Criminal Sexual Conduct as a Violation of International Humanitarian Law

Joseph L. Falvey Jr.
CRIMINAL SEXUAL CONDUCT AS A VIOLATION OF INTERNATIONAL HUMANITARIAN LAW

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I. INTRODUCTION

Instances of rape are not uncommon within the context of armed conflict.1 Armed conflict typically involves acts of domination, violence and power. Rape and other crimes of sexual violence are crimes of domination, violence and power, not crimes of passion.2 When a society fails to deter such malevolent conduct, it tends to occur more frequently.3 Similarly, when an armed force fails to deter such conduct through adequate discipline and training, the use of rape and crimes of sexual violence as extensions of the conflict will also occur more frequently.4 This problem is compounded when participants in the armed conflict encourage or

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1 See Margareth Etienne, Addressing Gender-Based Violence in an International Context, 18 HARV. WOMEN'S L.J. 139, 139 (1995) (discussing prevalent use of mass rapes and other violent acts against women as weapons of war and intimidation); see also Linda A. Malone, Beyond Bosnia in Re Kasinga: A Feminist Perspective on Recent Developments in Protecting Women from Sexual Violence, 14 B.U. INT'L L.J. 319, 320 (1996) (noting centuries old prohibition of rape by soldiers proscribed by laws of war); see, e.g., AMERICAS WATCH & WOMEN'S RIGHTS PROJECT, UNTOLD TERROR: VIOLENCE AGAINST WOMEN IN PERU'S ARMED CONFLICT 1-2 (1992) (reporting over forty documented cases of rape and sexual violence by Peruvian soldiers against fellow nationals committed during course of routine security checks and interrogations).

2 See Rosanna Cavallaro, A Big Mistake: Eroding the Defense of Mistake About Consent in Rape, 86 CRIM. L. & CRIMINOLOGY 815, 860 (1990); see, e.g., Dorothy E. Roberts, Rape, Violence, and Women's Autonomy, 69 CHI.-KENT L. REV. 359, 360-361 (1993) (examining categorization of sexual crimes as two separate groups: rape ("intercourse by actual or threatened physical violence") and sexual abuse or sexual misconduct ("nonviolent interference with freedom of choice").

3 See Lynne Henderson, Getting to Know: Honoring Women in Law and in Fact, 2 Tex. J. WOMEN & L. 41, 42 (1993). "[C]ommon beliefs about morality of heterosexuality and cultural understandings about what constitutes normal heterosexual practice account for much of the failure of law reform to reduce the rate of rape and sexual abuse." Id.

4 See Madeline Morris, By Force of Arms: Rape, War and Military Culture, 45 DUKE L.J. 651, 652 (1996) (stating concern over increased number of reported sexually violent crimes committed by military personnel during peacetime).
condone rape or other crimes of sexual violence as part of a systematic campaign of terror and intimidation. This appears to have been the case in the former Republic of Yugoslavia, and to some extent, in Rwanda.

The long list of atrocities already committed — and still being committed — in the former Republic of Yugoslavia and in Rwanda, are by now quite familiar. These crimes have included ethnically motivated killings, genocide, massacres, torture, rape and the expulsion of thousands from their traditional homes.

To try those responsible for these atrocities, the United Nations Security Council established an ad hoc International Tribunal. Most notable among the atrocities the Tribunal will consider is the practice of ethnic cleansing and the systematic use of rape and other crimes of sexual violence.

Few commentators could disagree that, under certain circumstances, rape is punishable as a violation of international law. In fact, numerous articles have been written regarding this very issue. These articles, however, fail to discuss the range of conduct

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that ought to be punishable as a violation of "international humanitarian law." Further discussion of the circumstances and range of conduct under which crimes of sexual violence should be punishable under international humanitarian law is therefore necessary. This brief commentary will discuss such circumstances and the range of criminal sexual conduct that ought to be punishable as a violation of international humanitarian law. Finally, this commentary will propose a model for consideration by the international community.

II. THE ELEMENTS OF THE CRIME OF RAPE AT INTERNATIONAL LAW

Although the International Tribunal was given broad jurisdiction to prosecute those responsible for specific offenses within general categories of crimes, there are no substantive definitions of these specific offenses under international law. Such definitions appear necessary when the burden of proof is on the prosecutor to prove the accused's guilt "beyond a reasonable doubt." Without definitions or "elements," the prosecutor may have difficulty determining what is to be proven and defendants may not be able to adequately prepare their defense. Moreover, Tribunal judges may disagree as to what must be proven, or may be incapable of determining whether the prosecutor has met the burden of proof without prior agreement as to what conduct constitutes the crime. Finally, victims will be left in doubt until final conviction as to whether the acts committed against them constitute violations of international law.

While defining the content of customary international law risks creating new substantive law, determining the "customary" definition is necessary given the absence of a "conventional" definition

sexual assault crimes in international conflicts); Kathleen M. Pratt & Laurel E. Fletcher, Time for Justice: The Case for International Prosecutions of Rape and Gender-Based Violence in the Former Yugoslavia, 9 BERKELEY WOMEN'S L.J. 77, 78 (1994) (beseeching international community to end sexual violence in former Yugoslavia); Tamara L. Tompkins, Prosecuting Rape as a War Crime: Speaking the Unspeakable, 70 NOTRE DAME L. REV. 845, 847 (1995) (noting increase in crime of rape during international conflicts).

12 Statute, supra note 9, arts. 2-5.

of rape. Determining the "international custom, as evidence of a general practice accepted as law" or "the general principles of law recognized by civilized nations" would require a thorough analysis of the basic understanding of the crime of rape in various legal traditions. Such an analysis, however, is well beyond the scope of this brief commentary.

A general understanding of rape, at least at common law, demonstrates the need for further discussion and perhaps a "redefinition" of the crime for purposes of prosecution as a violation of international human rights law. At common law, rape was "unlawful sexual intercourse with a woman against her will by force or threat of immediate force." Such a definition of rape, however, is unnecessarily limiting and does not cover the range of conduct that should be punishable as a violation of international law. Remediying this defect, however, requires a conventional definition of rape or a "new" understanding of the conduct which should be included within the traditional definition.

What should such a "redefinition" include? First, the proscribed conduct must encompass more than sexual intercourse. Traditionally, rape laws punished certain acts of sexual intercourse and "lesser" criminal prohibitions covered other "sex crimes." This

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15 Statute, supra note 9, art. 38 at 1(b)(c).
16 See, e.g., Timothy W. Murphy, A Matter of Force: The Redefinition of Rape, 39 A.F. L. Rev. 19, 19 (1996) (noting common law definition of rape was "carnal knowledge of a woman by force and against her will").
17 See, e.g., Arden Levy, International Prosecution of Rape in Warfare: Nondiscriminatory Recognition and Enforcement, 4 UCLA Women's L.J. 255, 257 (1994) (asserting that wartime desire to control adversary's women has caused rape to evolve into ultimate symbol of victory).
18 See Daphne Edwards, Acquaintance Rape and the 'Force' Element: When 'No' is Not Enough, 26 Golden Gate U. L. Rev. 241, 258 (1996). Despite its "victim-oriented" approach, the Michigan "violent sexual crimes" law definition of "force or coercion" nevertheless limits its "application to cases of conventional violence, while not addressing non-violent rape cases." Id. The danger here is that such a limited definition handicaps courts into a narrow construction of "force," thereby creating the judicial pitfall of ignoring "the vast majority of rape cases that occur without injury or physical brutality." Id.
19 See Lani Anne Remick, Read Her Lips: An Argument for a Verbal Consent Standard in Rape, 141 U. Pa. L. Rev. 1103, 1103 (1993). It is estimated that sixty to eighty percent of rapes fit into a category of law "founded on the paradigm of violent stranger rape which fails to clearly proscribe less violent rapes . . . in which some elements of a consensual sexual encounter are present." Id. In this light, the non-traditional rape victims' inability to avail themselves of the courts "to vindicate their rights . . . is thus one of the biggest impediments to the comprehensive protection of female sexual autonomy under the law of rape." Id. at 1104.
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limitation, however, fails to recognize that it is no less a violation
of a person's human rights and bodily integrity, and causes no less
injury to the victim, when the act involves forcible sodomy or pen-
etration with a foreign object. Moreover, traditional definitions
of rape failed to recognize that the crime of rape is not about sex-
ual interest or passion, but is about the domination by one per-
son of another through a violation of that person's bodily integrity
by acts of sexual violence. Thus, international law should not
only proscribe "rape" as that term is commonly understood, but
the entire range of criminal acts constituting crimes of sexual vio-
rence as well. Accordingly, these crimes are better described as
"crimes of sexual violence" rather than simply rape or "sex
crimes."

