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SEXUAL VIOLENCE AND PEREMPTORY NORMS: THE LEGAL VALUE OF RAPE

*Patricia Viseur Sellers**

Today, I will address whether sexual violence is a peremptory norm under international law. After the establishment of the ad hoc tribunals for the Former Yugoslavia and for Rwanda, crimes of sexual violence have attained more visibility and received marked importance in terms of prosecution under humanitarian law. I would like to inquire just how high up the legal hierarchy rape has traveled, and more specifically, what is the legal value that international law attaches to the act of rape?

Prosecution of international crimes took a giant leap forward in the past ten years. The *ad hoc* Tribunals are now in the “leadership phase” of their prosecutions. Former heads of state such as Slobodan Milosevic, past President of Serbia, and the former members of the collective Bosnian Serb Presidency, Mr. Krajisnik, and Ms. Plavsic¹ are, or will, soon be on trial. Moreover, the Prosecutor is urgently calling for Bosnian Serbs, Mr. Karadzic and General Mladic, to surrender or to be arrested and flown to The Hague.

At the Rwanda Tribunal, several trials involving multiple accused, representing various segments of society, are underway. The Media Trial alleges that Radio Télévision Libre des Mille Collines (“RTL”²) continuously incited Hutus to kill “roaches,” meaning, kill the Tutsi population.² In the Government Trial, the accused range from the Minister of Defense's assistant to various cabinet members who, the Prosecution

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¹Ms. Plavsic pleaded guilty to one count of crimes against humanity and was sentenced to eleven years imprisonment. See Prosecutor v. Plavsic, Sentencing Judgement, I.C.T.Y., No. IT-00-39&40/&-S, 27 (2003), available at <http://www.un.org/icty/plavsic/trialc/judgement/index.htm> (last visited Oct. 14, 2003).

² Prosecutor v. Nahimana, Indictment, I.C.T.R., No. ICTR-96-11 (1999), available at <http://www.ictcr.org> (last visited Sept. 21, 2003) [hereinafter Media Trial].

alleges, initiated the political machinery of genocide.³ Other accused are priests or pastors, highlighting the alleged involvement of persons from the religious institutions. Previous Rwanda trials have prosecuted local politicians and members of the business community. The *ad hoc* Tribunals are undoubtedly fulfilling their mandate to investigate and indict the top political and military leadership.

Beyond the *ad hoc* Tribunals, the entry into force of the Rome Statute⁴ and the recent functioning of the International Criminal Court assure the likelihood that prosecution of international crimes will continue in the future. In addition, universal jurisdiction as captured in the Princeton Principles⁵ and exercised by the indictments of Spanish and Belgian magistrates has put flesh on the legal bones of international surveillance exercised at the national level. Have these affirmative developments contributed to the legal value of sexual violence?

In my article, "Cultural Value of Sexual Violence," I trace the evolution of prohibitions of sexual violence, including rape, during armed conflict.⁶ I argue that sexual violence was outlawed in conformity to the shifting legal cultural values of patriarchal society. The article posits that sexual violence, particularly rape, is prohibited, along with other war crimes, in order to preserve the functioning of Medieval society and to allow, whoever won the war, the possibility to reap an intact society. Waves of rape and other forms of destruction crippled the civil societies that were fated to function in an age of endemic wars. Paradoxically, Medieval wartime rape was legal when armies employed the military tactic of a lawful siege. During a siege, rape and other crimes were part of the legal military means to a political end.

³ Prosecutor v. Bizimungu, Indictment, I.C.T.R., No. ICTR 99-50-I (1999), available at <http://www.ictr.org> (last visited Sept. 19, 2003); Prosecutor v. Bizimana, Indictment, I.C.T.R., No. ICTR 98-44-I (2001), available at <http://www.ictr.org> (last visited Sept. 19, 2003) [hereinafter Government Trial].

⁴ The Rome Statute of the International Criminal Court, July 17, 1998, U.N. Doc. A/CONF. 183/9 (1998), 37 I.L.M. 999, available at <http://www.un.org/law/icc/statute/rome.htm> (last visited Sept. 17, 2003) [hereinafter Rome Statute].

⁵ See generally PROGRAM IN LAW AND PUBLIC AFFAIRS, PRINCETON UNIVERSITY, THE PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION (2001), available at http://www.princeton.edu/~lapa/unive_jur.pdf (last visited Aug. 21, 2003). See also, AFRICA LEGAL AID, CAIRO-ARUSHA PRINCIPLES ON UNIVERSAL JURISDICTION IN RESPECT OF GROSS HUMAN RIGHTS OFFENCES: AN AFRICAN PERSPECTIVE (2002).

⁶ Patricia Viseur Sellers, *Cultural Value of Sexual Violence*, 93 AM. SOC'Y INT'L L. PROC. 312 (1999).

