

RAPE AS AN ACT OF TERRORISM: TOWARD AN INTERNATIONAL CONVENTION ON OUTRAGES OF HUMAN DIGNITY

Christopher Scott Maravilla[†]

INTRODUCTION

The form an act of terrorism takes is limited only by the imagination of the terrorist. A seemingly random act of personal violence may be part of a wider scale infliction of terror upon the civilian population; A situation recognized by the domestic law of the State of Israel.¹

Rape is already a recognized war crime under the Geneva Conventions and by the International Criminal Tribunal for the Former Yugoslavia. The definition of rape in international law is the penetration (a) of the vagina or anus by the penis or an object or (b) of the mouth by the penis.² Consent must be granted, voluntarily weighed under the individual circumstances.³ The *mens rea* is intentional penetration of the victim.⁴

However, the international conventions on terrorism focus on crimes against nation states, not individual citizens. Thus, a gap exists in current international covenants to cover victims of rape in terrorist acts, something that is covered under the domestic laws of some states. This article will: (1) provide an overview of the international conventions on

[†] Administrative Judge at the Federal Aviation Administration and Adjunct Professor of Law at American University Washington College of Law. Elected Member of the American Law Institute. JD, Georgetown University Law Center.

¹ The Counter-Terrorism Law, 5776-2016, SH No. 568876-2346 p. 4 (Isr.).

² See Prosecutor v. Kunarac, Case No. IT-96-23-T & IT-96-23/1-T, Judgment, ¶ 437 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 22, 2001).

³ See *id.* ¶ 460.

⁴ See *id.*

terrorism, (2) discuss the existing law establishing rape as a war crime, and (3) while considering domestic law examples, argue that rape should also be recognized as an act of terrorism in an international convention.

I. OVERVIEW OF THE INTERNATIONAL LAW OF TERRORISM

The following is an overview of the major international treaties and United Nations conventions on terrorism. First are the conventions regarding multinational treaties. Next, the UN General Assembly Resolutions, passed between the 1970's and 1990's, demonstrate a fundamental shift over time of the UN's attitude toward terrorism. Finally, this section will look at the Post-9/11 UN Resolutions.

A. *Convention on Offences and Certain Other Acts Committed on Board Aircraft*

The 1963 Aircraft Convention became effective in 1969 when the United States became the 12th signatory, six years after its enactment.⁵ Israel signed merely weeks later.⁶ It is interesting to note how the rise in international terrorism prompted more countries to sign the convention. By 1987, 128 countries had become signatories, and in 2001 the number of signatories rose to 171.⁷

⁵ Convention on Offences and Certain Other Acts Committed on Board Aircraft, Sep. 14, 1963, 10106 U.N.S.T. 220 (came into force on Dec. 4, 1969) [hereinafter The 1963 Aircraft Convention].

⁶ *Id.*

⁷ See U.N. Secretary-General, *Measures to Prevent International Terrorism which Endangers of Takes Innocent Human Lives of Jeopardizes Fundamental Freedoms and Study of the Underlying Causes of Those Forms of Terrorism and Acts of Violence which Lie in Misery, Frustration, Grievance and Despair and which Cause Some People to Sacrifice Human Lives, Including Their Own, In an Attempt to Effect Radical Change*, p. 26-29 U.N. Doc. A/42/519 (Sep. 8, 1987); see also International Civil Aviation Organization, *Convention on Offences and Certain Other Acts Committed on Board Aircraft Signed at Tokyo on 14 September 1963*.
https://www.icao.int/secretariat/legal/List%20of%20Parties/Tokyo_EN.pdf

The scope of the Convention covers offenses against a nation's penal laws, acts that jeopardize the safety of persons onboard aircrafts, or other acts, "which jeopardize good order and discipline on board."⁸ Under the Convention, aircraft commanders are permitted to use reasonable measures to protect the aircraft and its passengers, maintain good order and discipline, and deliver anyone committing an offense (as defined by Article I) to the proper authorities once the plane has landed. Any actions taken by the commander, crew, or passengers in accordance with the Convention (i.e., subduing an unruly passenger, hijacker, etc.) will not subject them to civil or criminal liability in the signatory states.⁹ Contracting states undertake the responsibility to detain any persons who commit an offense under the Convention, and provide detainees the right to contact an official of their home government.¹⁰ The Convention does not require extradition, but the offense is extraditable between two countries with an extradition treaty.¹¹

B. Convention for the Suppression of Unlawful Seizure of Aircraft

The 1970 Seizure of Aircraft Convention had more initial signatories than the 1963 Aircraft Convention, and by 2001 that number increased to 173 signatories.¹² The convention defines as an offense:

Any person who on board an aircraft in flight:

1. unlawfully, by force or threat thereof, or by any other form of intimidation, seizes, or exercises

⁸ See The 1963 Aircraft Convention, *supra* note 5, at 222.

