

ALIEN TORT CLAIMS ACT—CLASSIFYING PEACE-TIME RAPE AS AN INTERNATIONAL HUMAN RIGHTS VIOLATION

*Steve Kuan**

I. INTRODUCTION

Rape has occurred throughout human history. Currently, rape is not a violation of international human rights. Recently, the international community, with the help of mass media, has begun to crack down on rapes committed by state actors during war. However, it appears that rapes committed by private actors during peaceful times have not achieved the status of state actor rapes during wartime.

In international law,¹ private actor rapes in peacetime are relegated to the status of mere emotional and physical predicaments for the individual victims to deal with behind closed doors. These rape victims are often females burdened by societal and cultural norms, which causes their communities to banish them to a lower class.² As a result, the victims seldom seek justice.³ In addition to these internal injustices, the international community, by not officially recognizing rape, effectively deprives these victims of their only opportunity at justice.

Private actor peacetime rape deserves sanctions equal to the punishment allocated for war crimes. The recent atrocities committed against ethnic Chinese women in Indonesia exemplify the necessity of classifying such rapes as violations of international human rights.⁴

* Law Clerk, Judge Earl S. Hines, United States District Court for the Eastern District of Texas. B.B.A. and J.D., University of Houston. I wish to express my deepest gratitude to my family for their support, and Tina H. Mai for her invaluable editorial assistance in the preparation of this paper.

1. Throughout this paper, “international law” and “law of nations” will be used interchangeably.

2. See Shannon Oliver, *The International Fight for Human Rights: Women Lately Discovered*, 2 HOW. SCROLL: THE SOCIAL JUSTICE REVIEW 77 (1993) (recognizing the effect of “social, cultural, historical and religious factors” on violence against women). For example, women in Pakistan who had out of marriage affairs with men have been killed by their own families to preserve family honor. See *id.* at 78.

3. When Pakistani women were asked to join a protest against the rape of women by the Pakistani police form, the women refused out of fear that they would be picked up by the police and raped. See *id.* at 78.

4. See *True North*, BUS. WORLD (PHILIPPINES), JULY 14, 1998, available in WL 11634830.

This paper advocates that a peacetime rape committed by a private actor should be a violation of international human rights. Further, the victims should be able to bring actions in the United States federal courts under the Alien Tort Claims Act (ATCA).⁵ Section II provides a background on rape by examining the history of rape in armed-conflict and wartime, and focuses on the recognition of rape as a war crime. Section III discusses recognized international human rights and argues that rape should be included in this list. Section IV discusses the rapes that occurred during the Indonesian riots of 1997. Section V of the paper discusses the justiciability of the Indonesian rapes in the United States courts under the ATCA,⁶ with an examination of related jurisdictional issues. Finally, the paper concludes, in Section VI, that the United States should recognize peacetime rape by private actors and permit the victims recourse.

II. RAPE AS A WAR CRIME AND ITS RELATED PROSECUTIONS IN INTERNATIONAL TRIBUNALS

A. *History of War-Related Rape*

War and armed conflict have been an inevitable part of human history. Rape of women as a spoils of war has been a practice associated with warfare for centuries.⁷ This centuries old view of rape as an unavoidable consequence of war is slowly being taken more seriously. This section will examine rape as related to armed-conflicts.

1. *World War I Rape Cases*

World War I, from 1914–18, pitted Germany, Austria-Hungary, and Turkey against France, Great Britain, Russia, the United States, China, and other smaller nations.⁸ The war claimed over 8,500,000 soldiers' lives, from wounds or

5. See 28 U.S.C. § 1350 (1994).

6. See *id.* The statute provides that: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." *Id.*

7. See Judith Gardam, *Gender and Non-combatant Immunity*, 3 TRANSNAT'L L. & CONTEMP. PROBS. 345, 359 (1993) (discussing the prevalence of rape in warfare since medieval times); Sarnata Reynolds, *Deterring and Preventing Rape and Sexual Slavery During Periods of Armed Conflict*, 16 LAW & INEQ. J. 601, 605 (discussing the ancient Hebrew and Greek views that the right to rape women after warfare was considered part of the victor's booty).

8. See *The World Wars*, in 29 THE NEW ENCYCLOPEDIA BRITANNICA 982, 982 (15th ed. 1989) [hereinafter *World Wars*].

disease.⁹ The Germany military force often raped foreign women in its campaign to conquer new territories.¹⁰ When Germany invaded Belgium in 1914, rape was included in their battle plans.¹¹ The German plan of rape continued as the military forces moved into France.¹² Belgium publicized the rapes in an attempt to induce England and the United States to enter the war.¹³

2. World War II Rape Cases

World War II pitted Japan, Germany, and Italy against the Soviet Union, the United States, Great Britain, France, China, and other smaller nations.¹⁴ Compared to World War I, World War II claimed an extraordinary number of lives, estimated between thirty-five million and sixty million.¹⁵

During World War II, as Japan invaded neighboring countries, its military forces raped Chinese, Korean, and Philippine women.¹⁶ When the Japanese military invaded Nanking, China, they inflicted mass destruction, as well as a campaign to rape Chinese women.¹⁷ In 1937, General Chiang Kai-shek of the Chinese Nationalist Army withdrew from Nanking, which it had set up as China's capital, thereby leaving the city defenseless against the impending Japanese invasion.¹⁸ What followed was a horrendous number of rapes by the Japanese army.¹⁹

9. See *id.* at 1008.

10. See Reynolds, *supra* note 7, at 605 (citing SUSAN BROWNMILLER, *AGAINST OUR WILL: MEN, WOMEN AND RAPE* 40–41 (1975)).

11. See Danise Aydelott, Comment, *Mass Rape During War: Prosecuting Bosnian Rapists Under International Law*, 7 EMORY INT'L L. REV. 585, 588 (1993).