Second, the proscribed conduct must be described in gender-
neutral terms. Under traditional definitions of rape, only a wo-
man could be the victim of rape. Moreover, because sexual inter-
course was the proscribed act, only a man could perpetrate the
crime. The perpetrator's gender, however, should be irrelevant
with respect to the degree of moral condemnation society should
attach to the use of sexual violence by one individual against an-
other. The international community should consider the conduct
no less a crime because the person whose body is violated is a man
being subjected to a bodily violation at the hands of a woman or

20 See Cal. Penal Code § 289(a) (West 1996) (defining rape as crime of "penetration" by
"foreign object" of someone else's anal or genital openings against his or her will); see also
Pratt & Fletcher, supra note 11, at 78 (hoping international community will seek full ac-
countability for gender-specific offenses in the former Yugoslavia, since they contravene
fundamental principles of humanitarian law and violate basic, non-derogable human
rights).
21 See Roberts, supra note 2, at 359 (describing rape as embodying both physical harm
and subordinating sexuality).
22 Id.
23 See Cleiren & Tijssen, supra note 11, at 474 (asserting that rape and other types of
sexual assault should be regarded as crimes of violence of a sexual nature).
24 See Levy, supra note 17, at 262-63 (claiming that traditional concepts of fundamental,
universal human rights theoretically presuppose equality and gender neutrality) (citing
Jessica Neuwirth, Towards a Gender-Based Approach to Human Rights Violations, 9 Whi-
tier L. Rev. 399, 406 (1987)).
25 See Brande Stellings, The Public Harm of Private Violence: Rape, Sex Discrimination
and Citizenship, 28 Harv. C.R.-C.L. L. Rev. 185, 186 (1993) (noting FBI rape statistics are
only compiled when victim is female).
26 See, e.g., Susannah Miller, The Overturning of Michael M.: Statutory Rape Law Be-
comes Gender-Neutral in California, 5 UCLA Women's L.J. 289, 290 (1994) (noting Califor-
nia's original statutory rape law proscribed that only females could be victims and only
males could be punished).
another man, or that the victim is a woman suffering at the hands of another woman.

Third, although it is unlikely that the issue would ever arise within the context of a violation of international law applicable to armed conflict, the definition of crimes of sexual violence should not provide for a marital exemption.\textsuperscript{27} Under some traditional definitions of rape, a husband was immune from prosecution for forcing sexual intercourse upon his wife because no act of sexual intercourse with one's wife was considered "unlawful."\textsuperscript{28} This view stemmed from looking upon women as chattel subject to the unfeathered desires of their owner-husbands.\textsuperscript{29} Although it is hard to imagine a set of circumstances where an accused might claim such a "privilege" in the context of war crimes, international law should not continue to propagate false notions that fail to recognize the fundamental equal dignity of all.

Fourth, the definition of crimes of sexual violence should not explicitly or implicitly require "resistance" by the victim.\textsuperscript{30} Traditionally, a woman had to affirmatively and substantially resist the sexual intercourse unless the force or threat of force was such that resistance would be useless.\textsuperscript{31} Moreover, minor force or threatening minor force was deemed insufficient to constitute rape.\textsuperscript{32} This inappropriately focused on the victim's actions rather than the perpetrator's conduct.\textsuperscript{33} Even if criminal sexual behavior contin-

\textsuperscript{27} See Lisa R. Eskow, The Ultimate Weapon?: Demythologizing Spousal Rape and Reconceptualizing its Prosecution, 48 STAN. L. REV. 677, 677 (1996) (noting that although most states do not recognize marital exceptions to rape, lingering cultural and moral barriers still impede its prosecution).

\textsuperscript{28} See Eskow, supra note 27, at 680. At common law, a father was deemed to have valuable economic property rights in a daughter's virginity, which were then acquired by a husband in marriage and transformed into the husband's property right in the wife's fidelity. Id. Consequently, no legal basis existed to prosecute husbands for raping their own wives, since the husband did not infringe any man's property rights. Id.

\textsuperscript{29} See id. (explaining historical unities doctrine, whereby marriage made men and women one legal entity, women were "propertized," and husband assumed absolute control over entity).

\textsuperscript{30} See Edwards, supra note 18, at 261-62 (noting many courts still require proof of resistance, even though it is nearly impossible to demonstrate).

\textsuperscript{31} See id. at 261.

\textsuperscript{32} See Joshua Mark Fried, Forcing the Issue: An Analysis of the Various Standards of Forcible Compulsion in Rape, 23 PEPP. L. REV. 1277, 1279 (1996) (noting standard required female victim to show that she "resist[ed] to the upper limits of her physical ability").

\textsuperscript{33} See Allison West, Tougher Prosecution When the Rapist is Not a Stranger: Suggested Reform to the California Penal Code, 24 GOLDEN GATE U. L. REV. 169, 173 (1994) (asserting that difficult burden of demonstrating victim's nonconsent has shifted focus of rape reform law to offender's forceful or violent conduct).
ued to require proof of the victim's resistance, the requirement of "force" or "threat of force" should be satisfied through recognition of "constructive" force capable of rendering the victim's resistance unnecessary. Who would doubt the futility of a victim's resistance when faced by a sexual aggressor who is also participating in an armed conflict as a combatant? Accordingly, the law should not demand proof of resistance on the part of the victims of such crimes occurring in armed conflict.

Fifth, although also unlikely to be an issue with regard to cases of rape as violations of international humanitarian law, consent should be viewed as an affirmative defense rather than as an element of the crime. Most would regard the "absence of consent" to be an element of the offense or the "presence of consent" to be an affirmative defense. In either case, the issue of consent is properly part of the substantive definition of the crime. Addressing the issue of consent as an affirmative defense, however, maintains

34 See Fried, supra note 32, at 1279 (noting burden of proof was on victim).
35 Admittedly, this discussion is largely academic given the nature of the allegations arising in the former Yugoslavia. See Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780, U.N. Doc. S/1994/674 Add.2, Vol. 1-5 at 245-49 (1992). According to the Commission of Experts investigating the atrocities committed in the former Yugoslavia, the rape and sexual assault allegations investigated fell within five different patterns: (1) sexual assault committed in conjunction with looting and intimidation of the target ethnic group; (2) sexual assaults committed in conjunction with fighting in an area; (3) sexual assault committed on detained people; (4) sexual assaults committed against women for the purpose of terrorizing and humiliating them, often as part of the policy of "ethnic cleansing;" and (5) sexual assaults of women detained in hotels or similar facilities for the sole purpose of sexually entertaining soldiers. Consent would not likely be an issue in cases arising in the context of any of these "patterns." Id.