I also point out in the article that according to Article 46 of The Hague Convention of 1907, rape was prohibited during times of occupation in order to promote pacification of the conquered population and thus reduce the exposure of occupying forces to retaliation by civilians.⁷ After World War I, because women were recognized as increasingly vital to national war efforts and exposed to capture, the 1929 Geneva Convention that governed prisoners of war inserted a provision to ensure that women prisoners of war would be treated with all consideration due to their sex.⁸ At the end of World War II, similar provisions were drafted into the First, Second and Third Geneva Conventions of 1949.⁹ In the Fourth Convention, female civilians who fell into in enemy hands or were under occupation were protected from rape or enforced prostitution and insults of any kind, together with the general proscription against inhumane acts.¹⁰ The Additional Protocols of 1977 finally codified much of the prohibitions against sexual violence during international and internal wars.¹¹

The article ends by observing that parallel to the evolving position of women in society, sexual violence was outlawed during all phases of armed conflict. As a result, rape and sexual violence are not only prohibited, but cannot be condoned during a siege, justified by military necessity, nor considered collateral damage in proportion to legitimate military acts. I conclude by asking why, therefore, the prohibition of rape could not be recognized as a peremptory norm.¹² That inquiry begins this lecture.

⁷ *Id.* at 318 (citing Hague Convention with Respect to the Laws and Customs of War on Land, Oct. 18, 1907, art. 46, 36 Stat. 2277, T.S. No. 539).

⁸ *Id.* at 319 (citing 1929 Geneva Convention Relative to the Treatment of Prisoners of War, July 27, 1929, art. 3, 118 L.N.T.S. 343).

⁹ *Id.* at 321 (citing Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, art. 12, 75 U.N.T.S. 31 [hereinafter First Geneva Convention]; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, art. 12, 75 U.N.T.S. 85 [hereinafter Second Geneva Convention]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 14, 75 U.N.T.S. 135 [hereinafter Third Geneva Convention]).

¹⁰ *Id.* (citing Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 27, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention]).

¹¹ *Id.* at 322 (citing Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3; Protocol Additional to the Geneva Conventions of August, 12 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609).

¹² *Id.* at 324.

Peremptory norms reside at the apex or the summit of international law. Is the prohibition of rape among the most honored? Please note that I will use the terms *jus cogens* and peremptory norms interchangeably.

To understand the origins of *jus cogens*, one should return to post-Medieval Europe. Modern international law, and particularly international humanitarian law, admits to embracing foundations that are very Eurocentric. As noted in footnote 13 in my article, I was fortunate and very grateful to talk to Alex Obote-Odora, a Ugandan scholar and lawyer, who wrote his doctoral thesis on humanitarian law.¹³ Obote explained that European-based humanitarian law emerging in Europe during the 13th and 14th centuries and was preceded by humanitarian law precepts from the Middle East and Japan, dating from the seventh century, and from China, dating from the second century.¹⁴ These precedents, now "earlier modern" humanitarian law precepts, mainly military codes, regulated armed conflict and included prohibitions of sexual violence.

Our analytic roots of *jus cogens* remain European-based, mainly because international law's development of peremptory norms is wedded to the notion of the community of states. The recognition of a community of states started in the post-Medieval era that encompassed European countries and disregarded the legal input of the rest of the world. The initial international legal community consisted of European states and excluded African, New World, or Asian states, many of which were later subjected to European colonization.

At that juncture, and even today, the two primordial international law principles were that states were sovereign and that states were equal in their sovereignty. Hence, relations between states typically rested upon bilateral accords or treaties. Two equal states, because of recognized sovereignty, could enter into treaties that served their mutual interest. Whatever two states agreed upon, the principle of non-interference with the affairs of sovereigns demanded that their agreements be respected by all other states. When emphasis would shift ever so slightly to underscore the communal notion of the community of sovereign states, states would refer to notions international law. Multilateral treaties as well as bilateral accords and treaties thus were complimented by recognition of international customary law.

¹³ ALEX OBOTE-ODORA, *THE JUDGING OF WAR CRIMINALS: INDIVIDUAL CRIMINAL RESPONSIBILITY UNDER INTERNATIONAL CRIMINAL LAW* (1997).

¹⁴ Sellers, *supra* note 6, at n. 13.

Custom is a funny precept under international law. It derives not from an individual state, but from communal consensus. I like to refer to custom as similar to Quaker consent – basically, everyone looks at each other and nods in agreement. Custom is an obligation that is not necessarily placed in writing, even if it codified by treaty law. States under customary law act based upon that nodded agreement and indeed consider and articulate that nodded intra-state agreement as binding law. Even though states were and remained sovereign, with custom, states recognized obligations *vis a vis* other individual states and the community of states.