12. See *id.* at 588.

13. See *id.* at 589.

14. See *World Wars*, *supra* note 8, at 982.

15. See *id.* at 1043. The data from Soviet Union and China, the two countries with the greatest number of casualties, were unreliable, thus making an accurate count impossible. See *id.*

16. See Reynolds, *supra* note 7, at 605 (citing *Report on the Mission to the Democratic People's Republic of Korea, the Republic of Korea and Japan on the Issue of Military Sexual Slavery in Wartime*, U.N. ESCOR Commission on Human Rights, 52d Sess., Prov. Agenda Item 9(a), para. 12–18, U.N. Doc. E/CN.4/1996/53/Add.1 (1996)).

17. See Nicole Eva Erb, *Gender-Based Crimes Under the Draft Statute for the Permanent International Criminal Court*, 29 COLUM. HUM. RTS. L. REV. 401 (1998) (citing BROWNMILLER, *supra* note 10, at 57).

18. See Aydelott, *supra* note 7, at 592.

19. See *id.* (indicating that approximately 20,000 cases of rape occurred during the first month of occupation).

In addition, the Japanese military forced 80,000 to 200,000 women to become sex slaves, subjecting them to repeated daily rapes.²⁰ In particular, during Japan's colonization of Korea the Japanese military forced Korean women into sexual servitude.²¹ These women were known as "comfort women."²² The women were captured, tricked, or kidnapped by the Japanese Imperial military forces to serve as sex slaves.²³ Ironically, the Japanese government since has stated that the reason for the use of comfort women was to prevent its soldiers from committing the kind of rape that Nanking saw.²⁴

Astonishingly, the tales of these violations of basic rights of freedom and bodily privacy did not emerge until 1991, when a group of Korean women finally spoke out against Japan.²⁵ Initially, the Japanese government denied official involvement, but after increasing pressure from other Asian nations, finally acknowledged its role in obtaining the women from Japan, Korea, China, Taiwan, the Philippines, and Indonesia.²⁶

B. Prosecuting Rape as a War Crime Violation

After World War I, a post war commission was set up to investigate war-related crimes committed by Germany.²⁷ Rape was included as a war crime.²⁸

The victors of World War I inquired into breaches of law by rapes perpetrated by Germans, but no prosecutions for rape resulted.²⁹ It was not until after World War II that rape was first prosecuted as a war crime. Japanese military officials were tried for rape.³⁰ Some Japanese officials were "found guilty of rape "because they failed to carry out their duty to ensure that their subordinates complied with

20. *See id.* at 594-95.

21. *See* Erb, *supra* note 17, at 401.

22. *See* Aydelott, *supra* note 11, at 594.

23. *See id.* at 595.

24. *See id.* at 594.

25. *See id.*

26. *See id.* at 594-95.

27. *See* Aydelott, *supra* note 7, at 589.

28. *See id.*

29. *See* Gardam, *supra* note 7, at 360 n.55.

30. *See* Catherine A. MacKinnon, *Crimes of War, Crimes of Peace*, 4 UCLA WOMEN'S L.J. 59, 84 (1993) [hereinafter MacKinnon, *Crimes of War*].

international law."³¹ However, rape was not a major focus of the Japanese proceedings.³²

1. International Criminal Tribunal in the Former Yugoslavia (ICTY)

In 1991, Croatia and Slovenia seceded from Yugoslavia.³³ After the Serbian military forces invaded Croatia in 1991, mass genocide warfare occurred in 1992.³⁴ The Serbian forces systematically exterminated Croats and Muslims, and in the course of this genocide, a multitude of Croatian and Muslim women were raped.³⁵ The Serbs had a policy of "ethnic cleansing": the extermination of all non-Serbs in order to have a nation of only Serbs.³⁶ Estimates indicate that approximately 20,000 victims, including children, suffered rape, and many of the victims died during or after being raped.³⁷ Some of the rapists did not intend the immediate death of their victims, rather their intent was to impregnate their enemies with Serbian babies.³⁸ Many of these victims were Muslim, who, once no longer virginal, were ineligible for marriage and even if married, could be refused by her husband.³⁹

The mass media around the world focused sharply on the heinous sexual violence that had been committed against women in the former Yugoslavia.⁴⁰ For once, the world saw and heard about the atrocities so common in battle history, so well hidden from view. The atrocities committed sparked the international community and people all over the world to act, in order to prevent future war-related rapes.

31. See Theodor Meron, *Rape as a Crime Under International Humanitarian Law*, 87 AM. J. INT'L L. 424, 426 n.14 (1993).

32. See Erb, *supra* note 17, at 410.

33. See Aydelott, *supra* note 11, at 599.

34. See Catherine A. MacKinnon, *Rape, Genocide, and Women's Human Rights*, 17 HARV. WOMEN'S L.J. 5, 6 (1994) [hereinafter MacKinnon, *Rape*].

35. See *id.* at 6-7. See also Aydelott, *supra* note 11, at 598-99 (discussing mass rape as a form of genocide). While these acts are prohibited under laws of nation, no one was held accountable. See MacKinnon, *Rape*, *supra* note 34, at 7-8.

36. See MacKinnon, *Crimes of War*, *supra* note 30, at 63.

37. See *id.* at 63, n.11.

38. See Aydelott, *supra* note 11, at 599.

39. See *id.* at 602.

40. See Paul Gullixson, *Global Justice*, THE PRESS DEMOCRAT, Oct. 24, 1999 at G1.

In 1993, the United Nations Security Council established an international tribunal for the purpose of prosecuting international human rights violations committed in the former Yugoslavia.⁴¹ The International Criminal Tribunal in the Former Yugoslavia (ICTY) is made up of judges appointed by the General Assembly.⁴² Each nation may nominate up to two candidates for judgeship, provided that no two judges are of the same nationality.⁴³

The significance of the Tribunal is great: it is "the first time sex crimes have been tried in an international court under the auspices of the United Nations."⁴⁴ This significance is contained in the Secretary-General's report regarding Yugoslavia.⁴⁵ Article Five of the report specifically recognizes rape as a "crime against humanity."⁴⁶ Article 5 provides:

The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population:

- (a) murder;
- (b) extermination;
- (c) enslavement;
- (d) deportation;
- (e) imprisonment;
- (f) torture;
- (g) *rape*;
- (h) persecutions on political, racial, and religious grounds;
- (i) other inhumane acts.⁴⁷ (emphasis added).

