe del'Universalité en Droit Pénal International: Droit et Obligation pour les Etats de Poursuivre et Juger Selon le Principlede l'Universalité (2000). M. Ch. Bassiouni & E. M. Wise, Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law 3-5 (1995); M. Ch. Bassiouni, T*he Sources and Content of International Criminal Law: A Theoretical Framework*, *in* M. Ch. Bassiouni (Ed.), International Criminal Law 3, at 5 (1999); H. Donnedieu de Vabres, Introduction à l'étude du droit pénal international: essai d'histoire et de critique sur la compétence criminelle dans les rapports avecl'étranger 183 (1922).

[135] Every state could face this eventuality at some point. For example, no other state might seek an alien suspect's extradition and no international criminal court might have jurisdiction over the crime or the suspect or the case might be inadmissible for some reason in such a court. Therefore, as a practical matter, the view of some that the *aut dedere aut judicare* rule today does not require a state to exercise universal jurisdiction is not strictly correct. It is true that some early treaties expressly imposed an *aut dedere aut judicare* obligation only with respect to suspects who were nationals of the requested state. Now, however, the usual rule is to impose such an obligation regardless of the nationality of the suspect. Therefore, in some cases, the principle will require the exercise of territorial or other principles of extraterritorial jurisdiction; in other cases, however, the only way the requested state will be able to fulfill its obligations under international law will be to exercise universal jurisdiction. Indeed, almost every treaty imposing an *aut dedere aut judicare* obligation expressly requires states parties to provide for universal jurisdiction in the event that extradition is not possible.

[136] 1996 Draft Code of Crimes, Commentary to Article 8, para. 3. International Law Commission,

Rape is therefore a *ius cogens* norm and has attained the sataus of an international crimes as, war crimes, crimes against humanity, genocide and torture. By exercising universal jurisdiction in punishing the offenders of rape States will be therefore punishing a breach of international law.[137]

F. Conclusion and Recommendations

I. Conclusion

This article aimed at addressing the *obligatio erga omnes* of rape as a *ius cogens* norm. We have proved that rape is a constituent element of every accepted *ius cogens* norm and therefore obligations *erga omnes*. The examined jurisprudence of the ICTY, ICTR and ICC on rape affirms our hypothesis that there is sufficient legal authority to back up this premise that rape is a *ius cogens* norm. We have also explained the harm of rape to victims and the historical treatment of the crime.

We also raised issue as to whether the crime of rape has really attained a right of its own as a *ius cogens* norm under international law and if not whether the international jurisprudence recognizing rape in the context of a crime against humanity or genocide, fails to identify rape and other sexual abuses as a form of persecution in violation of victims human rights. This issue has been affirmatively proven *de jure* on how serious and heinous rape is and to allow States to treat rape as a domestic criminal offense rather than a peremptory norm ignores this *de facto*.

Hence this article concludes that the failure to list rape as a grave breach in its own right has unfortunately sent the signal that States are not required to prosecute them as the most serious crimes, such as, genocide, war crimes and crimes against humanity. The establishment of the ICTY, ICTR and now the ICC has brought about a number of significant developments with regard to addressing serious crimes of violence against victims through international criminal law. The Statutes of the two ad hoc tribunals and the permanent criminal court have incorporated gender-based violence in a relatively limited way; they included rape as a crime against humanity only and not as a war crime. They have also expanded the definitions of rape and developed procedures for the prosecution of the same through jurisprudence. It is our opinion that rape now is a crime that has attained its own status – a *ius cogens* norm.

Since rape is a *ius cogens* norm, binding on national jurisdictions, the definition of rape as defined by international jurisprudence should be the one that trumps the definition of rape by national jurisdictions. The international rape law includes

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Report of the International Law Commission on the Work of its Forty-Eighth Session, 51 UN G.A.O.R. Supp. (N.10) at 9, UN Doc. A/51/10 (1996).

[137] *See* Brownlie, *supra note* 66, at 308. *See also* T. Hillier, Principles of Public International Law 137 (1999); Malanczuk, *supra note* 79, at 113 (agreeing with Brownlie that war crimes and crimes against humanity "are a violation of international law, directly punishable under international law itself" (and thus universal crimes)).

an expansive definition of rape. Most rape domestic jurisdiction definitions have resulted to perpetrators being acquitted of rape under the international rape standard despite overwhelming evidence that rape was committed just because there is insufficient evidence of physical force.