Customary law and treaties functioned in tandem. Two states that undertook a bilateral agreement that violated customary law could come under the scrutiny of third states. These communal obligations could and did override the ability of two states to enter into bilateral accords. To ensure that immutable customary norms that benefited the entire community would be respected, states started to develop notions of peremptory norms or values that could pre-empt agreements between states.¹⁵

The community of states thus identified interests that served the common good of the community, not only their individual sovereign interests. States are much like today's co-op owners, who permit each other to reside in separate apartment dwellings, but agree that concern for the community of residents includes indivisible vigilance for security of common areas such as the hallways, stairwells, or entry-ways. *Jus cogens* or peremptory norms were first used to secure communal interest.

The first common hallways that intra-state relationships concerned were freedom of the seas and facilitating the passage of intra-state diplomacy. States were mindful of the strictures of the common good. Why? Simply put, the passageway between many states was either by sea or by land. States needed to ensure that the high seas and overland travel were secure. Piracy threatened the commercial, military, and diplomatic use of the open seas and therefore the communal good. Additionally, if diplomatic representatives traveled overland, say, through my country to your country, my assurance of their safe passage would in the future invoke a communal reciprocity whenever my emissaries were required to travel through your territory to a third realm. Today's shuttle diplomacy is quite analogous and still requires notions of safe passage. Consequently, the

¹⁵ My discussion of the origins and application of *jus cogens* norms owes extended gratitude to the work of Lauri Hannikainen. See LAURI HANNIKAINEN, PEREMPTORY NORMS (JUS COGENS) IN INTERNATIONAL LAW: HISTORICAL DEVELOPMENT, CRITERIA, AND PRESENT STATUS (1988).

entry point for the early construct of *jus cogens* values became the strict outlawing of piracy and interference with diplomatic passage.

The modern concept of peremptory norms is defined in Article 53 of the Vienna Convention.¹⁶ The Vienna Convention is similar to the Uniform Commercial Code that codifies the regulation of commercial agreements. The Vienna Convention codifies the law that regulates how conventions are drafted and interpreted. Article 53 states that a “peremptory norm of general international law is a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted, and which can be modified only by a subsequent norm of general international law having the same character.”¹⁷

The plain meaning of the definition is not so plain. Article 53, in essence, claims that peremptory norms override all other legal values because they are the highest values that embody the interest of the community of states as a whole. Peremptory norms cannot therefore be derogated from and can only be replaced only by another peremptory norm of equal value to the community.

The International Law Commission¹⁸ – an august body, of gray-haired men and for the first time in fifty years, one woman – are mandated by the United Nations to oversee the progressive development of international law and its codification. The Commission interprets a rule of *jus cogens* to be so overriding that it deprives any conflicting situation or act of its legality. A *jus cogens* norm automatically renders what is contrary to it illegal.

The modern examples of this grandiose supreme legal entity are the crimes of genocide and piracy and the crimes and the human rights violations of slavery and torture. One could readily agree that today, no state or states could collude and enter into a treaty to commit genocide or piracy against a third country. All states have obligations *vis a vis* peremptory norms.¹⁹ In that way, peremptory norms or *jus cogens* function

¹⁶ Vienna Convention on the Law of Treaties, May 23, 1969, art. 53, 1155 U.N.T.S. 331, 344.

¹⁷ *Id.*

¹⁸ See G.A. Res. 174 (II), U.N. GAOR, 2d Sess., 123d mtg., at 105, U.N. Doc. A/519 (1947) (establishing the International Law Commission).

¹⁹ What is exactly the obligation that peremptory norms exact from a state, other than an absolute prohibition to engage in conduct that violates a peremptory norm, or is not settled. Whether states are obligated to suppress, prosecute and punish violations of peremptory norms through national or international tribunals, or at least denounce through normal diplomatic channels or international bodies remains unclear. M. Cherif Bassiouni states that he, and some scholars “support the proposition that an independent theory of universal

to identify and to uphold what is deemed to be the most serious and essential values of the community of states.

Like the gradual outlawing of rape and sexual violence under international humanitarian law, rules of *jus cogens* are also historically bound, reflecting the political and legal culture of their era. I offer an example. By 1825, the community of states acknowledged and acted upon a legal obligation to stop the international slave trade. The international slave trade was, by its nature, cross-boarder, but it mainly took place on the open oceans. States were comfortable with recognizing and accepting this peremptory norm because, similar to piracy's prohibition, banning of the slave trade extended the regulation of maritime traffic and passageways among countries. Simultaneously and contradictorily, halting the slave trade was not intended to impinge on domestic institutions of slavery. Slavery, in a sovereign's realm, remained legal because a state's treatment of its own citizens, and particularly a state's treatment of stateless people, disenfranchised people, i.e., slaves, did not concern other states. Domestic slavery, including the internal trade in slaves, was not governed by international law in the early 1800s.

Hence, the second peremptory norm of the community of states was prohibition of the international slave trade, but not the institution of slavery. Gradually, by the end of the nineteenth century, the abolition of domestic slavery became widespread. Legal scholars observe that by the 1930s, the institution of slavery and the slave trade were recognized and accepted as being part of the same peremptory norm. Attainment of *jus cogens* status for the prohibition of slavery was pegged to overriding political and economic interest as well as to legal values of the twentieth century. This evolution continued with the gradual recognition and acceptance that trafficking and other slavery-like institutions also were part of the peremptory norm prohibitions.