The Secretary-General of the United Nations stated that a crime must have been committed as part of a widespread or systematic attack on discriminatory grounds

41. See S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., at 1, U.N. Doc. S/RES/827 (1993).

42. See 32 I.L.M. 1203 (1993).

43. See *id.*

44. Reynolds, *supra* note 7, at 625.

45. See 32 I.L.M. 1159, 1166-67 (1993).

46. See *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808*, U.N. SCOR, Annex, Art. 5, U.N. Doc. S/25704 (1993) [hereinafter *Report of the Secretary-General*].

47. *Id.*

in order to be considered a crime against humanity.⁴⁸ The maximum judgment against a convicted person would be imprisonment.⁴⁹ Furthermore, the ICTY provides an appellate procedure.⁵⁰ There are two grounds for an appeal: “an error on a question of law invalidating the decision or, an error of fact which has occasioned a miscarriage of justice.”⁵¹ The prosecutor also is entitled to the appeal on the same grounds.⁵²

2. *International Criminal Tribunal on Rwanda (ICTR)*

Following decades of fighting, in a span of three short months, “between half a million and one million citizens of Rwanda were killed by fellow Rwandans.”⁵³ The violence was indirectly triggered by the death of President Habyarimana in a plane crash on April 6, 1994.⁵⁴ Immediately thereafter, the Presidential Guard began to eliminate political opponents, including the Prime Minister, the President of the Supreme Court, and several human rights activists.⁵⁵ The genocide lasted until the Rwandan Patriotic Front (RPF) defeated the Rwandan Army and took control of the government.⁵⁶

On November 8, 1994, the United Nations Security Council passed a resolution to establish an International Tribunal for Rwanda.⁵⁷ The purpose of the tribunal is to “prosecute persons responsible for genocide and other serious violations of international humanitarian law committed in Rwanda . . . during 1994.”⁵⁸

Article three is entitled “Crimes against humanity” and includes the following language:

The International Tribunal for Rwanda shall have the power to prosecute persons responsible for the

48. *See id.*

49. *See* 32 I.L.M. 1159, 1186 (1993).

50. *See id.* at 1187.

51. *See id.*

52. *See id.*

53. Barrett Prinz, Comment, *The Treaty of Versailles to Rwanda: How the International Community Deals with War Crimes*, 6 TUL. J. INT’L & COMP. L. 553, 578 (1998).

54. *See id.* at 577–78.

55. *See id.*

56. *See id.*

57. *See* 33 I.L.M. 1598 (1994) (reporting on UN Security Council Resolution 955 (1994)).

58. *Id.*

following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds:

- (a) Murder;
- (b) Extermination;
- (c) Enslavement;
- (d) Deportation;
- (e) Imprisonment;
- (f) Torture;
- (h) Rape;
- (i) Persecutions on political, racial and religious grounds;
- (j) Other inhumane acts.⁵⁹ (emphasis added).

The resolution contains similar articles regarding the selection of judges,⁶⁰ judgment,⁶¹ and appellate procedure⁶² as in the Yugoslavia resolution.⁶³

These two international tribunals demonstrate that the international community has fully embraced the idea that rape committed during war is punishable as a violation of international human rights. They are the first step in the right direction in protecting civilians from the ravages of war.

III. INTERNATIONAL HUMAN RIGHTS LAW

A. *International Human Rights as Enumerated in Restatement Section 702*

The current recognized law of international human rights contained in Section 702 of the Restatement of the Law (Third) - Foreign Relations, titled Customary International Law of Human Rights, states:

- A state violates international law if, as a matter of state policy, it practices, encourages, or condones
- (a) genocide,
 - (b) slavery or slave trade,

59. *See id.* at 1603.

60. *See id.* at 1606-7.

61. *See id.* at 1610.

62. *See id.* at 1611.

63. *See* Yugoslavia Resolution, *supra* note 45 [Title need in initial cite] .

- (c) the murder or causing the disappearance of individuals,
- (d) torture or other cruel, inhuman, or degrading treatment or punishment,
- (e) prolonged arbitrary detention,
- (f) systematic racial discrimination, or
- (g) a consistent pattern of gross violations of internationally recognized human rights.⁶⁴

However, this is not a cumulative list.⁶⁵ International human rights continue to expand, and customary law may include other rights not yet recognized.⁶⁶

The rights enumerated in the *Restatement*, however, are only valid against state officials or action.⁶⁷ The comment to Section 702 explains that a state is responsible for acts of officials even if the acts were not authorized or known to the authorities.⁶⁸ A state may be presumed to have violated section 702 if the acts "have been repeated or notorious and no steps have been taken to prevent them or to punish the perpetrators."⁶⁹

The comment to section 702 notes that a state is not ordinarily responsible for an individual's violations, for example, individual acts of torture or of racial discrimination.⁷⁰ For private acts, a state would be responsible if it "required, encouraged, or condoned" such acts.⁷¹ Mere failure to prohibit the acts by a lack of laws or regulations that spell out the prohibitions does not constitute encouragement or condonation by the state.⁷²

B. Inclusion of Rape in the Restatement Section 702's Definition of International Human Rights?

Construed narrowly, section 702 does not encompass rape as one of the violations of international human rights.

64. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW, § 702 (1987) [hereinafter RESTATEMENT].

65. *See id.* cmt. a.

66. *See id.*

67. *See id.* cmt. b.

68. *See id.*

69. *See id.* § 702 cmt. b.

70. *See* RESTATEMENT, *supra* note 64, § 702 cmt. b.

71. *See id.*

72. *See id.*

Reading the section on its face, rape is not included as an international human rights violation. Furthermore, the comments and notes that follow section 702 do not mention rape specifically. Finally, the annotations to the section fail to mention rape as a specific violation of international human rights, as defined in section 702.

Read liberally, rape may be covered under subsections (d) and (g) of section 702. Section 702(d) expressly lists "torture or other cruel, inhuman, or degrading treatment or punishment" as a violation.⁷³ Comment g of the *Restatement* defines torture as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person for such purposes . . . [as] intimidating him or other persons."⁷⁴ Subsection (g) includes "other infringements of recognized human rights that are not violations of customary law when committed singly or sporadically. . . [a] violation is gross if it is particularly shocking because of the importance of the right or the gravity of the violation."⁷⁵

Some have taken the position that torture, defined similarly to section 702, includes rape.⁷⁶ As the horrific examples of Yugoslavia and Rwanda have shown the world, rape is not only a violent sexual crime, but also a tool for genocide and torture.⁷⁷ Absent an express addition to the Restatement, the only method of classifying rape as an international human rights violation under the Restatement is to argue that rape is a form of torture.⁷⁸

73. *Id.* § 702(d).

74. *Id.* cmt. g (quoting *Declaration on the Protection of All Persons From Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Art. 1(1), G.A. Res. 3452, 30 U.N. GAOR Supp. No. 34 at 91).

75. *Id.* at cmt. m.

76. See Beth Stephens, *Humanitarian Law and Gender Violence: An End to Centuries of Neglect?*, 3 HOFSTRA L. & POL'Y SYMP. 87, 95–6 (1999).

77. See *UN Tribunal Convicts Alfred Museama of Genocide*, AFRICA NEWS, Jan. 28, 2000, available in 2000 WL 4131431 (describing the prosecution of a defendant for genocide and recognizing that rape is a component of genocide); Caroline D. Krass, *Bringing the Perpetrators of Rape in the Balkans to Justice: Time For an International Criminal Court*, 22 DENV. J. INT'L L. & POL'Y 317, 318 (1994) (discussing the number of rapes which occurred in Yugoslavia and the push to frame rape as a tool of genocide and torture).

78. Cf. Stephens, *supra* note 76, at 95 (discussing the emerging trend of recognizing rape as a form of torture and thus prohibited by international law).

The analysis of genocidal rape as torture, however, may seem to imply that rape is a lesser crime than it really is.⁷⁹ Instead, it has been argued that rape should be a violation of international human rights in its own category, as witnessed in the United Nations resolutions authorizing the international tribunal for Yugoslavia and Rwanda.⁸⁰

IV. STUDY OF THE 1997 INDONESIAN PEACE-TIME PRIVATE ACTOR RAPES OF ETHNIC CHINESE WOMEN

A. *Causes and Effects of the Private Actor Rape in Times of Peace*

Since World War II, Asia has enjoyed tremendous growth in economic and social status.⁸¹ Most of Southeast Asia's economy grew at a rate that the rest of the world could only envy.⁸² Human rights progressed as well, albeit at a slower pace.⁸³ As living standards and economic wealth increased overall, more and more citizens enjoyed greater rights and protection.

In 1997, however, Asian nations faced a currency devaluation crisis that crippled their once high-flying economies and tremendous growth.⁸⁴ This currency devaluation means the Asian countries lost buying power against other currencies, especially the U.S. dollar.⁸⁵ The crisis started in Thailand and quickly spread throughout the region, bringing the once proud economies down to a shadow

79. See *Prosecuting Rape as Genocide*, N.J. L.J., Aug. 21, 1995, at 6 (detailing comments by Court TV's Terry Moran on the possible effect of categorizing rape as torture rather than establishing it as a separate offense).

80. See Stephens, *supra* note 76, at 98 (discussing the fact that while it is a good step that rape is being recognized as torture, that there is still a need to make rape and violence against women a violation of international law in its own right).

81. See J.L. Hazelton, *Asia; Economic Giant Rises, then Rises Again*, in *20th Century*, THE CINCINNATI ENQUIRER, Nov. 14, 1999, at A16.

82. See Ronald Nangoi, *Asia Must Strive to Compete With Integrated EU*, JAKARTA POST, Jan. 22, 2000, available in 2000 WL 4784870.

83. See Vitit Muntarbhorn, *Asia, Human Rights and the New Millennium: Time For a Regional Human Rights Charter?*, 8 TRANSNAT'L L. & CONTEMP. PROBS. 407, 408-09 (1998).

84. See generally Henry Laurence, *Financial System Reform and the Currency Crisis in East Asia*, ASIAN SURVEY, Mar. 1, 1999, at 348.

85. Cf. Eisuke Sakakibara, *IMF's Indonesia Reforms Too Severe*, THE YOMIURI SHIMBUN, Dec. 10, 1999, available in 1999 WL 29832011 (discussing the changes in U.S./Indonesian currency exchange rates as the crisis developed).

of their former selves.⁸⁶ While many of the nations in the region had enjoyed double-digit growth before the crisis, a majority of the Indonesians were still living in poverty at that time.⁸⁷

Indonesia was one of the countries crushed by the currency devaluation crisis.⁸⁸ Like many of its neighbors, Indonesia had enjoyed strong economic growth.⁸⁹ Ethnic Chinese, who had lived in Indonesia for many generations, but were resented by Indonesians for their wealth, controlled much of that wealth and growth.⁹⁰

As a direct consequence of the crisis, the standard of living plummeted in Indonesia almost overnight.⁹¹ Citizens' living standards, already low despite the country's growth, further worsened, and some essential materials, such as food, became scarce.⁹² Students rioted against the

86. See generally Suein L. Hwang & Michael M. Phillips, *Asia Bailout Could Aid Tobacco Firms-IMF Program May Help Open Cigarette Markets in South Korea, Thailand*, ASIAN WALL ST. J., Dec. 17, 1998, at 5.