36 See I.T.R.P.E., supra note 13, at R. 96(ii). Interestingly, the Tribunal rules originally provided that "[c]onsent shall not be allowed as a defense" in sexual assault cases. Id. Subsequently, the Tribunal amended the rules to provide that consent is not 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 subjected to, threatened or put in fear." Id. In other words, consent is not a defense unless it is voluntary. Id.

37 For two articles concerning the relationship of consent to allegations of rape and sexual assaults see Donald A. Dripps, Beyond Rape: An Essay on the Difference Between the Presence of Force and the Absence of Consent, 92 COLUM. L. REV. 1780, 1799-1800 (1992) (arguing for reclassification of sexual assaults into two categories: (1) sexual assaults (forcible acts); and (2) sexual expropriation (non-consensual acts)); Cynthia Ann Wicktom, Note, Focusing on the Offender's Forceful Conduct: A Proposal for the Redefinition of Rape Laws, 56 GEO. WASH. L. REV. 399, 399 (1988) (arguing that definitions of sexual assault crimes focus on force and consent remain as an affirmative defense).
38 But see John H. Biebel, I Thought She Said Yes: Sexual Assault in England and America, 19 SUFFOLK TRANSNAT'L L. REV. 153, 167 (1995) (noting courts usually concluded that victim consented to intercourse if there was no evidence of resistance).
the focus of the prosecution on the perpetrator’s conduct rather than the victim’s actions and state of mind. 39

Finally, although it is an “evidentiary” or “procedural” rule rather than part of the substantive definition, rape or “crimes of sexual violence” punishable at international law should not require “corroboration.” 40 In fact, the International Tribunal’s rules provide that “no corroboration of the victim’s testimony shall be required” 41 in sexual assault cases. In this regard, the International Tribunal has followed the modern trend. 42 This should not be surprising given that the justifications typically advanced to support such a requirement are not concerns before a body such as the International Tribunal. For example, false claims, although possible, are not as likely within the context of war crimes as in other contexts. 43 Also, the International Tribunal is unlikely to be so outraged by an allegation to the point of being unable to appropriately weigh the evidence and hold the prosecution to its burden of proof. 44 Finally, although the absence of a corroboration requirement makes it somewhat more difficult to defend a rape allegation 45 and eases the prosecution’s burden of production, it does

Consent given at any time before penetration is a good defense to a prosecution for a forcible rape, but the fact that the woman consented after the offense was consummated is not a defense to the act. Even though a man may not be guilty of the crime of rape, due to the fact that the woman consented before the intercourse, yet if, before the consent was given, it appears that the defendant used force as to evince an intention to commit rape, the defendant may be convicted of an assault with an intent to commit rape. Since, by statutes in many jurisdictions, a female under a certain age is declared incapable of consenting to an act of intercourse, it is no defense in a prosecution for statutory rape that she did, in fact, consent.

Id. (citations omitted)

[I]n some jurisdictions, corroboration of the prosecutrix is necessary in prosecutions for rape, statutory rape and assaults with intent to commit rape. . . [however, in other] jurisdictions, the uncorroborated testimony of an unchaste prosecutrix, or even of one whose reputation for chastity and truth is bad, may be sufficient to sustain a conviction. Even where the defendant denies the crime, it has been held that the charge of the prosecutrix, in order to prevail when denied by the defendant, must be corrobo-rated by other facts.

Id. (citations omitted)
41 J.T.R.P.E., supra note 13, at R. 96(i).

42 See id. at 38. Specifically, the above-cited rule proscribes that “no corroboration of the victim’s testimony shall be required” in cases of rape or acts of sexual violence. Id.

43 See, e.g., Note, The Rape Corroboration Requirement: Repeal Not Reform, 81 YALE L.J. 1365, 1373 (1972) (noting that corroboration requirement is justified by theory that it prevents frivolous claims).

44 See id. at 1378 (claiming corroboration requirement protected defendant from unfair conviction, imposed by emotionally enraged judge or jury).

45 See id. at 1382 (stating that corroboration requirement was partially based on difficulty in defending against rape accusation); see also Susan Estrich, Rape, 96 YALE L.J.
not diminish its burdens of proof or persuasion. The prosecutor must still convince the fact-finder of the accused’s guilt beyond a reasonable doubt. Such a requirement will undoubtedly necessitate that the prosecutor introduce "corroborating" evidence.

III. A Model: Criminal Sexual Conduct

The international community’s willingness to create a tribunal to consider war crime allegations is of tremendous precedential importance. The procedural and evidentiary rules used by the International Tribunal will likely serve as models for future tribunals and perhaps a permanent international criminal court patterned after the International Court of Justice. Equally im-

1087, 1138 (1986) (noting lack of corroboration left only conflicting testimony of victim against accused).

46 See Robinson, Criminal Law Defenses § 4 (1984). "Except for defenses that simply negate an element of the offense, a defense will be submitted to the jury where the prosecution bears but fails to carry the burden of production or where the defendant bears and successfully carries the burden." Id. (citations omitted)

47 See Charles Allen Wright, Federal Practice & Procedure, Federal Rules of Criminal Procedure § 500 (1982). The United States Constitution ensures that under a criminal charge, the defendant can only be convicted according to the evidentiary standard of proof beyond a reasonable doubt. Id. To this end,

A well-established principle of the common law, incorporated into the statutory provisions of many states, that a person accused of a crime is presumed to be innocent until he is proved to be guilty, and that in a criminal prosecution the state has the burden of establishing all the essential elements of the crime with which the accused is charged and must prove his guilt beyond a reasonable doubt. Id.

48 See, e.g., 29A Am. Jur. 2d Evidence § 1473 (1994). For example, [C]orroboration of an accused's extrajudicial confession need not, to satisfy a conviction, consist of evidence sufficient to prove the offense beyond a reasonable doubt or even by a preponderance of the evidence, as long as there is substantial independent evidence that the offense has been committed, and the evidence as a whole proves beyond a reasonable doubt that the defendant is guilty. Id. (citations omitted)

49 See David Stoeckler, International Courts Flourish in 1990’s, N.Y.L.J., Aug. 4, 1997, at S2. The process of enforcing criminal sanctions has always been an exclusive right reserved to autonomous nations and, thus, “the right to apply punitive sanctions against individuals is inextricably linked with the essence of sovereignty.” Id. In keeping with these principles, over the course of the past three years, formal ongoing U.N. sessions have centered on establishing the groundwork for “the world’s first permanent international criminal court (ICC) which would exercise criminal jurisdiction concurrently with national courts.” Id.


51 A permanent international criminal court was first proposed in 1950 by the United Nations International Law Commission (ILC). For the next 45 years, the proposal languished because of the absence of consensus as to the governing law and the unwillingness of States to cede a portion of their sovereignty. See generally M. Cherif Bassiouni & Christopher L. Blakesley, The Need for an International Criminal Court in the New International World Order, 25 Vand. J. Transnat’l L. 151 (1992); M. Cherif Bassiouni, The Time
Important, however, is the precedential importance of the substantive law applied by the International Tribunal. In light of these eventualities, and the attempts in the international community to draft a criminal code for a permanent international criminal court, a comprehensive "criminal sexual conduct statute," such as that found in Michigan, may serve as a model for consideration by the international community satisfying the concerns enumerated above. The following paragraphs discuss this statute, focusing on the first degree offense, and compare the major components of the statute with the shortcomings of the common law understanding of rape.

Focusing on the Michigan statute seems appropriate given that, of the states that have reformed their rape laws, Michigan is among the few hailed as going the furthest toward reducing the incidents of sex crimes. Moreover, since 1974 when the reforms took effect, a general consensus has emerged that Michigan's rape reform is worthy in its effort, as it focuses the crime on the defendant's conduct and away from the victim's state of mind.