With that brief background on peremptory norms, how can one determine if the prohibition rape has attained peremptory norm status? First, it is fair to say there exists no acknowledged, exhaustive list of peremptory norms. What remains debate-free is that torture, genocide, and

jurisdiction exist with respect to *jus cogens* international crimes," leading to the conclusion that to peremptory norms that are also international crimes, might invoke concrete option if not obligations under a regime of universal jurisdiction to prosecute. M. Cherif Bassiouni, *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice*, 42 VA. J. INT'L L. 81, 104 (2001). Christine Chinkin notes that, "some jurist have argued that all states have a legal interest and consequently standing to complain in international for a about violations of *jus cogens* by another state, Hilary Charlesworth & Christine Chinkin, *The Gender of Jus Cogens*, 15 HUM. RTS. Q. 66 (1993).

slavery are accepted as peremptory norms that can only be modified by a subsequent norm having the same character. States, according to non derogatory obligations, cannot commit nor condone other states that torture, commit genocide, or enslave.

For this reason, the U.S. State Department under President Clinton, cautiously avoided officially characterizing the upheaval in Rwanda as genocide. Official recognition would have obligated the United States to act. In all fairness, or more accurately in complete unfairness to Rwandans, one has to admit it was not only the United States that refrained from using the "G" word.

Belgium, where I live, has invoked its international obligations and has decided to prosecute Rwandans for war crimes and acts of genocide. Two Roman Catholic nuns and a Rwandan businessman were convicted last year for their participation in genocide.²⁰ Belgium did not have territorial jurisdiction, although arguably it had *in personam* jurisdiction because the accused had been hiding, and were arrested, in Belgium.²¹ Obligations to uphold peremptory norms do influence intra-state actions.

It can be posited, that acts of sexual violence are already characterized as components of *jus cogens* obligations. Sexual violence has been held to satisfy elements of torture in several cases. Under the jurisprudence of the European Court of Human Rights and the Inter-American Court of Human Rights, rape has been interpreted as an act of torture, a human rights violation. In *Aydin*, the European Court of Human Rights found that acts of rape constituted torture in violation of European Convention of Human Rights.²² The Inter-American Commission found in the case of *Mejia* that the rapes inflicted by the security force violated her human rights in regard to torture.²³ Since the prohibition of torture is a peremptory norm, arguably, the rapes under *Aydin* and *Mejia* formed part of the violation of that norm.

²⁰ See Linda Keller, *Belgian Jury to Decide Case Concerning Rwandan Genocide*, AMERICAN SOCIETY OF INTERNATIONAL LAW (May 2001), at <http://www.asil.org/insights/insigh72.htm> (last visited Sept. 17, 2003).

²¹ See *id.*

²² *Aydin v. Turkey*, 1997-IV Eur. Ct. H.R. 23178/94.

²³ *Mejia v. Peru*, Case 10.970, Inter-Am. C.H.R. 157, OEA/ser. L./V/II 91, doc. 7 rev. (1996).

At the Yugoslav Tribunal, the *Celebici* case concerned a Muslim-run detention center where Serbian men and women were sexually assaulted.²⁴ Women were raped by the camp authorities. The Trial Chamber held that the rapes were acts of torture.²⁵ In *Furundzija*, the Trial Chamber and the Appeals Chamber confirmed that acts of torture, consisted, in part, of rapes committed against a Bosnian female while she was interrogated.²⁶ Lastly, in *Kunarac*, the Trial Chamber and Appeals Chamber again upheld convictions for torture consisting of acts of sexual violence, and specifically rape.²⁷ Therefore, rape has been recognized under human rights and humanitarian law as an act satisfying the *actus reus* of torture, an accepted peremptory norm.

Similarly, one can demonstrate that sexual violence, including rape, is a component of genocide and therefore resides within its peremptory norm protection. The Rwandan Tribunal's jurisprudence in *Akayesu* recognized that sexual violence satisfied genocidal conduct.²⁸ The Trial Chamber found that the sexual violence was committed with the requisite intent to destroy the Tutsi population, in whole or part. Moreover, the rapes were committed to inflict serious bodily and mental harm to members of the group, namely Tutsi women, as prohibited Article 2(b) of the Genocide Convention.²⁹

The Yugoslav Tribunal's indictments against the leadership, Mr. Karadzic and General Mladic, and former member of the collective Presidency, Mr. Krajisnik, allege sexual violence under the genocide

²⁴ Prosecutor v. Delalic, Judgement, I.C.T.Y., No. IT-96-21/T (1998) at ¶¶ 7-25, available at <http://www.un.org/icty/celebici/trialc2/judgement/index.htm> (last visited Sept. 17, 2003) [hereinafter *Celebici* case].