87. See Curtis Runyan, *An Unfinished Revolution*, WORLD WATCH, Jan. 1, 1999 at 34, available in 1999 WL 11071028 (describing the increase in the number of persons living at poverty level in Indonesia as a result of the economic crisis); Imbert Mattee, *Indonesia's Problems Festering the Times are Critical for Suharto's Rule in Impoverished Land*, SEATTLE POST-INTELLIGENCER, Mar. 19, 1998, at A1 (stating that before the crisis one in every five Indonesians lived at or below their country's poverty line and that after the crisis that number has doubled); Lora Western, *Rethinking Asia: the Search For Solutions, Faulty Vision: Past Forecasts of the Region's Prospects by Seasoned Asia Watchers Failed to Foresee the Current Crisis; Remember That When Others Tell You What's Likely to Happen Next*, ASIAN WALL ST. J., Oct. 26, 1998, at S6 (discussing the economic growth and strength of the region before the crisis).

88. See Jay Solomon, *Asian Economic Survey 1998-99, Rethinking Asia: The Search for Solutions, Indonesia: The Past Year Has Been Filled With Political Upheaval, Rioting and Economic Turmoil; Will The Near Future Make Those 12 Months Seem Like the Good Old Days?*, ASIAN WALL ST. J., Oct. 26, 1998, at S18 (discussing the deleterious effects of the economic crisis in Indonesia).

89. See Richard Borsuk, *Suharto Says Big Projects Should Be Put On Hold*, THE ASIAN WALL ST. J., Aug. 19, 1991, at 3.

90. See Christine T. Tjandraningsih, *Dragon Dancers Perform in Jakarta After 3 Decades in Hiding*, JAPAN ECONOMIC NEWSWIRE, Feb. 5, 2000, available in LEXIS, All Sources, News.

91. See *Stability Needed in Indonesian Crisis*, THE CANBERRA TIMES, Dec. 31, 1997, at A10, available in LEXIS, All Sources, News.

92. See Jeremy Wagstaff, *Rethinking Asia: Indonesia's Poverty: How Bad Is It? Urban areas are cloaked in despair, but nutmeg farmers are buying satellite dishes; It's this paradoxical mix that makes this question a tough one - but an important one for gauging Indonesia's social and economic resilience*, ASIAN WALL ST. J., Oct. 26, 1998, available in 1998 WL-WSJA 12989232.

government, blaming it for failure to stop the worsening living conditions.⁹³

Beginning on May 13, 1997, two days of violence broke out in Jakarta, Indonesia.⁹⁴ On May 14 and May 15, 1997, Indonesian citizens rioted en masse throughout the country.⁹⁵ Other cities were affected as well, including Solo, Central Java, and Palembang, South Sumatra.⁹⁶ While facts from the riots are unreliable and unclear to this day, it is almost certain that the riots were well orchestrated, with a strong anti-Chinese sentiment demonstrated by the mob leaders.⁹⁷ In fact, the violence and the resulting effects have led to a mass exodus of Chinese from Indonesia.⁹⁸

In the aftermath of the May riots, resident human rights workers reported numerous rapes.⁹⁹ Almost all involved rapes of ethnic Chinese by Indonesians.¹⁰⁰ In addition to rape, other forms of sexual violence also took place during the riots.¹⁰¹ Human rights groups have been working diligently to document the abuses from May, and many of them have been threatened with violence.¹⁰² Documentation has been a major problem, as victims were afraid to speak out and medical attention after the rapes was non-existent.¹⁰³ Rapes on ethnic Chinese women have subsequently occurred in June, July, and August of 1997.¹⁰⁴ These rapes were better documented.¹⁰⁵

93. See *Indonesia Ends State Support of Suharto Foundations*, ASIAN WALL ST. J., July 6, 1998, available in 1998 WL-WSJA 12981596.

94. See *Indonesia: The Damaging Debate on Rapes of Ethnic Chinese Women* (visited Jan. 24, 2000) <<http://www.hrw.org/hrw/reports98/indonesia3.htm>> [hereinafter *Human Rights Watch Report*].

95. See William McGurn, *Indonesia's Kristallnacht*, WALL ST. J., July 10, 1998, at A14, available in 1998 WL-WSJ 3501114.

96. See *Human Rights Watch Report*, *supra* note 94.

97. See *id.*

98. See *id.*

99. See *World in Brief—Indonesia Rights Groups Cite Assaults on Women*, L.A. TIMES, June 11, 1998, at A10.

100. See *Human Rights Watch Report*, *supra* note 94; *Indonesia to Probe Human Rights Panel Report on 1998 Mass Rape*, ASIAN POLITICAL NEWS, Jan. 17, 2000, available in 2000 WL 9204894 (discussing efforts by the Indonesian Human Rights Minister to investigate mass rapes of Chinese women).

101. See *id.* (indicating that witnesses viewed public stripping of women).

102. See *id.*

103. See *id.*

104. See *id.*

105. See *Human Rights Watch Report*, *supra* note 94.

The best estimate of the damage from the riots is 1,198 dead, 4,083 shops and 1,026 homes burned, and forty shopping malls destroyed.¹⁰⁶ Eyewitness accounts report that Indonesian youths were trucked to Chinese dominated neighborhoods.¹⁰⁷ Some of the youths have admitted that they were paid, an indication that the riots were organized.¹⁰⁸ However, allegations of a systematic and organized attack have not been verified.¹⁰⁹

Father Sandyawan, leader of the Volunteer Team for Humanity, which was investigating the rapes, published a report on the sexual violence.¹¹⁰ The report indicated that there were 168 cases of sexual violence, with 130 rape cases reported in Jakarta.¹¹¹ As volunteers continue to track the cases, the number is expected to fall below the 130 cases first reported.¹¹²

The world community has been silent on this matter, presumptively because private individuals, not government-regulated employees or agents conducted the actions. It is this resounding silence and inaction that requires international action. Examples like this pattern of Indonesian atrocities towards the Chinese, if left unproved and untold, could inspire atrocities of the same kind.