Michigan's reform began with a repeal of its "rape" law in favor of the more comprehensive "criminal sexual conduct" statute:

Has Come for an International Criminal Court, 1 IND. INT'L & COMP. L. REV. 1, 1-5 (1991). The success of the international community in creating the International Tribunal for the former Yugoslavia had sparked renewed interest in a permanent international criminal court. Id.


54 See MICH. COMP. LAWS ANN. §§ 750.520a to 750.520m (West 1991) (dividing rape into four degrees of criminal sexual conduct depending upon circumstances at time of such conduct).

55 See Beverly J. Ross, Does Diversity in Legal Scholarship Make a Difference?: A Look at the Law of Rape, 100 DICK. L. REV. 795, 853 (1996) (noting that greatest increase of rape reporting was in Michigan, where strongest reform was enacted; New York and Illinois are also frequently cited); see also Cassia C. Spohn & Julie Horney, Criminology: The Impact of Rape Law Reform on the Processing of Simple and Aggravated Rape Cases, 86 J. CRIM. L. & CRIMINOLOGY 861, 865-66 (1996) (stating that Michigan adopted strongest and most comprehensive reforms regarding rape by any state); Wicktom, supra note 37, at 415 (crediting Michigan and New York's rape statutes with influencing reform efforts in other states).

56 See Wicktom, supra note 37, at 418 (noting Michigan was first state to shift focus of rape law from victim's nonconsent to defendant's forceful or violent conduct); see also Robert J. Haddad & Erich H. Hintzen, Evidence, Annual Survey of Michigan Law, 41 WAYNE L. REV. 907, 935 (1994-1995) (explaining that Michigan Courts have ruled that evidence of rape victim's sexual conduct and reputation are inadmissible).

57 See 1952 MICH. PUB. ACTS 73, repealed by 1974 MICH. PUB. ACTS 266. Before 1974, Michigan's rape statute adhered to the common law definition of rape and stated that:

Any person who shall ravish and carnally know any female of the age of 16 years, or more, by force and against her will . . . shall be guilty of a felony, punishable by impris-
utes. Under the then existing definition of rape, often "the victim was treated more harshly in trial than the rapist." Overall dissatisfaction with a criminal justice system and a definition of a crime that would permit the victim to be treated so harshly finally persuaded the Michigan legislature to repeal the existing rape statute and adopt the criminal sexual conduct statute.

The legislature's intent was to increase the range of conduct qualifying as criminal sexual behavior. The new law scaled four gender-neutral degrees of criminal sexual conduct based on the severity of the offense and criminalized activities that were not punishable under the old law.

**A. The Statutory Definition of Criminal Sexual Conduct**

The Michigan criminal sexual conduct statute makes punishable various acts of "sexual penetration" and "sexual conduct." Onment in the state prison for life or for any term of years. Such carnal knowledge shall be deemed complete upon proof of any sexual penetration however slight.

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58 Mich. Comp. Laws Ann. §§ 750.520a to 750.520g (West 1997). These sections classify crimes of sexual violence into four different degrees of criminal sexual conduct and one assault with intent to commit a criminal sexual conduct offense.


61 See Nelson, 261 N.W.2d at 306 (discussing reasons behind enactment of criminal sexual conduct statute).

62 See id. at 307-08 (noting purpose of statute was to strengthen criminal law describing unlawful sexual conduct).

63 See Mich. Comp. Laws Ann. §§ 750.520a to 750.520e (West 1997); see also Mich. Comp. Laws Ann. § 750.520a(m) (West 1997) (defining "victim" as person alleging to have been subjected to criminal sexual conduct).


65 Mich. Comp. Laws Ann. § 750.520a(l) (West 1997) (defining "sexual penetration" as "sexual intercourse, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body, but emission of semen is not required"). See People v. Hammons, 534 N.W.2d 183, 183 (Mich. Ct. App. 1995) (holding act of forcing finger into vagina of nine year old through her underwear constituted "sexual penetration"); People v. Legg. 494 N.W.2d 797, 797 (Mich. Ct. App. 1992) (asserting that cunnilingus involves act of "sexual penetration").
The statute is scaled from first to fourth degree criminal sexual conduct depending on whether the act involves penetration or contact.\textsuperscript{67} The law also considers whether the sexual penetration or contact is committed under certain circumstances or with a particular result.\textsuperscript{68}

First and third degree criminal sexual conduct\textsuperscript{69} (CSCI and CSCIII) proscribe sexual penetration committed under certain circumstances, including when force or coercion\textsuperscript{70} is used, to achieve the sexual penetration of the victim. CSCI is distinguished from CSCIII by the existence of certain enumerated aggravating factors.\textsuperscript{71} Foremost among these factors is the infliction of personal injury.\textsuperscript{72}

\textsuperscript{66} See Mich. Comp. Laws Ann. § 750.520a(l) (West 1997) (defining "sexual penetration"); see also Mich. Comp. Laws Ann. § 750.520a(k) (West 1997) (defining "sexual contact" as including "the intentional touching of the victim's or actor's intimate parts or the intentional touching of the clothing covering the immediate area of the victim's or actor's intimate parts, if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification").

\textsuperscript{67} Mich. Comp. Laws Ann. §§ 750.520b to 750.520e (West 1997) [also referred to as CSCI, CSCII, CSCIII and CSCIV] (proscribing four varying degrees of criminal sexual conduct).


\textsuperscript{69} Mich. Comp. Laws Ann. §§ 750.520b (CSCI) and 750.520d (CSCIII) (West 1997) (defining first and third degree criminal sexual conduct); see also infra note 76 and accompanying text (aggravating factors include, for example, commission of felony, being helped by another person, and inflicting personal injury).

\textsuperscript{70} See Mich. Comp. Laws Ann. § 750.520b(1)(f)(i)-(v) (West 1997). Specifically, the law allows for prosecution of persons that use force with or without violence to "overcome" the victim, and also those that use only the suggestion of force, positional authority, or the threat of retaliation. \textit{Id.}

\textsuperscript{71} Mich. Comp. Laws Ann. § 750.520b (1997). The crime of criminal sexual conduct in the first degree includes such factors considered to aggravate the offense such as the age of the victim, the victim's mental capacity, the amount and force used, whether there was more than one perpetrator, whether the act was part of the commission of another felony, whether a weapon was used, if the victim was related to the perpetrator and whether the perpetrator was in a position of authority to coerce the victim. \textit{Id.} As can be seen from the long list of the circumstances that elevate the offense to first degree criminal sexual conduct, the Michigan statute is applicable to many more sexual offenses than the traditional common law rape statute. \textit{Id.}

\textsuperscript{72} See Mich. Comp. Laws Ann. § 750.520b(1)(f)(i)-(v) (West 1997) (including personal injury to victim among circumstances defined in statute); see also Mich. Comp. Laws Ann. § 750.520a(j) (West 1997) (defining personal injury as meaning "bodily injury, disfigurement, mental anguish, chronic pain, pregnancy, disease, or loss or impairment of a sexual or reproductive organ"); People v. Brown, 495 N.W.2d 812, 812 (Mich. Ct. App. 1992) (holding that personal injury needed to support conviction of first degree criminal sexual conduct was established when defendant came upon sexual assault victim while victim was distraught and upset due to kidnapping and rape of victim by other men, even though defendant was not responsible for personal injury); People v. Jenkins, 328 N.W.2d 403, 404-405 (Mich. Ct. App. 1982) (holding that to satisfy bodily injury, injury need not be permanent or substantial); cf. Mich. Comp. Laws Ann. § 750.520d(1)(b) (West 1997) (defining third degree criminal sexual assault as only requiring that sexual penetration be accomplished through force or coercion without requirement of injury).
Second degree criminal sexual conduct\textsuperscript{73} (CSCII) mirrors CSCI with the distinction that the actor need only engage in sexual "contact" rather than sexual penetration.\textsuperscript{74} Touching any of the victim's genital areas or the clothing covering those areas qualifies as a violation of the law.\textsuperscript{75} Also punishable as CSCII is when the actor touches his or her own genitalia in the presence of the victim for the purpose of sexual arousal or gratification.\textsuperscript{76} CSCIV, on the other hand, is similar to CSCII in punishing sexual contact committed through force or coercion,\textsuperscript{77} but, like the distinction between CSCI and CSCIII, CSCIV does not require that the victim sustain personal injury.\textsuperscript{78}