²⁵ *Id.*

²⁶ Prosecutor v. Furundzija, Judgement, I.C.T.Y. No. IT-95-17/1T (1998), available at <http://www.un.org/icty/furundzija/trialc2/judgement/index.htm> (last visited Sept. 17, 2003); Prosecutor v. Furundzija, Judgement, I.C.T.Y., No. IT-95-17/1-A (2000), available at <http://www.un.org/icty/furundzija/appeal/judgement/index.htm> (last visited Sept. 17, 2003).

²⁷ Prosecutor v. Kunarac et al., Judgement, I.C.T.Y., No. IT-96-23/T (2001), available at <http://www.un.org/icty/foca/trialc2/judgement/index.htm> (last visited Sept. 17, 2003) [hereinafter *Kunarac* Trial Court]; See Prosecutor v. Kunarac et al., Judgement, I.C.T.Y. No. IT-96-23/1-A (2002), available at <http://www.un.org/icty/foca/appeal/judgement/index.htm> (last visited Sept. 17, 2003) [hereinafter *Kunarac* Appellate Court].

²⁸ Prosecutor v. Akayesu, Judgement, I.C.T.R., No. ICTR 96-4/T (1998), available at <http://www.ictr.org/ENGLISH/cases/Akayesu/judgement/akay001.htm> (last visited Sept. 3, 2003).

²⁹ *Id.* ¶¶ 698-734.

provisions of the Statute.³⁰ In addition, the former President of Serbia, Mr. Milosevic, faces charges of genocide, replete with sexual violence, including rape, for crimes committed in Bosnia.³¹ The Rome Statute uses sexual violence to illustrate the genocidal act called “causing serious bodily and mental harm to members of the group.”³² Certainly, rape conduct can now be interpreted as evidence that satisfies elements of genocide, a peremptory norm.

Moreover, sexual violence including rape can be evidence of enslavement, an accepted form of the peremptory norm of slavery. As mentioned earlier, in *Kunarac*, Bosnian women were held in a series of detention centers. A small group of women were reduced to slavery. The Trial Chamber convicted and the Appeals Chamber later confirmed the conviction of two accused for the crime of enslavement.³³ Ownership of the women, an element of enslavement, was primarily shown by the relentless and unconditional sexual access that the accused had to the women.³⁴

Thus, rape has been interpreted to establish conduct that proves elements of torture, slavery, and genocide under the jurisprudence of the *ad hoc* criminal tribunals and by regional human rights courts. It seems uncontested that acts of sexual violence fit within the prism of peremptory norms. I readily applaud that eminent jurisprudence; however, I suggest the result is a form of legal piggybacking. Prohibitions of sexual violence do not rise on their own volition, but enters by way of a non-explicit sexual crime, to reach the glory of *jus cogens*.

Beyond these true advances, and the incorporation of sex-based crimes in the Rome Statute, the community of states has not expressed a more poignant interest in accepting prohibition of rape, in and of itself, as a peremptory norm. These advances have not triggered articulation of any overriding community interest or obligations. States still do not “act obligated” in the face of present day massive trafficking of eastern European women or Asian women throughout Europe, that is essentially institutionalized rape. Therefore, my specific question still remains. Under

³⁰ Prosecutor v. Karadzic, Indictment, I.C.T.Y., No. IT-95-5-I (1995), available at <http://www.un.org/icty/indictment/english/kar-ii950724e.htm> (last visited Sept. 20, 2003); Prosecutor v. Krajisnik, Indictment, I.C.T.Y., No. IT-00-39 & 40-PT (2002), available at <http://www.un.org/icty/indictment/english/kra-cai020307e.htm> (last visited Sept. 20, 2003).

³¹ Prosecutor v. Milosevic, Indictment, I.C.T.Y., No. IT-01-51-I (2001), available at <http://www.un.org/icty/indictment/english/mil-ii011122e.htm> (last visited, Sept. 20, 2003).

³² Rome Statute, *supra* note 4, art. (6)(b).

³³ *Kunarac Trial Court*, No. IT-96-23/T; *Kunarac Appellate Court*, No. IT-96-23/I-A.

³⁴ See *Kunarac Appellate Court*, No. IT-96-23/I-A at ¶ 255.

international law as recognized by the community of states, can the prohibition of rape, standing alone, be deemed a peremptory norm?

Let us revisit the criteria for peremptory norms in Article 53 of the Vienna Convention.³⁵ To re-cap, in order identify a peremptory norm, there must exist a general norm of international law that is accepted and recognized by the international community as a whole. Norms of international law are rules, laws, custom, or principles. They must be universal, not just regional, norms. Peremptory norms create obligations on all states to not engage in proscribed conduct, and possibly, if the peremptory norm is an international crimes, to pursue, and suppress or punish the violations. Peremptory norms do not allow derogation, nor relent to *force majeure*, nor succumb in situations of emergency or distress. States cannot dissent, object, nor opt out of their obligations under the norm. Also, the state cannot subvert or disarm a *jus cogens* norm by consenting to its infliction. So, does the prohibition of rape meet the pre-requisites of peremptory norms?