B. Official Statement from the Indonesia Government Regarding the Riots and the ensuing controversy over the rapes

The Indonesian government has admitted that the riots were deliberate.¹¹³ On June 2, the National Commission on Human Rights condemned the violence and suggested that it was an organized effort.¹¹⁴ On July 23, the government

106. *See id.*

107. *See id.*

108. *See id.*

109. *See id.*

110. *See id.*

111. *See id.* (noting that the horrors of the initial reports made documentation suspect).

112. *See id.* (discussing the checking and cross-checking of cases and pointing out that campaign of intimidation and harassment by the government may have discouraged women from reporting their rapes). Note also that rape victims during the military operations in 1990-91 are just now coming forward, seven years after the incident. *See id.*

113. *See id.*

114. *See id.*

appointed a joint fact-finding team, *Tim Gabungan Pencari Fakta* ("TGPF"), to investigate the violence.¹¹⁵ The team includes armed forces members, government agencies, and human rights advocates.¹¹⁶ On August 3, the armed forces commander, General Wiranto, apologized for the military's lack of prevention; then less than 3 weeks later on August 21, he acknowledged that some of the military were involved in the riots.¹¹⁷ Amidst the General's somewhat inconsistent statements on August 13, Jakarta police made arrests in connection with the May riots.¹¹⁸

Despite these admissions, the government started to deny that the rapes took place. A policewoman said in an interview with a Jakarta paper that she did not believe any rapes took place at all.¹¹⁹ The national police commander, General Roesmanhadi, began to entertain the idea of prosecuting organizations for falsely spreading rumors of rape.¹²⁰

The state intelligence chief claimed that the reports were fabricated.¹²¹ General Wiranto, on August 26, told police that no evidence was found in 103 cases of rape.¹²² In the midst of the government's delayed denials of the rapes, a young Chinese-Indonesian female volunteer of the Volunteer Team for Humanity was found murdered.¹²³

C. *Conclusions from the Study on the Indonesian Rapes*

The riots and the resulting rapes in Indonesia showcase how difficult it can be for a victim to report rapes and seek justice. There is a near consensus that the Chinese victims will not come forward to report the alleged rapes, much less

115. *See id.*

116. *See id.*

117. *See id.*

118. *See id.*

119. *See id.*

120. *See id.*

121. *See id.* (quoting Lt. Gen. Moetojib, after meeting with President Habibie: "I have come to the conclusion that the rumors were spread for political purposes to defame Indonesia in the international arena and to cause the disintegration of national unity.").

122. *See id.* General Wiranto further observed that "it is doubtful if any rapes actually took place." *Id.*

123. *See Better Protection of Rapes Investigators Needed* (visited Jan. 18, 2000) <<http://www.hrw.org/hrw/press98/oct/indo1012.htm>> (noting that the Indonesian government has an obligation to conduct investigations into the murder and threats made against those investigating rapes within Indonesia).

seek prosecutions of the rapists. Assuming that the Chinese victims do come forward, however, it is doubtful whether the Indonesia police will make any meaningful arrests. The next part of the paper discusses what rights these victims should have in the United States federal district courts.

V. TRYING RAPE AS AN INTERNATIONAL LAW VIOLATION IN THE UNITED STATES FEDERAL COURTS

A. *A. International Human Rights Violations Tried in United States Federal District Courts Under the Alien Tort Claims Act*

Due to the lack of a single realistic judicial remedy for victims such as those involved in the Indonesia riots, this section examines whether suits may be brought in a United States federal district court under the Alien Tort Claims Act ("ATCA").¹²⁴ The Act, originally a part of the Judiciary Act of 1789, had rarely been used until the Second Circuit revived it in 1980.¹²⁵ This section will examine some of the most important cases that have arose under the ATCA.

1. *Filartiga v. Pena-Irala*

In *Filartiga*¹²⁶, Dr. Filartiga and his daughter, both Paraguay citizens living in the United States, brought suit in the Eastern District of New York against Americo Norberto Pena-Irala (Pena), another Paraguay citizen, for wrongfully causing the death of Dr. Filartiga's seventeen-year-old son, Joelito, in Paraguay.¹²⁷ Pena was Inspector General of Police in Paraguay when Joelito was kidnapped and tortured to death.¹²⁸ The Filartigas contended that Joelito was killed because of Dr. Filartiga's political beliefs and activities against the Paraguay government.¹²⁹

Prior to filing the suit, Dr. Filartiga had commenced a criminal action against Pena in Paraguay for the murder of Joelito.¹³⁰ The Paraguayan attorney representing Dr. Filartiga

124. See 28 U.S.C. § 1350 (1994).

125. See Peter Schuyler Black, *Kadic v. Karadzic: Misinterpreting the Alien Tort Claims Act*, 31 GA. L. REV. 281 (1996) (noting that ATCA is now used primarily to allow limited states federal courts to hear international human rights case).

126. 630 F.2d 876 (2d Cir. 1980).