The extensive list of aggravating circumstances that elevate an offense from CSCIII to CSCI or from CSCIV to CSCII encompasses many crimes of sexual violence that traditionally would not be equated with the crime of rape.\textsuperscript{79} Moreover, as with common law rape,\textsuperscript{80} CSCI and CSCIII are general intent crimes that do not require that the penetration under one of the enumerated circumstances be for the purpose of sexual gratification.\textsuperscript{81}

\textsuperscript{73} \textsc{Mich. Comp. Laws Ann.} $\S$ 750.520c (West 1997) (defining second degree criminal sexual conduct).

\textsuperscript{74} \textsc{Mich. Comp. Laws Ann.} §§ 750.520a, 750.520b (West 1997) (differentiating between degrees).

\textsuperscript{75} See \textsc{Mich. Comp. Laws Ann.} $\S$ 750.520a(k) (West 1997) (defining sexual contact); see \textit{also} People v. Duenaz, 384 N.W.2d 79, 81 (Mich. Ct. App. 1985) (holding that intentionally touching breasts constituted sexual contact).

\textsuperscript{76} See \textsc{Mich. Comp. Laws Ann.} $\S$ 750.520a(k) (West 1997).

\textsuperscript{77} See \textsc{Mich. Comp. Laws Ann.} $\S$ 750.520e (West 1997). Defining fourth degree criminal sexual conduct, the statute provides:

1. A person is guilty of criminal sexual conduct in the fourth degree if he or she engages in sexual contact with another person and if any of the following circumstances exist: (a) That other person is at least 13 years of age and under 16 years of age, and the actor is 5 or more years older than that other person.

(b) Force or coercion is used to accomplish the sexual contact.

\textit{Id.}

\textsuperscript{78} See \textit{id.} (describing fourth degree criminal sexual conduct); see \textit{also supra} note 72 and accompanying text (discussing personal injury).

\textsuperscript{79} See \textsc{Mich. Comp. Laws Ann.} §§ 750.520a to 750.520e (West 1997) (listing criminal sexual conduct statutes); see \textit{also supra} notes 57-62 and accompanying text (describing Michigan's old rape statute and the enactment of the new criminal sexual conduct statutes).

\textsuperscript{80} For an analysis of the traditional and common law derivations of the elements of the crime of rape, see \textit{supra} notes 28-34 and accompanying text.

\textsuperscript{81} See People v. Garrow, 298 N.W.2d 627, 629 (Mich. Ct. App. 1980) (holding statute's plain meaning meant act of criminal sexual conduct in first [or third] degree is committed when there is intrusion into genital or anal opening of another person, regardless of the actor's sexual purpose).
B. The Statutory Definition of Sexual Penetration

One of the methods used by the legislature to broaden the acts that are punishable under the Michigan statute draws from the long list of circumstances that elevate an offense to first degree criminal sexual conduct. Moreover, the manner in which sexual penetration is defined further demonstrates the breadth of conduct intended to be proscribed by the legislature.

For example, the definitional section of the statute states, "[s]exual penetration means sexual intercourse, cunnilingus,fellatio, anal intercourse or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body, but emission of semen is not required." Accordingly, the statute criminalizes a broader range of sexual penetration than vaginal-penile penetration and puts sexual assaults that do not fall within the traditional definition of rape, such as forcible anal sodomy, on equal footing with vaginal-penile "rape." Moreover, the bodily intrusion need not be committed with a part of the human body, but the offense is complete with the penetration of the victim's genital or anal opening with "any object."

Additionally, the definition of sexual penetration "does not state that, if these defined acts include penetration, they are penetration within the meaning of this section." Instead, "the acts in and of themselves are acts that involve sexual penetration." Therefore, if one of the acts outlined in the definition are performed, there is no requirement that there be something additional by way of penetration for CSCI or CSCIII to have been committed. The criminal sexual contact statute includes a similarly broad definition of the sexual contact necessary for CSCII and CSCIV. This includes "the intentional touching of the victim's or

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82 See generally Mich. Comp. Laws Ann. §§ 750.520a to 750.520e (West 1997) (setting forth factors used in deciding each level of offense).
84 See id.
85 See, e.g., Murphy, supra note 16, at 21 (discussing characteristics of Michigan's rape statute).
86 See Michigan Criminal Jury Instructions § 20.1 (CJI 2d 20.1). Sexual penetration has even been interpreted to include such bodily violations as the forcing of the victim's underwear into her vagina by the defendant's fingers. Id.; see, e.g., People v. Hammons, 534 N.W.2d 183, 184 (Mich. Ct. App. 1995).
88 Id.
89 Id.
actor's intimate parts or the intentional touching of the clothing covering the immediate area of the victim's or actor's intimate parts, if that touching can reasonably be construed as being for the purpose of sexual arousal or gratification."\(^9\)

C. Gender-Neutrality

In addition to broadly defining the circumstances and range of conduct punishable as criminal sexual conduct, the criminal sexual conduct statute is gender-neutral, further expanding the scope of protection provided by the law.\(^91\) The statute describing first degree criminal sexual conduct is written in gender-neutral terms and uses the phrase "he or she" when describing the perpetrator and the term "person" when describing the victim of the crime.\(^92\) As such, Michigan's criminal sexual conduct statute is unbiased in its prosecution based upon an alleged perpetrator's gender.\(^93\)

This gender-neutral description of the crime is in sharp contrast to the traditional common law definition of rape where the assailant had to be a man and the victim a female.\(^94\) The description of the crime in gender-neutral language is desirable because it allows prosecution of crimes that would not be allowed under the traditional common law definition of rape. It also allows for prosecution under the same statute as other similar crimes.\(^95\)

D. Resistance By the Victim

Another change from the traditional understanding of rape embraced by the criminal sexual conduct statute is the express elimination of the requirement that the victim resist the sexual assault.\(^96\) At common law the victim was required to resist to the


\(^{94}\) 65 Am. Jur. 2d Rape § 27 (1972). A somewhat dated and obsolete entry of Am. Jur. 2d states: "It is unquestioned that the act constituting the basis of the crime of rape can be committed by a male person only so that in the common-law and statutory definitions the sex of the perpetrator of the offense is seldom if ever mentioned." Id.

\(^{95}\) See Murphy, supra note 16, at 21 (describing Michigan's rape statute); see, e.g., Malkowski, 499 N.W.2d at 452 (convicting defendant of male on male assault under criminal sexual conduct statute, formerly unpunishable under common law rape statute).