In the United States state of Ohio case of *State v. Schaim*[138] a father was acquitted of rape despite a long-standing pattern of incest because the court held that there was insufficient evidence of physical force. The court gave some consideration to the pattern of incest between the father and his daughter, but found that such a pattern would not substitute for the statutory requirement of physical force. This case illustrates the extent to which the force requirement may comprise an undue evidentiary burden for victims of sexual violence. The broader definition of rape under international jurisprudence, i.e., 'the willful causing of great suffering or serious physical injury" would have qualified the element of force under domestic rape law and hence Schaim[139]could have different results.

In the state of Montana case *State v. Thompson*[140] explains the inadequacy of the rape construction under national jurisprudence of rape. In this case a high school principal used the threat of academic failure to procure sex from the student. The court held that the behavior did not constitute rape because the student was over the age of consent[141] and there was no evidence of physical force. It is our view that if that force requirement could have considered the threat paused by the accused in this case which was in the form of coercion and the bargaining power between the parties, such as the student—teacher relationship, age and the broader construction of rape, 'willful causing of great suffering', this case could have been decided differently. In the two above cases, such a definition of rape would have permitted the court to consider more fully the prominent effect of coercion and a more individuated analysis of what causes psychic pain and suffering.[142]

The Inter-American Court of Human Rights (IACtHR) decision of *Raquel Marti de Mejia v. Peru*[143] is often cited as the authoritative interpretation of the American Convention's prohibition of rape as a *ius cogens* norm. Raquel Mejia was a principal of a school for the handicapped in Peru who was raped by a member of a counterinsurgency unit of the Peruvian military. The IACHR acknowledged that rape could rise to the level of torture, an aggravated form of inhumane treatment, which is prohibited by Article 5(2) of the American Convention, which reads,

> No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.

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138 600 N.E.2d 661, 665 (Ohio 1992).
139 *Id.*
140 792 P.2d 1103 (Mont. 1990).
141 Under Montana statute, sex without consent occurs if the victim is less than 15 years old.
142 P. D. Seawell, *Rape as a social construct: A comparative analysis of rape in the Bosnian and Rwandan Genocides and U.S. domestic Law*, 18 Nat'l Black L.J. 180, at 192 (2003).
143 Case 10.970, Report No. 5/96, Inter-Am.C.H.R., OEA/Ser.L/V/II.91 Doc. 7 at 157 (1996) also found at http://www1.umn.edu/humanrts/cases/1996/peru5-96.htm (last visited 24 March 2006).

The IACHR explained, "Raquel Mejia was a victim of rape, which caused her physical pain and suffering … [she] was raped with the aim of punishing her personally and intimidating her …"[144]

The status of rape as a i*us cogens* norm that is *erga omnes* enables States to exercise universal jurisdiction. This legally means that it is an obligation owed to the community of States and all States have a legal interest in its protection notwithstanding either national and/or territorial jurisdiction. It is our opinion that once national jurisdictions attain this level of understanding it will contribute to the discouragement of future offenders of the crime. It will create consistency in the application of law, expedite trials and minimize court expenses. Defendants will be able to be prosecuted in any State, not necessarily in the jurisdiction where rape was committed and there will be no need to extradite the accused to the country where the subject is a national.

II. Recommendations

This discussion has shown that rape has been acknowledged as one of heinous crimes and hence elevated to a *ius cogens* norm that has created *obligatio erga omnes*. Since the definition of rape under domestic jurisdictions has contributed in making perpetrators of rape either go free or get mediocre sentences, betraying the victims who have been stripped off of their dignity, destroying their sense of self and humanity as a whole, the definition of rape under International jurisprudence should be the applicable law.

Domestic laws should therefore embody the definition of rape that is consistent with the international jurisprudence of rape as provided under Article 7(1)(g)(1) of the Elements of Crime of the ICC.[145]

> (1) The perpetrator invaded[146] the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any other part of the body.
> (2) The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse or power, against such a person or another person, or taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent."[147]

This definition improves on domestic definitions of rape because of the following reasons, first, the definition is gender-neutral meaning that rape can be committed or otherwise facilitated by a female or a male perpetrator, and the victim can be either female or male. Second, the definition includes acts of penetration by objects or other body parts, not just the penis (as in many domestic definitions of

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144 *Id.*

145 ICC-ASP/1/3 *also see* http://www.un.org/law/icc/asp/1stsession/report/english/part_ii_b_e.pdf (last visited 24 March 2006).