127. See *id.* at 878.

128. See *id.*

129. See *id.*

130. See *id.*

was arrested and subsequently disbarred.¹³¹ During the course of the trial, Hugo Duarte, the son of Pena's companion, confessed to the murder of Joelito.¹³² Duarte claimed that he caught Joelito and his wife in an affair, and killed Joelito in the heat of passion.¹³³ Apparently, Duarte was not convicted or sentenced in the trial.¹³⁴ The Filartigas submitted gruesome photographs of Joelito's corpse to the court.¹³⁵ The photographs, they believe, indicate that Joelito had been tortured.¹³⁶

In 1978, Pena arrived in the United States with his companion on a visitor's visa, and established residence in Brooklyn, New York.¹³⁷ Upon learning of Pena's presence in the United States, the Filartigas alerted the Immigration and Naturalization Service (INS).¹³⁸ INS then filed a deportation proceeding.¹³⁹

Dolly Filartigas filed suit against Pena, while Pena was being held pending deportation.¹⁴⁰ The Filartigas' cause of action was under the following authorities:

[W]rongful death statutes; the U.N. Charter; the Universal Declaration on Human Rights; the U.N. Declaration Against Torture; the American Declaration of the Rights and Duties of Man; and other pertinent declarations, documents and practices constituting the customary international law of human rights and the law of nations, as well as 28 U.S.C. section 1350, Article II, section 2 and the Supremacy Clause of the U.S. Constitution.¹⁴¹

Jurisdiction was invoked by federal question and ATCA.¹⁴²

The Filartigas sought to enjoin Pena's deportation, but the district judge dismissed the complaint based on

131. *See id.*

132. *See Filartiga*, 630 F.2d at 878 & n.1.

133. *See id.* at 878.

134. *See id.*

135. *See id.*.

136. *See Filartiga*, 630 F.2d at 878.

137. *See id.* at 878-79.

138. *See id.* at 879.

139. *See id.*

140. *See id.*

141. *Filartiga*, 630 F.2d at 879.

142. *See id.*

jurisdictional grounds.¹⁴³ The deportation stay was granted for forty-eight hours, while the Filartigas applied for further stays to the Second Circuit.¹⁴⁴ The circuit court and the Supreme Court denied the stays, and Pena was deported.¹⁴⁵ On appeal, the Filartigas argued that ATCA provides federal jurisdiction, and Pena's conduct violated the law of nations.¹⁴⁶

In holding that the law of nations forbids torture and forced detention, the Second Circuit looked to the Supreme Court for appropriate sources of international law.¹⁴⁷ The law of nations¹⁴⁸ "may be ascertained by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law."¹⁴⁹

The Supreme Court affirmed this view in *The Paquete Habana*:

[W]here there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations, and, as evidence of these, to the works of jurists and commentators who by years of labor, research, and experience have made themselves peculiarly well acquainted with the subjects of which they treat.¹⁵⁰

This is also the view followed by the International Court of Justice, which applies to: "(b) international custom, as evidence of a general practice accepted as law; (c) the general principles of law recognized by civilized nations."¹⁵¹ The Second Circuit held that ATCA grants federal courts

143. *See id.* at 879–80 (holding that the "law of nations," as employed in § 1350, excludes the law that governs a state's treatment of its own citizens). Pena sought to dismiss the suit by claiming diplomatic immunity on the jurisdictional ground and claimed the doctrine of *forum non conveniens*, in that the Paraguayan court provides remedy for the wrongs alleged. *See id.* at 879.

144. *See id.* at 880.

145. *See id.*

146. *See Filartiga*, 630 F.2d. at 880.

147. *See id.*

148. *See id.* at 877-878 (noting that the Constitution observes the accepted norms of international law which is also known as the law of nations).

149. *Id.* at 880 (citing *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 160–61; *Lopes v. Reederei Richard Schroder*, 225 F. Supp. 292, 295 (D. Pa. 1963)).

150. 175 U.S. 677, 700 (1900).

151. Statute of the International Court of Justice, June 26, 1945, Art. 38, 59 Stat. 1055, 1060.

jurisdiction.¹⁵² Further, the court noted that torture by a state actor violates international law.¹⁵³

2. *Kadic v. Karadzic*

The next case arose from the Bosnia conflict.¹⁵⁴ Victims of the former Yugoslavia sued the leader of Bosnian-Serb forces, Radovan Karadzic, in a United States district court under the ATCA.¹⁵⁵ The Second Circuit expanded *Filartiga*, and held that Karadzic may be held liable for “genocide, war crimes, and crimes against humanity in his private capacity.”¹⁵⁶

The plaintiffs were “victims, and representatives of victims, of various atrocities, including brutal acts of rape, forced prostitution, forced impregnation, torture, and summary execution” committed by soldiers under Karadzic’s command.¹⁵⁷ While Karadzic was in the United States as an invitee of the United Nations, plaintiffs served him on two separate occasions.¹⁵⁸ Karadzic argued that there was insufficient service of process, lack of subject matter jurisdiction, and nonjusticiability of the claims.¹⁵⁹ The district court dismissed the suit for lack of subject matter jurisdiction.¹⁶⁰

Regarding the subject matter jurisdiction issue, the Second Circuit noted that unless there is a violation of international law, ATCA does not grant jurisdiction.¹⁶¹ In a significant expansion of *Filartiga* doctrine, the court held that certain conduct violates international law whether state actors or private individuals commit it.¹⁶²

152. *See Filartiga*, 630 F.2d at 887.

153. *See id.* at 890.

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

155. *See id.* at 236.

156. *Id.*

157. *Id.* at 236–37.

158. *See id.* at 237.

159. *See id.*

160. *See Kadic*, 70 F.3d at 237.

161. *See id.* at 238.

162. *See id.* at 239.