\(^{96}\) See Mich. Comp. Laws Ann. § 750.520i (West 1997). "A victim need not resist the actor in prosecution under sections 520b to 520g." Id.
utmost in order for the prosecution to prove non-consent to the act.\textsuperscript{97} Although all United States jurisdictions have negated the "utmost resistance requirement,"\textsuperscript{98} many jurisdictions require a showing of reasonable resistance under the circumstances.\textsuperscript{99} The Michigan criminal sexual conduct statute adopted the view that resistance is not a valid indicator of the victim's non-consent and that requiring resistance may cause a risk of serious bodily injury or death.\textsuperscript{100} Eliminating the resistance requirement appropriately shifts the focus to the perpetrator's use of force or coercion to accomplish the offense, and away from the victim's state of mind.\textsuperscript{101}

E. Consent as an Element of Criminal Sexual Conduct

Closely related to the elimination of the resistance requirement is the elimination of consent from the definition of the offense. Unlike the repealed rape law, which provided that the offense

\textsuperscript{97} 65 AM. JUR. 2D Rape § 5. This section provides that:
The well-settled general rule is that carnal act must have been committed against the resistance of the woman. The importance of resistance is to establish two elements in the crime — carnal knowledge by force by one of the parties and nonconsent thereto by the other. These are essential in every case in which the complainant had the use of her faculties and physical powers at the time, and was not prevented by terror or the exhibition of brutal force.

\textit{Id.} (citations omitted).

\textsuperscript{98} See 65 AM. JUR. 2D Rape § 6. This section specifies that:
Resistance or opposition by mere words is not enough; the resistance must be by acts. While some courts require the utmost resistance, and the most vehement exercise of every physical means or faculty within the woman's power to resist the penetration of her person, it is more generally recognized that resistance is necessarily relative, and the woman, if her resistance is bona fide, is not required to resist to the utmost of her physical strength if she reasonably believes that resistance would be useless and result in serious bodily injury to her.

\textit{Id.} (citations omitted); see also Laughlin v. United States, 368 F.2d 558 (9th Cir. 1967). The Laughlin court held that it "is no longer the law that a person attacked and threatened with rape must fight [to the] 'last ditch stage. Threats . . . of bodily harm . . . with some degree of physical force' is sufficient." \textit{Id.} at 559 (quoting Ewing v. United States, 135 F.2d 633 (U.S. App. D.C. 1942).

\textsuperscript{99} See State v. Lima, 643 P.2d 536, 539 (Haw. 1982) (requiring genuine physical effort on part of victim to discourage assailant from his intended purpose); see also MODEL PENAL CODE § 213.1 cmt.4, at 304-7 (1980) (discussing Model Code's focus on actor's use of force).

\textsuperscript{100} See People v. Nelson, 261 N.W.2d 299, 307 (Mich. Ct. App. 1977) (explaining that focus is on force or coercion of assailant and not on victim's consent or resistance); see also Murphy, supra note 16, at 21 (noting studies indicate that incidence and degree of violence in rape are heightened when woman physically resists).

\textsuperscript{101} See Edwards, supra note 18, at 251. Arguably, the single-most significant rape law reform to take place in the 1970's was redefining the common law crime "to shift the focus away from scrutinizing the victim's behavior at trial." \textit{Id.} Previously, the pitfall had been that the "element of lack of consent and resistance had enabled the courts to focus attention solely on the propriety of the victim's behavior." \textit{Id.} It was with this problem in mind that the "reformers hoped to redefine the offense to focus on the defendant's criminal conduct or his use of 'force' instead." \textit{Id.} at 251-52.
must be against the victim's will or without her consent, the criminal sexual conduct statute is silent as to the issue of the consent of the victim. "Although consent is clearly admissible to show lack of force or coercion, it does not, under this statute, rise to the level of an element of the offense, lack of which the people must prove." The omission of non-consent as an element of the offense was a calculated act of the legislature:

The bill eliminates the present requirement that the non-consent of the victim must be proved "beyond a reasonable doubt" at the outset of the "rape" trial. The question as to whether or not the victim consented is not an issue in any felony other than rape. This bill would make the rape standard consistent with the standard for other felonies by allowing the victim to assess rationally the danger of injury or death and conduct herself/himself accordingly.

This omission of consent shifted the focus from the victim's consent to whether force or coercion was used to accomplish the penetration.

This is not to say, however, that the legislature intended "to preclude an accused from alleging consent as a defense to the charge." Once successfully raised as an affirmative defense, the prosecutor may have to prove the victim did not consent or that the victim physically resisted or verbally rebuffed the defendant's advances. Thus, the criminal sexual conduct statute does not fully eliminate issues regarding the victim's non-consent or completely remove issues regarding the degree of resistance. The law, however, successfully shifts the focus to the force or coercion of the

102 See generally supra note 57 and accompanying text.
105 See Nelson, 261 N.W.2d at 307 (explaining that focus is on force or coercion of assailant, not victim's consent or resistance).
108 See People v. Thompson, 324 N.W.2d 22, 23 (Mich. Ct. App. 1982) (discussing defendant's right to have jury determine consent when raised as affirmative defense).
defendant and relegates consent to the role of an affirmative defense to be raised and proven by the defense.\textsuperscript{109}

F. Corroboration of the Victim’s Testimony

Just as the criminal sexual conduct statute negates the requirement of resistance by the victim, it also does not require any corroboration of the victim’s testimony.\textsuperscript{110} Even before the enactment of the criminal sexual conduct statute, Michigan courts had held that a rape case should not be dismissed because the victim’s testimony was not corroborated.\textsuperscript{111} The courts based this holding on the notion that it was within the jury’s province to determine the credibility of a witness, and if the charges were dismissed because the victim’s testimony lacked corroboration, the court would be performing a function allocated to the finder of fact.\textsuperscript{112} Thus, the criminal sexual conduct statute simply codified what the Michigan courts had previously interpreted as the law of Michigan.\textsuperscript{113}

G. The Marital Rape Exemption

The latest amendment to the criminal sexual conduct statute further expanded the range of conduct punishable under the statute by eliminating the spousal exception to the prosecution of criminal sexual conduct.\textsuperscript{114} Prior to 1988, Michigan had retained the spousal exception to the criminal sexual conduct statute.\textsuperscript{115} Under this exception, the victim’s spouse was immune from prosecution for criminal sexual conduct.\textsuperscript{116} This marital rape exemption

\textsuperscript{109} See Mich. Comp. Laws Ann. § 750.520i (West 1997) (stating that victim does not have to resist actor).

\textsuperscript{110} See Mich. Comp. Laws Ann. § 750.520h (West 1997) (proscribing that testimony of victim need not be corroborated in prosecutions).

\textsuperscript{111} See, e.g., People v. Inman, 24 N.W.2d 176, 182 (Mich. 1949). The court, in response to an argument by the defendant that a conviction in a rape case could not be sustained by the uncorroborated testimony of the victim, stated, “[t]he rule in most jurisdictions is that in the absence of statute, a conviction for rape may be sustained on the uncorroborated testimony of the prosecutrix.” Id.

\textsuperscript{112} See id.

\textsuperscript{113} See People v. Smith, 385 N.W.2d 654, 657 (Mich. Ct. App. 1985). In a post-enactment case, the Michigan Court of Appeals reaffirmed the prior judicial standard holding that it was not an error to give a jury instruction that, to convict the defendant, the victim’s testimony need not be corroborated. Id.

\textsuperscript{114} See Mich. Comp. Laws Ann. § 750.520(a) (West 1997).