⁹ See The 1963 Aircraft Convention, *supra* note 5, at 228–29.

¹⁰ See The 1963 Aircraft Convention, *supra* note 5, at 23132.

¹¹ See The 1963 Aircraft Convention, *supra* note 5, at 234.

¹² Int'l Civil Aviation Org. [ICAO], *Convention for the Suppression of Unlawful Seizure of Aircraft* (Dec. 16, 1970), https://www.icao.int/secretariat/legal/List%20of%20Parties/Hague_EN.pdf.

control of, that aircraft, or attempts to perform any such act, or

2. is an accomplice of a person who performs or attempts to perform any such act . . .¹³

Signatory states are obliged to perform the standard actions cited in the introduction to Section I. These include making the above acts criminal under domestic law, seizing persons who commit an offense under the Convention, and either extraditing to another state or prosecuting the offender.¹⁴ States also pledge to take measures to restore control of the plane to its lawful commander.¹⁵

*C. Convention to Prevent and Punish the Acts of
Terrorism Taking the Form of Crimes Against Persons
and Related Extortion that are of International
Significance*

As of 2001, the 1971 Organization of American States (OAS) Terror Convention had only 17 signatories among OAS nations.¹⁶ The primary focus of the treaty is kidnapping and extortion. Article I of the Convention provides that:

The contracting states undertake to cooperate among themselves by taking all the measures that they may consider effective, under their own laws, and especially those established in this convention, to prevent and punish acts of terrorism, especially kidnap[p]ing, murder, and other assaults against the life or physical integrity of those persons to

¹³ See Convention for the Suppression of Unlawful Seizure of Aircraft art. 1, Dec. 16, 1971, U.N.T.S. 12325.

¹⁴ Seizure of Aircraft Convention, *supra* note 13, at 108.

¹⁵ *Id.* at 109.

¹⁶ Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion that are of International Significance art. 1, Feb. 2, 1971, T.S. No. 37 [hereinafter "The 1970 OAS Terror Convention"].

whom the state has the duty according to international law to give special protection, as well as extortion in connection with those crimes.¹⁷

There is no standard definition of an offense within the Convention, and the convention does not define who the “persons” are who are afforded “special protection” under international law. The main provisions of the Convention are similar to other international conventions. States pledge to take measures against these terrorist acts and make them extraditable offenses.¹⁸ There is no focus on individual victims within this Convention.

*D. Convention for the Suppression of Unlawful Acts
Against the Safety of Civil Aviation*

This convention is very similar to its 1970 predecessor. The only major change is the definition of what constitutes an offense under the Convention. The definition covers more than hijacking aircrafts, but also destruction of the airplanes themselves. The Convention provides:

Any person commits an offence if he unlawfully and intentionally:

1. performs or act of violence against a person on board an aircraft in flight if that act is likely to endanger the safety of that aircraft; or
2. destroys an aircraft in service or causes damage to such an aircraft which renders it incapable of flight or which is likely to endanger its safety in flight; or
3. places or causes to be placed on an aircraft in service, by any means whatsoever, a device or

¹⁷ The 1970 OAS Terror Convention, *supra* note 16, art. 1.

¹⁸ See The 1970 OAS Terror Convention, *supra* note 16, art. 3.

substance which is likely to destroy the aircraft, or to cause damage to it which renders it incapable of flight, or to cause damage to it which is likely to endanger its safety in flight; or

4. destroys or damages air navigation facilities or interferes with their operation, if any such act is likely to endanger the safety of aircraft in flight; or

5. communicates information which he knows to be false, thereby endangering the safety of an aircraft in flight.¹⁹

The obligations of the signatory states are the same as the 1970 Seizure of Aircraft Convention.²⁰

E. Convention and Prevention of Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents

The 1973 Protected Persons Convention defines an internationally protected person as a Head of State, Foreign Minister, or any state official or official of an international organization who is afforded special protection under international law.²¹ Offenses under the convention include “murder, kidnapping, attacks or the threat or attempt of any of the preceding, against such an internationally protected person.”²² The rest of the convention is fairly standard in terms of its provisions on extradition, cooperation between

¹⁹ Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation art. 1, Sep. 23, 1971, U.N.T.S. 14118 [hereinafter “The 1971 Civil Aviation Convention”].