First, let us determine if the prohibition of rape is a general norm of international law. Treaties and agreements can embody general principles of international law. General norms could also be evidenced by customary law. Scholarly writings or judgments, such as those of the International Court of Justice, the Yugoslav Tribunal, or the Rwanda Tribunal are, however, only a secondary or a subsidiary source of international law. They do not occupy the top rung of sources of law, no matter how important your law professor or my judges proclaim them to be. Scholarly writings and judgments might recognize or rely upon general norms in their conclusions, but they do not *a fortiori* create general norms of international law.

If conventions and custom are to be examined first to determine the general norms of international law, what international conventions expressly outlaw rape and trigger state obligations. First resort might be to look to the Geneva Conventions. I sing the legal praises of Article 27 of the Fourth Geneva Convention.³⁶ Article 27 especially protects women from rape, enforced prostitution and indecent assault of any kind during times of occupation and armed conflict. However, neither the express prohibition of rape in Article 27 nor the implicit prohibitions of rape in the First, Second or Third Geneva Conventions³⁷ are explicitly contained in any of the four

³⁵ Vienna Convention, *supra* note 16.

³⁶ Geneva Convention Relative to the Protection of Civilian Persons in Time of War , Aug. 12, 1949, art. 27, 75 U.N.T.S. 287.

³⁷ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, art. 12, 75 U.N.T.S. 31; Geneva Convention for

grave breaches provisions. When crimes are assumed to be war crimes, and those war crimes peremptory norms, it is the grave breaches to which undeniable reference is made.³⁸ Therein resides an important difference between the grave breaches and the non-grave breaches provisions. Under the grave breaches, states are obligated to pursue and to prosecute violations. Under Article 27, a non-grave breach provision, persons are to be protected from rape and other sexual violence, and states may not renounce their protection, but the state is not further obligated *vis a vis* such violations. Thus, although there is a norm to prohibit rape, there does not seem to exist an unremitting obligation beyond protective measures. This is a very technical, yet a technically correct reading of the Geneva Conventions.

Today, the Geneva Conventions have moved beyond their status as a multi-national treaty that binds only those states that have ratified their terms. The Geneva Conventions are recognized as customary international law. Article 27 must be seen within the body of customary law. Although customary international law is probably a pre-requisite, it is not automatically considered the equivalent of a peremptory norm. Even as a part of custom, and as a recognized general norm of humanitarian law, Article 27 does not clearly trigger the legal consequences of neither the grave breaches nor a peremptory norm. So, while Article 27 remains alive and harbors excellent potential use, it does not ensure the identification of rape as a peremptory norm.

One is tempted to assert that because Additional Protocol I extends the prohibitions of the Geneva Convention for international armed conflict and provides for protection against rape, in Article 76, we are "home free."³⁹ Article 76 protects women from rape; however, similar to Article 27 of the Fourth Geneva Convention, it does not have the legal status of the grave breaches provision, which is found in Article 85 of the Additional Protocol I.⁴⁰ Under Article 85, wherein State obligations are triggered, rape is not mentioned.⁴¹

the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, art. 12, 74 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 14, 75 U.N.T.S. 135.

³⁸See, A. Mark Weisburd, *The Emptiness of the Concept of Jus Cogens, As Illustrated by the War in Bosnia-Herzegovina*, 17 MICH. J. INT'L L. 1, 23, citing Brownlie Whiteman and Hannikainen.

³⁹ Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, art. 76, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I].

⁴⁰ *Id.* art. 85.

⁴¹ *Id.*

Additional Protocol II⁴² extends the protection granted persons caught in internal wars that was first articulated by Common Article 3 of the Geneva Conventions. In Article 4, the fundamental guarantees, infliction of rape, enforced prostitution, and indecent assault, are prohibited for men and women.⁴³ Additional Protocol II underscores that these sex-based crimes are absolutely prohibited at all times and under all circumstances. However, Additional Protocol II, unlike Additional Protocol I, has not been as widely ratified. Many countries, including the United States, do not recognize its provisions as binding under treaty or customary international law. Although any state would be denounced if it refuted the minimum guarantees embodied in Article 4 of the Additional Protocol II, it is also clear that states are not universally bound by, by customary law to Article 4 of the Additional Protocol II.

Thus, the prohibition of rape is a general norm under the treaty law of the Geneva Conventions and the Additional Protocols, and is a norm to the extent that these treaties are recognized as customary law. The norm does not appear to trigger consistent universal obligations. Hence, it is less than clear that rape stands as an independent peremptory norm under these leading humanitarian instruments.