146 The concept of "invasion" is intended to be broad enough to be gender neutral.

147 It is understood that a person may be incapable of giving genuine consent if affected by natural, induced or age-related incapacity.

rape)[148] it also includes forced oral and anal penetration.[149] Third, the definition focuses on the actions of the perpetrator rather than the victim. This is achieved by focusing on the force, threat of force or coercive circumstances used by the perpetrator, rather than the consent or lack of consent of the victim.[150] Fifth, the definition covers non-physical coercive circumstances. Therefore, it is not necessary to show that the perpetrator employed overwhelming physical force to establish that rape occurred, which has to be established in some domestic jurisdictions.[151]

Including this jurisprudence on rape in domestic jurisdictions will ensure the end to impunity for perpetrators of rape and will also allow domestic courts to prosecute rape under the Universal Jurisdiction principle as we have discussed under section E of this article.

The rules of procedure and evidence under international jurisprudence of rape as we have elaborated under section D.II.4 should also be adopted by domestic jurisdictions. This will not only balance the between the rights of the accused and the interests of the victims and witnesses, but also emphasizing on the rights of the accused. In the recent high profile rape case of Mr. Jacob Zuma the former Deputy President of South Africa, there has been a discrepancy between the rights of the accused *vis-à-vis* those of the victim. In the last hearing,[152] the victim (woman) was subjected to a wholesale examination of her sexual history. The prosecution failed to object to any of these questions, essentially leaving the complainant at the mercy of the court. Unfortunately, the court failed to extend any protection. Complaint's past sexual history was attacked by the defense, information the she had been raped four times since her childhood; reports that she had been in therapy after her father's death; details of when last she had sex

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[148] K. D. Askin, *Sexual Violence in Decisions and Indictments of the Yugoslav and Rwandan Tribunals: Current Status*, 93 The American Journal of International law, at 97 (1999) *see also* S. Goonesekera, *Constitutional and Legislative Measures to Combat Violence Against Women in South Asia*, *in* UNFPA, Violence Against Women in South Asia: A regional analysis (2002) at 40 available at http://www.unfpa.org.np/pub/vaw/VAW_REG_Analysis.pdf (last visited 24 March 2006).

[149] The case of *Furundzija* at the ICTY found that some domestic jurisdictions consider this rape and others do not. The Trial Chamber found that "forced penetration of the mouth by the male sexual organ constitutes a most humiliating and degrading attack upon human dignity … such an extremely serious sexual outrage as forced oral penetration should be classified as rape." Prosecutor *v*. Furundzija, *supra* note 112, at para. 183.

[150] *See* P. Spees, *Women's Advocacy in the Creation of the International Criminal Court: Changing the Landscapes of Justice and Power*, 28 Signs: Journal of women and culture and Society, at 1233 (2003).

[151] Special Rapporteur on violence against women, its causes and consequences, Integration of human rights of women and the gender perspective: Violence against women. UN Doc. E/CN.4/2003/75 (2003) found at http://72.14.203.104/search?q=cache:fDRg6yzVNPEJ:www.stopvaw.org/printview/International_Legal_Framework__The_United_Nations.html+UN+Doc.+E/CN.4/2003/75+(2003)&hl=en&gl=us&ct=clnk&cd=2 then click 'Special Rapporteur, 2003 Report of the Special Rapporteur on Violence Against Women, (last visited 24 March 2006).

[152] Reported in the Sunday Times March 19, 2006, http://www.sundaytimes.co.za/articles/article.aspx?ID=ST6A172562.

and how many people she had sex with; her sexual orientation and so forth.[153] It is this article's submission that the Tribunals' Rules and Evidence provide a more logical procedure of admitting evidence in a rape trial?[154] One author had this to say about the treatment of rape victims and witnesses on domestic rape trials:

> I spent one year listening to sound recordings of [national] sexual assault trials. I heard women give their evidence and through the court process play the role of complainant, accuser, victim and survivor … There were days when what I heard brought tears to my eyes, nausea to my stomach and shame – that I participate in a profession that takes degradation, dresses it up in cloaks promoting its status, buries it in a complex exclusive language and enshrines it in statute books … The day I heard a complainant vomit in the witness box … was the day I was convinced that things have to change.[155]

Incorporating these provisions of procedure and evidence from international criminal law on rape will ensure a dignified way of conducting and hearing rape cases in domestic jurisdictions and the this article's submission, *obligatio erga omnes* of rape as a *ius cogens* norm will be fully realized.

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[153] *Id.*

[154] *See* Rule 96 (iv) of the ICTY/R Rules of Procedure and Evidence and Rule 71 of the ICC Rules of Procedure and Evidence.

[155] P. van de Zandt, *Heroines of Fortitude*, *in* P. Easteal (Ed.), Balancing the Scales: Rape, Law Reform and Australian Culture (1998) at 103.