²⁰ See The 1971 Civil Aviation Convention, *supra* note 19; See also The 1970 Seizure of Aircraft Convention, *supra* note 12.

²¹ Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents art. 1, Dec. 14, 1973, 1035 T.S. No. 167 [hereinafter “The 1973 Protected Persons Convention”].

²² See The 1973 Protected Persons Convention, *supra* note 21, art. 2.

states, and prosecution. There is no mention of victim's rights under the convention.

F. European Convention on the Suppression of Terrorism

The 1977 European Terrorism Convention has 46 signatories.²³ The primary focus of the Convention is extradition. Article I establishes that hijackings, attacks on Diplomats, kidnapping, hostage taking, bombings, and the use of various weapons are not "political offenses."²⁴ Many countries will refuse to extradite for crimes which are deemed political. Thus, the Convention attempts to remove any terrorist act from the definition of a political offense. However, Article 13 provides:

Any State may, at the time of signature or when depositing its instrument of ratification, acceptance or approval, declare that it reserves the right to refuse extradition in respect of any offence mentioned in Article 1 which it considers to be a political offence, an offence connected with a political offence or an offence inspired by political motives, provided that it undertakes to take into due consideration, when evaluating the character of the offence, any particularly serious aspects of the offence²⁵

This language may allow a state to make a terrorist non-extraditable if it considers the nature of the offense. Further, there is no particular focus on the victim within this Convention.

²³ European Convention on the Suppression of Terrorism, Jan. 21, 1977, E.T.S. No. 90 [hereinafter "The 1977 European Terrorism Convention"].

²⁴ The 1977 European Terrorism Convention, *supra* note 23, art. 1.

²⁵ The 1977 European Terrorism Convention, *supra* note 23, art. 13.

G. International Convention Against the Taking of Hostages

This Convention was a response to the Iran hostage crisis.²⁶ The enumerated offense is defined as when:

Any person . . . seizes or detains and threatens to kill, to injure or to continue to detain another person . . . in order to compel a third party, namely, a State, an international intergovernmental organization, a natural or juridical person, or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage. . . .²⁷

The responsibilities of signatory states are established in the introduction to Section I with one notable caveat:

Article 12. In so far as the Geneva Conventions of 1949 for the protection of war victims or the Additional Protocols to those Conventions are applicable to a particular act of hostage-taking, and in so far as States Parties to this Convention are bound under those conventions to prosecute or hand over the hostage-taker, the present Convention shall not apply to an act of hostage-taking committed in the course of armed conflicts as defined in the Geneva Conventions of 1949 and the Protocols thereto, . . . in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination, as

²⁶ Robert Rosenstock, *International Convention Against the Taking of Hostages: Another International Community Step Against Terrorism*, 9 *Denv. J. Int'l L. & Pol'y* 169, 170-71 (1980).

²⁷ International Convention Against the Taking of Hostages art. 1, Dec. 17, 1979, 1316 U.N.T.S. 205 [hereinafter "The 1979 Hostage Convention"].

enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.²⁸

This language reflects the influence of developing nations at that time.

H. International Convention for the Suppression of Terrorist Bombings

The 1997 Bombing Convention defines an offense as follows:

Any person commits an offence (*sic*) within the meaning of this Convention if that person unlawfully and intentionally delivers, places, discharges or detonates an explosive or other lethal device in, into or against a place of public use, a State or government facility, a public transportation system or an infrastructure facility:

(a) with the intent to cause death or serious bodily injury; or

(b) with the intent to cause extensive destruction of such a place, facility or system, where such destruction results in or is likely to result in major economic loss.”²⁹

(Any attempt of the above mentioned acts is also an offense).

²⁸ The 1979 Hostage Convention, *supra* note 27, art. 12.

²⁹ International Convention for the Suppression of Terrorist Bombings art. 2, Dec. 15, 1997, 2149 U.N.T.S. 256 (hereinafter “The 1997 Bombing Convention”).

The signatories are obliged to follow identical provisions to other conventions with one notable exception, unlike the 1979 Hostage Convention, this treaty has no exception for wars against Colonialist or Racist regimes. Article 5 goes even further than just a mere retraction of that language:

Each State Party shall adopt such measures as may be necessary, including where appropriate, domestic legislation, to ensure that criminal acts within the scope of this Convention . . . are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature and are punished by penalties consistent with their grave nature.³⁰

This is one of the few major changes from earlier conventions. It reflects an end to some of the Cold War era alignments reflected in multinational agreements at that time.