\textsuperscript{116} See Mich. Comp. Laws Ann. § 750.520 (West 1997); see also People v. Hawkins, 407 N.W.2d 366, 366 (Mich. 1987). Reversing the Michigan Court of Appeals, the Michigan Supreme Court confirmed that § 12 of the old “statute prohibiting criminal sexual conduct
is a vestige of English common law and derives from three common law presumptions: (1) Women gave up their right to refuse to have sexual relations upon marriage; (2) married women merged into the existence of their husbands; and (3) women became chattel of their husbands upon marriage.⁷ These archaic justifications for the marital rape exemption faded with the recognition of the individual rights of women.⁸

Michigan's legislative amendment resulted from the appeal of a criminal conviction for marital rape.⁹ Instead of deciding the case on constitutional grounds,¹⁰ the Michigan Supreme Court decided the case on the basis of statutory construction.¹¹ Michigan's public interest and women's rights groups reacted intensely to the Michigan Court of Appeals' vacation of the accused's conviction,¹² and the Michigan Supreme Court's refusal to uphold the conviction on constitutional grounds.¹³ This reaction prompted the legislature to abolish the marital exception.¹⁴ "The simple, straightforward abolition of the marital rape exemption in the criminal sexual conduct statute mandates that a husband be ar-

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⁷ See Judith A. Lincoln, Abolishing the Marital Rape Exemption: The First Step in Protecting Married Women from Spouse Rape, 35 WAYNE L. REV. 1219, 1220-21 (1989) (noting that presumption at common law was that married women became chattel of husband).

⁸ See id.


¹⁰ See, e.g., People v. Liberta, 474 N.E.2d 567, 567 (N.Y. 1984). In a landmark decision, the New York Court of Appeals struck down the marital exemption portion of New York's forcible rape statute as unconstitutional on equal protection grounds. Id.

¹¹ See Hawkins, 407 N.W.2d at 366. The defendant sought reversal of his conviction of criminal sexual conduct in the trial court based on the marital exemption, which only allowed prosecution if the couple were living separately and had filed for divorce. Id. The couple were living separately and had filed for divorce, but had done so incorrectly. Id. The Supreme Court, rather than deciding the equal protection issue, found that the defendant was not subject to the marital rape exemption because even though the divorce might not be legally binding it showed the objective ending of the marriage. Id.


¹³ Hawkins, 407 N.W.2d at 367 (reversing lower court ruling).

¹⁴ See MICH. COMP. LAWS ANN. 750.5201 (West 1997). The amended statute now reads: "A person may be charged and convicted under sections 520b to 520g even though the victim is his or her legal spouse. However, a person may not be charged or convicted solely because his or her legal spouse is under the age of 16, mentally incapable, or mentally incapacitated." Id.
rested, prosecuted and convicted for any type of criminal sexual conduct involving his wife."\textsuperscript{125}

IV. JURISDICTIONAL "AGGRAVATING" ELEMENTS

Not all acts of rape or crimes of sexual violence, however, are punishable as violations of international law.\textsuperscript{126} To the contrary, the subject matter jurisdiction of the International Tribunal is limited to "serious violations of international humanitarian law."\textsuperscript{127} The statute identifies four categories of crimes within this jurisdiction: grave breaches of the Geneva Conventions;\textsuperscript{128} violations of the laws and customs of war;\textsuperscript{129} genocide;\textsuperscript{130} and crimes against humanity.\textsuperscript{131} A permanent international criminal court would likely be subject to similar jurisdictional constraints. Limiting an international tribunal’s subject matter jurisdiction to such crimes advances the principle of "nullum crimen sine lege" — no crime without law.\textsuperscript{132} It is important that the International Tribunal, or a permanent tribunal, not create or legislate the law.\textsuperscript{133} Instead, the role of such a tribunal should be to simply apply existing international humanitarian law.\textsuperscript{134} Any attempt by the International Tribunal, or any other such tribunal, to create law would likely prevent some nations from cooperating with the creation or functioning of such a tribunal.\textsuperscript{135}

\textsuperscript{125} Lincoln, supra note 122, at 1242.
\textsuperscript{126} See Pratt & Fletcher, supra note 11, at 81. Instances of rape and violent sex crimes have always been a pervasive element of armed conflicts throughout the world. Id. This fact notwithstanding, “gender-specific violations of humanitarian and human rights law have not been accorded the same attention as other violations either in prosecutions for serious violations of international law, or in reports by U.N. entities charged with investigating and reporting on human rights violations.” Id.
\textsuperscript{127} Report, supra note 9, at par. 31.
\textsuperscript{128} See Statute, supra note 9, Annex at art. 2.
\textsuperscript{129} See id. at art. 3.
\textsuperscript{130} See id. at art. 4.
\textsuperscript{131} See id. at art. 5.
\textsuperscript{132} See Report, supra note 9, at par. 34.
\textsuperscript{133} See I.T.P.R.E., supra note 13, at par. 29 (explaining that International Tribunal should prosecute by applying existing international humanitarian law, not by legislating or creating new law).
\textsuperscript{134} See id. This will also avoid the difficulty presented by “adherence of some but not all States to specific conventions.” Id. at par. 34.
Only these four general categories of crimes that are "beyond doubt . . . part of international customary law . . . applicable in armed conflict," and other specific acts that are within the accepted definitions of these crimes, fall within the International Tribunal's subject matter jurisdiction. Other violations of international humanitarian law and ordinary crimes would not fall within the Tribunal's jurisdiction and would be punishable only by national courts.

Thus, even though an individual accused's conduct may satisfy the requisites to characterize the conduct as rape or another crime of sexual violence, punishing the crime as a violation of international humanitarian law requires something more. The crime must also fall within one of the four general categories of crimes inclusive of the subject matter jurisdiction of the International Tribunal.

A. Rape as a Crime Against Humanity

Rape or other crimes of sexual violence committed within the context of a "widespread or systematic attack" against a civilian population on "national, political, ethnic, racial, or religious grounds" constitute crimes against humanity as that term is understood. Generally, establishing crimes against humanity requires, as a necessary element, proof of systematic governmental planning and action. Thus, to convict an individual accused of

136 I.T.P.R.E., supra note 13, at par. 35.
137 See Commission Report, supra note 135, at 264-65 (setting forth specific treaty defined crimes that confer concurrent subject matter jurisdiction on proposed International Criminal Court).
138 See Report, supra note 9, at par. 34 (asserting that ICC's application of international customary law will strengthen its power to prosecute persons responsible for serious violations of international humanitarian law).
140 See Report, supra note 9, at para. 48.
141 See Theodor Meron, The Case for War Crimes Trials in Yugoslavia, FOREIGN AFFAIRS, (Summer 1994) at 122, 130 [hereinafter War Crimes Trials]. The Nuremberg jurisprudence suggested that war crimes, if committed in a widespread, systematic manner on political, racial, or religious grounds, may also amount to crimes against humanity. Id. Proof of systematic governmental planning of alleged acts was a requirement of crimes against humanity. Id. There is no such requirement for war crimes; crimes against humanity are therefore more difficult to establish. Id.; see also Rape as a Crime, supra note 11, at 428. Proof of systematic planning is required pursuant to the United Nations War Crimes Commission. Id.
rape or other crimes of sexual violence as a crime against humanity, the prosecutor would have to prove that the conduct was part of such systematic action engaged in for such a purpose.\textsuperscript{142} Acquiring evidence of such planning or action may be difficult and present an obstacle to effective prosecution.\textsuperscript{143}

B. Rape as Genocide

A similar evidentiary problem arises in charging widespread or systematic rape as genocide. Under the Genocide Convention, certain acts committed with the "intent to destroy . . . a national, ethnical, racial, or religious group" constitutes genocide.\textsuperscript{144} These acts include causing serious bodily or mental harm to members of the group, deliberately inflicting conditions on the group calculated to bring about its destruction and imposing measures intended to prevent births within the group.\textsuperscript{145} Thus, prosecuting rape or other crimes of sexual violence as genocide requires proof of this specific intent as a necessary element.\textsuperscript{146} The difficulty in such cases would be establishing the specific intent requirement.\textsuperscript{147}

C. Rape as a Violation of the Laws or Customs of War or as a Grave Breach of the Geneva Conventions

Given the evidentiary problems associated with proving crimes against humanity and genocide, the only remaining options would be to prosecute rape or other crimes of sexual violence as a "lesser" offense of either a "violation of the laws or customs of war" or a

\textsuperscript{142} See War Crimes Trials, supra note 141, at 130 (discussing difficulties encountered when prosecuting war crimes).