3. *Xuncax v. Gramajo*

Under *Xuncax*¹⁶³, a federal district court held that the ATCA grants plaintiffs both subject matter jurisdiction, and a private right of action for tortious violations of international law or a treaty of the United States that have no other recourse or cause of action.¹⁶⁴ The court held that the ATCA was intended to provide a default remedy, the last resort for victims of grave crimes by private actors.¹⁶⁵ “It is only where the nations of the world have demonstrated that the wrong is of mutual, not merely several, concern, by means of express international accords,” does a wrong become an international violation within the meaning of the ATCA.¹⁶⁶

However, the ATCA does not require international agreement.¹⁶⁷ “[F]or a court to determine whether a plaintiff has a claim [under the ATCA] for a tort committed in violation of international law, it must [first] decide whether there is an applicable norm of international law... and [then] whether it was violated in the particular case.”¹⁶⁸

4. *Abebe-Jira v. Negewo*

In *Abebe-Jira*¹⁶⁹, three plaintiffs, who were tortured in Nigeria during the 1970's and later encountered their torturer in the United States, brought suit in a federal district court under the ATCA.¹⁷⁰ Each plaintiff alleged that they were separately tortured in the 1970s by Negewo, who served as chairman of a section of Ethiopia's capitol.¹⁷¹ The court found Negewo guilty for “torture and cruel, inhuman, and degrading treatment” and awarded each plaintiff damages.¹⁷²

In affirming the decision, the Eleventh Circuit held that the ATCA confers federal jurisdiction when the following

¹⁶³. *Xuncax v. Gramajo*, 886 F. Supp. 162 (D. Mass. 1995).

¹⁶⁴. *See id.* at 179.

¹⁶⁵. *See id.*

¹⁶⁶. *Id.* at 180 (quoting *Filartiga v. Pena-Irala*, 630 F.2d 876, 888 (2d Cir. 1980)).

¹⁶⁷. *See id.* at 180–81.

¹⁶⁸. *Xuncax*, 886 F. Supp at 184 (quoting *Trajano v. Marcos*, In re Estate of Marcos, Human Rights Litigation, 978 F.2d 493, 502 (9th Cir. 1992)).

¹⁶⁹. *Abebe-Jira v. Negewo*, 72 F.3d 844 (11th Cir. 1996).

¹⁷⁰. *See id.* at 845–46.

¹⁷¹. *See id.*

¹⁷². *Id.* (awarding each plaintiff \$500,000; \$200,000 in compensatory damages and \$300,000 in punitive damages).

three conditions are met: “(1) an alien sues (2) for a tort (3) committed in violation of the law of nations (i.e., international law).”¹⁷³ The court rejected Negewo’s assertion that the ATCA does not provide for a private right of action.¹⁷⁴

B. The United States Should Recognize Rapes by Private Actors in Times of Peace

Rape is a terrible crime, whether committed in peacetime or in wartime. Recently, the world has witnessed atrocious wartime rapes in the Bosnian conflict. The world has now witnessed peacetime rapes in Indonesia.¹⁷⁵ Whereas the Bosnian rapes received international attention, the Indonesian rapes have not.

On its face, ATCA is a simple statute. It provides: “[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the Unites States.”¹⁷⁶

Rape is a tort. It is more than a physical violation. It violates the victim’s mental and emotional state of being. It is recognized in a special category, apart from assault and battery. Many countries, including the United States, punish the perpetrators differently. Numerous commentaries and articles have been written about the effects of rape, in legal, scientific, and medical journals. In addition, scholars and scholastic journals articulate that rape should be included as an international human rights violation.¹⁷⁷

In times of armed conflict, the Geneva Convention prohibits rape.¹⁷⁸ The Convention states that “[w]omen shall be especially protected against any attack on their honour (sic), in particular against rape, enforced prostitution, or any form of indecent assault.”¹⁷⁹ Other international agreements enumerate the rights for armed conflicts not of an

173. *Id.* at 847 (quoting *Kadic v. Karadzic*, 70 F.3d 232, 238 (2d Cir. 1995)).

174. *See id.*

175. *See Human Rights Watch Report*, *supra* note 94.

176. 28 U.S.C. § 1350 (1994).

177. *See Reynolds*, *supra* note 7, at 605–07.

178. *See Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, opened for signature Aug. 12, 1949, Art. 27, 6 U.S.T. 3516, 75 U.N.T.S. 287 (entered into force Oct. 21, 1950).

179. *Id.*

international character.¹⁸⁰ The characterization of rapes as “crimes against honor” separates sex crimes from other acts of torture.

In peacetime, the Geneva Convention does not classify rape as a violation of international human rights. However, peacetime rape should be categorized as an international human rights violation.

The Indonesian rapes discussed earlier offer an example of the tragic consequences of peacetime rapes. Ethnic Chinese that lived in Indonesia for their entire lives left the country out of fear.¹⁸¹ The victims were intimidated in an effort to keep them silent and not report to the human rights worker documenting evidence of the sexual violence. The authorities did not provide adequate protection during the riots, nor did they respond adequately after the allegations surfaced.

In light of *Filartiga*, *Kadic*, ICTY, and ICTR, there is now a much stronger case to advocate rape as an international human rights violation. This classification should not be divided on whether the rapes are committed in wartime or peacetime. The consequences of rapes are now documented to have similar effects as torture. Most victims are not likely to see their perpetrators punished in a court of law. Frequently, rights of women are ignored in developing nations.

The courts in the United States have allowed parties to bring an action under the ATCA for torture suffered in foreign countries. The interests of justice compel the courts to recognize an action under the ATCA for peacetime rapes.

VI. CONCLUSION

With the creation of the ICTY and the ICTR, the international community is moving towards setting up legal guidelines by which rape is punishable as private individual acts during peacetime. While this is a commendable shift in recognizing and punishing sexual violence, it is still deficient in protecting against rape. The rapes in Indonesia demonstrate that victims often do not have any adequate avenues to seek justice, regardless of an allegedly accessible internal justice system.

180. See Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609, 16 I.L.M. 1443 (entered into force Dec. 7, 1978).

181. See *Human Rights Watch Report*, *supra* note 94.