Do the Statutes of the Yugoslavia Tribunal⁴⁴ and the Rwanda Tribunal⁴⁵ assist our analysis? Both expressly enumerate rape as a crime against humanity, following in the legal footsteps of Control Council No. 10⁴⁶ that governed some of the subsequent trials in World War II. However, the Yugoslavia and Rwanda Statutes are not multi-lateral treaties and they purposely exercise limited jurisdiction. One recalls that the Statutes have been criticized because they were drafted by UN civil servants on behalf of the Secretary-General as requested by the Security Council. The Statutes were not negotiated and then ratified by the community of states. The Yugoslav and Rwandan Statutes therefore do not obligate states, but only the organs of the Tribunals to prosecute, judge and

⁴² Protocol Additional to the Geneva Conventions of August, 12 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Additional Protocol II].

⁴³ *Id.* art. 4.

⁴⁴ S.C. Res. 808, U.N. SCOR, 48th Sess., U.N. Doc. S/Res/808 (1993) [hereinafter Statute of the Yugoslavia Tribunal or Yugoslav Statute].

⁴⁵ S.C. Res. 955, U.N. SCOR 49th Sess., U.N. Doc. S/RES/955 (1994) [hereinafter Statute of the Rwanda Tribunal or Rwanda Statute].

⁴⁶ Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, Dec. 20, 1945, 3 Official Gazette Control Council for Germany 50 (1946).

punish international crimes. The Statutes only obligate states to cooperate with the *ad hoc* Tribunals in terms of responding to subpoenas, assisting in arrests, or furnishing documents. Clearly, those obligations do not bind entire the community of states "act" in regard to any prohibition of rape, nor has the ensuing jurisprudence of the Tribunals opined that the prohibition of rape obtained peremptory norm status.

What about the Nuremberg and Tokyo Charters?⁴⁷ They are chiseled in stone and lawyers tend to put their hands across their heart when citing them, but they do not mention rape. That is not to say that sexual violence, including rape was not prosecuted under the Tokyo or Nuremberg Charters. When the International Law Commission formulated the Nuremberg Principles, derived from the Charters, rape was not expressly included. The Principles were eventually recognized as customary law. The absence of rape compounded the ambiguity of its status as a customary norm.

During the Commission's forty plus years of formulating another legal instrument, the Draft Code of Mankind,⁴⁸ the crime of rape was not expressly included until a re-wording of the Draft Code in 1994, in the wake release of the Yugoslav Statute. At this stage, the Draft Code, including the provisions on rape, could embody norms, but the Draft Code does not have the status of a multi-lateral treaty nor emanate binding obligations on the community of states.

By way of contrast, can the Rome Statute that includes rape under the provisions of international and internal war crimes, and crimes against humanity provide guidance? The Rome State was signed by a majority of states in the modern community of states. The Rome Statute is therefore a widely endorsed multi-lateral treaty that probably indicates general norms of international law. It binds ratifying states to prosecute international crimes first under their national jurisdiction and then under the provisions of the Rome Statute. However, its eventual- customary law status, reminiscent of Additional Protocol II, is hindered by states who remain persistent objectors to the treaty.

⁴⁷ Charter of the Nuremberg International Military Tribunal, Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279 [hereinafter Nuremberg Statute]; Charter of the International Military Tribunal for the Far East, Jan. 19, 1946, T.I.A.S. No. 1589, 4 Bevans 20 [hereinafter Tokyo Statute].

⁴⁸ *Report of the International Law Commission on the work of its forty-eighth session*, G.A. Res. 51/160, U.N. GAOR, 51st Sess., Supp. No. 49, at 333, U.N. Doc. A/51/49 (1996).

We have examined the prohibition of rape as a general norm inscribed in humanitarian law instruments. No independent peremptory norm for the prohibition of rape has been identified. Human rights law, the other significant body of international law, must also be examined.

With recourse to legal shorthand, I would like to list the human rights treaties that *do not* list rape as a violation: The Universal Declaration of Human Rights, the International Covenant for Civil and Political Rights, International Covenant of Economic and Social Rights, the Convention for Elimination and Discrimination Against Women, the Additional Protocol for the Convention for Elimination and Discrimination Against Women, the Convention for the Child, the Apartheid Convention, the European Convention of Human Rights, the African Charter of Human Rights, the American Declaration of the Rights of Man. Astoundingly, none of the leading human rights conventions expressly intone nor condemn rape as a human rights violation nor even mention the word "rape."

A lone contrast is found in the 1994 the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women.⁴⁹ Article 2, states that rape violates a person's human rights when it occurs in the family or in the community.⁵⁰ Article 7 of that Inter-American Convention requires the state to condemn, to pursue, to prosecute, to punish, and to eradicate rape.⁵¹ Article 18 only allows reservations to the Convention that are consistent with the purpose of the convention.⁵² Still, there are notable drawbacks. Article 27 allows states to denounce the Convention, noting that such denunciations can be recognized if they are serious and firmly persist during the whole year.⁵³ Also, the Convention is regional. It binds only the North and South American states that ratify its terms and not the entire community of states. The Convention, a welcomed step, is not evidence of the prohibition of rape as a peremptory norm, but rather evidence of an emerging, regional human rights norm.