\textsuperscript{143} See id. at 133 (noting evidence gathered by Commission of Experts, International Tribunal, and nongovernmental organizations may offset absence of "paper trail").

\textsuperscript{144} See Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, art. II, 78 U.N.T.S. 277; see also Statute, supra note 9, at art. 4, par. 2.

\textsuperscript{145} See Statute, supra note 9, at art. 3. The U.N. Convention on the Prevention or Punishment of the Crime of Genocide defines genocide to include: "killing members of the group," "causing serious bodily or mental harm to members of the group" and "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part." Id. The Convention requires proving intent to destroy, in whole or in part, a national, ethnic, racial or religious group as such. Id.; see also War Crimes Trials, supra note 141, at 428.

\textsuperscript{146} See, e.g., Pratt & Fletcher, supra note 11, at 97-8.

\textsuperscript{147} See id. at 97-102.
“grave breach of the Geneva Conventions.”\textsuperscript{148} This too may be problematic given the traditional meanings of these terms.

“Violations of the laws or customs of war” are crimes against the conventional or customary law committed by persons on one side of a conflict against persons or property of the other side.\textsuperscript{149} Generally, these “war crimes” prohibit certain means and methods of warfare such as use of poisonous weapons, wanton destruction of cities not justified by military necessity, and attack or bombardment of undefended towns.\textsuperscript{150} Rape would not appear to fall within this definition. Moreover, even if rape were to be considered within the conventional or customary definition of “war crimes,” rape of a citizen of one’s own nationality might not be.\textsuperscript{151}

The 1949 Geneva Conventions categorized war crimes as either ordinary crimes or “grave breaches” of the convention.\textsuperscript{152} Grave breaches are subject to universal jurisdiction, while ordinary crimes are not.\textsuperscript{153} Grave breaches of the Geneva Conventions are serious acts committed against an individual protected by the Geneva Conventions including willful killing, torture, inhuman treatment and willfully causing great suffering to body or health.\textsuperscript{154} Rape and other crimes of sexual violence under international law may constitute inhuman treatment or willfully causing great suffering to body or health; and, under some circumstances, the conduct may constitute torture.\textsuperscript{155}

The difficulty with this approach, however, is that the offense is only a grave breach if committed against a “protected person.”\textsuperscript{156} Generally, the Geneva Conventions only include wounded and sick combatants, medical and religious personnel, prisoners of

\textsuperscript{148} See Theodor Meron, \textit{War Crimes in Yugoslavia and the Development of International Law}, 88 Am. J. Int'l L. 78, 84 (1994) (hoping that prosecution of “the far more frequent cases of rape that are regarded as 'lesser' war crimes or grave breaches” is not neglected).

\textsuperscript{149} See Report, supra note 9, at par. 34.

\textsuperscript{150} See Statute, supra note 9, at art. 3.

\textsuperscript{151} See Rape as a Crime, supra note 11 at 426 n.19 (noting that customarily, war crimes can only be committed against persons belonging to “other side”).


\textsuperscript{153} See id.

\textsuperscript{154} See id.

\textsuperscript{155} See Rape as a Crime, supra note 11, at 426 (asserting that rape can rise to level of torture in certain instances).

\textsuperscript{156} See Report, supra note 9, at art. 2. The pertinent part of the Statute of the International Tribunal for Former Yugoslavia provides: “The International Tribunal shall have the power to prosecute persons committing or ordering to be committed grave breaches of the Geneva Conventions of 12 August 1949,” thereafter listing the proscribed acts contemplated. Id. at 192.
war, shipwrecked persons and civilians in an occupied territory who are not of the same nationality as the perpetrator within its definitions of “protected person.” If the victim is not a “protected person,” then the rape or other crime of sexual violence would not be considered a “grave breach” within the jurisdiction of the International Tribunal.

Thus, in some circumstances, absent evidence of a “widespread or systematic attack” required of crimes against humanity or the specific intent required of genocide, certain crimes of sexual violence would not fall within the definitions described above. In obviating this pitfall, one possible alternative is to charge rape as a violation of the laws and customs of war as reflected in Common Article 3 of the Geneva Conventions rather than as a grave breach. These articles apply to non-international armed conflicts and generally mandate that all persons not participating in the conflict be “treated humanely.” Also, they specifically prohibit “violence to life and person,” as well as “outrages upon


158 See Report, supra note 9, at art. 2. See generally supra note 162.

159 See, e.g., International Criminal Tribunal for the Former Yugoslavia: Indictment Against Nikolic, Nov. 7, 1994, reprinted in 34 I.L.M. 996 (1994). Charge 1.3 of the indictment of Dragon Nikolic demonstrate “specific intent.” Id. It reads:

From about 13 June 1992 to about 24 June 1992, in Susica Camp Dragan Nikolic committed a Crime against Humanity by participating in the murder of Durmo Handzic during a period of armed conflict and as part of a widespread or systematic attack directed against a civilian population, an offense recognized by Article 5(a) of the Statute of the Tribunal.

Id. at 998.

160 See Oren Gross, The Grave Breaches System and the Armed Conflict in the Former Yugoslavia, 16 MICH. J. INT’L L. 783, 786 (1995) (concluding that rape may actually be considered grave breach of Geneva Conventions despite fact that it was not explicitly mentioned as such).


162 See Geneva Convention IV, supra note 157, at 287. This protection would likely be best covered by Article 3 under Convention IV. Id.

163 See Geneva Convention IV, supra note 157, at 287.

164 See id.
personal dignity."\textsuperscript{165} Certainly, such conduct encompasses rape and other crimes of sexual violence.

**CONCLUSION**

The goal of the international community in prosecuting violations of international humanitarian law with respect to crimes of sexual violence should be to prosecute \textit{all} impermissible sexual behavior. Prosecuting only those offenses traditionally considered to constitute "rape" would leave unpunished at international law an entire range of conduct no less reprehensible and no less in need of society's moral condemnation.

Although the consensus of the international community is that, under certain circumstances, "rapes" ought to be punished as a violation of international humanitarian law, there is likely a lack of similar consensus regarding the circumstances and range of conduct that should be punished given the various legal traditions and cultures represented.

Accordingly, the international community should give serious consideration to including a "criminal sexual conduct" provision in any "code of crimes" it adopts. This code should make punishable the full range of crimes of sexual violence, including all acts of sexual penetration or contact committed by force or coercion. The punishment should be heightened if the conduct results in either physical or mental injury. Of course, for the crime to fall within the jurisdiction of the International Tribunal, or any other similarly constituted body, would also require proof satisfying jurisdictional "aggravating" factors. As such, any definition must include the intent, the "protected status," or the other requirements described above.

Michigan's criminal sexual conduct statute provides a model for the international community. As discussed, the statute provides for the prosecution of a wider range of offenses than the traditional common law understanding of rape, while shifting the focus of the trial to the assailant's use of force or coercion from the victim's state of mind. Moreover, the statute provides a comprehensive scheme that removes the traditional male-oriented view of rape, not only by making the crime gender-neutral, but also by

\textsuperscript{165} See id.
including punishable conduct in addition to sexual intercourse. Such a statute at international law would advance the interest in punishing all impermissible sexual conduct and would better approach a modern view of what should be punishable as a crime of sexual violence.