Finally, one might discern norms about the prohibition of rape in the proliferation of resolutions passed by the General Assembly and the Security Council. The resolutions have deplored, denounced and condemned the rapes in Haiti, Afghanistan, Rwanda, Yugoslavia and Myanmar (Burma). The General Assembly of the United Nations is the

⁴⁹ Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, June 9, 1994, 27 U.S.T. 3301, 33 I.L.M. 1534.

⁵⁰ *Id.* art. 2.

⁵¹ *Id.* art. 7.

⁵² *Id.* art. 18.

⁵³ *Id.* art. 27.

embodiment of the modern community of states. The pronouncements in General Assembly resolutions, even if driven by politics and not conceived as treaty-law, evidence states opinion about international law and ensuing obligations. The Security Council is a sub-set among the community of states. Security Council resolutions are deemed more significant pronouncements that tend to reflect the grave interest of the community of states, as long as those interests of the permanent members are not challenged, resulting in a veto. The resolutions of the General Assembly, and the Security Council apparently identify the prohibition of rape as squarely within the community's interest.

However, it remains difficult to determine the legal weight conferred upon United Nations resolutions. The sources of law fixed under Article 38 of the ICJ,⁵⁴ which pre-dates the proliferation of United Nation resolutions, and even the modern spate of international criminal courts, seems moribund in light of states' participation in international organizations. The increasing United Nation resolutions, possibly aiding the transforming rape into a human rights violation, and urging its protection under humanitarian law still fall short of accepting the prohibition of rape as a peremptory norm, and of articulating concomitant obligations.

Lastly, the domestic law of every state in the world outlaws rape. How rape is defined under different jurisdictions varies. It is often inclusive of heterosexual rape and sometimes exclusive of marital rape or homosexual rape although irrespective of the definitions, domestic law is increasingly invoked for male survivors of rape. Unmistakably, there is a general norm of international law derived from municipal law regarding the illegality of rape. That general norm, of course, only binds each state to its own law. The United States federal law on rape does not bind Mexico to suppress, or punish or abstain from derogation in its own jurisdiction. Rape under New Jersey state law does not obligate Pennsylvania state, other than to possibly extradite New Jersey fugitives accused of rape. Municipal law does not "act" to protect the overriding interest of the international community in relation to the prohibition of rape. Hence, even the widely recognized municipal-derived general norm regarding rape does not translate into a peremptory norm.

In sum, there is a general norm prohibiting rape during times of armed conflict. Suppression of wartime rapes was invoked to preserve society, or promote pacification in occupied territories, and more recently to secure humane treatment of protected persons. Under every domestic or municipal jurisdiction, there is likewise a general norm prohibiting rape. Domestic

⁵⁴ Statute of the International Court of Justice, June 26, 1945, art. 38, 59 Stat. 1031, T.S. No. 993.

courts increasingly prosecute rape committed against a wider class of survivors. In contrast, there is no precisely articulated international human rights violation concerning rape even though the emerging jurisprudence of regional human rights courts refers to rape within the violation of torture and one regional human rights instrument explicitly proscribes it.

Article 53 of the Vienna Convention requires that a peremptory norm be recognized by the international community of states “as a whole” and that “no derogation” be permitted.⁵⁵ It is questionable whether a general norm of the prohibition of rape, in and of itself, in human rights law. It is likewise uncertain that the crime rape under humanitarian law has been considered, in and of itself, as imposing a non derogatory obligation on the community of states other than protection against its infliction. And quite frankly, rape has never been cited, heretofore, as a peremptory norm.

The *Celebici* judgment of the Yugoslav Tribunal, held rape to strike at the very core of human dignity and physical integrity.⁵⁶ Moreover, could one fathom two states entering into an agreement to rape persons in a third state, without the condemnation of the international community of States? If so, why has rape, whether a commonly committed national or international crime or perhaps an emerging human rights violations that is never justifiable, not crossed the peremptory norm threshold? Is the prohibition of rape’s inability to meet international law’s formalistic peremptory norm requirements the gendered legacy of a patriarchal legal culture?

I conclude by noting that in 1993, Christine Chinkin, lawyer and scholar, inquired about the gender of *jus cogens*?⁵⁷ In the very least, one observes, that in apparent legal blindness, the community of states wedded the formulation of peremptory norms to a patriarchal vision that facially spites its overriding interests for it proverbial nose.

Thank you very much for your attention.

⁵⁵ Vienna Convention, *supra* note 16.

⁵⁶ *Celebici Case*, No. IT-96-21/T.

⁵⁷ See Hilary Charlesworth & Christine Chinkin, *The Gender of Jus Cogens*, 15 HUM. RTS. Q. 63 (1993).