I. International Convention for the Suppression of the Financing of Terrorism

The 1999 Terror Financing Convention expanded the scope of signatory obligations to not just the acts of terrorism, but its financial roots as well. The Convention provides:

Any person commits an offence within the meaning of this convention if that person by any means, directly or indirectly, unlawfully and willfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out:

³⁰ The 1997 Bombing Convention, *supra* note 29, at 5.

(a) An act which constitutes an offence within the scope of and as defined in one of the treaties listed in the annex (basically all the major conventions cited above).

(b) Any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or abstain from doing any act.³¹

As with the 1997 Bombing Convention, there is no exception for combating a Colonialist or racist régime.³² While conforming to the general provisions of conventions, signatories of this Convention are also obliged to seize funds identified as benefiting terrorists.³³ Also of note, the Convention requires states to take measures in their domestic banking systems to identify terrorist funds.³⁴ Some of the language in this pursuit is not authoritative. For instance, “State Parties shall consider: Adopting regulations prohibiting the opening of accounts the holders or beneficiaries of which are unidentified or unidentifiable, and measures to ensure that such institutions verify the identity of the real owners of such transactions”³⁵ This language allows countries who have banking anonymity to continue such practices. Merely considering changes to the financial system fulfills the Convention’s requirements. Language

³¹ G.A. Res. 54/109, at art. 2 (1), International Convention for the Suppression of the Financing of Terrorism (Dec. 9, 1999), <https://www.un.org/law/cod/finterr.htm> (Hereinafter “The 1999 Terror Financing Convention”).

³² *See id.* at art.6.

³³ *Id.* at art. 8(1).

³⁴ *Id.*

³⁵ *See id.* at art. 18(1)(b)(i).

which requires banks to report unusually large transactions is subject to the same permissive language.³⁶

J. Reservations of Signatory States

When States sign these conventions, many of them add their own reservations. For instance, upon signing the 1963 Aircraft Convention, China stated: “The Chinese Government declares illegal and null and void the signature and ratification by the Chiang clique [Taiwan] usurping the name of China in regard to the above mentioned convention.”³⁷ Many Arab nations, including Bahrain, Iraq, Kuwait, Oman, UAE, Libya and Saudi Arabia, when signing the Conventions, declared that their ratification in no way signals their recognition of Israel as a State.³⁸

1. General Assembly Resolutions Pre 9/11

There are numerous documents from the General Assembly and Security Council which touch on international terrorism. Generally, they add little substance to the measures in place, but urge countries who have not yet done so to sign and ratify the conventions already in force. A few resolutions, however, are of particular interest.

2. U.N. General Assembly Resolution 34/145 (1979)

Although not a major resolution in and of itself, this resolution against international terrorism is indicative of most anti-terror resolutions of this time.³⁹ It calls upon

³⁶ See *id.* at art. 18 (1)(b)(iii).

³⁷ See U.N. Secretary-General, *Measures to Prevent Int'l Terrorism Which Endanger or Takes Innocent Human Lives or Jeopardizes Fundamental Freedoms and Study of the Underlying Causes of those Forms of Terrorism and Acts of Violence Which Lie in Misery, Frustration, Grievance and Despair and Which Cause Some People to Sacrifice Human Lives, Including Their Own, in an Attempt to Effect Radical Changes*, 29, U.N. Doc. A/42/519 (Sept. 8, 1987).

³⁸ *Id.*

³⁹ G.A. Res. 34/145, ¶ 1-3 (Dec. 17, 1979).

signatory nations to more closely follow the conventions, to sign them if they have not already done so, and to consider further measures to combat terrorism.⁴⁰ This resolution, however, does have language which singles out insurgencies against “colonial and racist regimes.”⁴¹ Actions undertaken in such an insurgency are excepted from the definition of terrorist acts.

3. UN General Assembly Resolution 49/60 (1995)

This anti-terror resolution is a reflection of a fundamental shift in attitudes since the 1970’s.⁴² It implores States to take similar measures against terrorism as the 1979 resolution, but does not include any of the anti-colonial or racist regime language. Furthermore, the resolution states, “criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstances unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them.”⁴³

This shift in attitudes is also reflected in the major conventions promulgated in the 1990’s, as well as the fact that the controversial Resolution 3379 (Zionism-equals-Racism) was repealed in 1991. Terrorism is no longer forgiven implicitly by the international community depending on its goals.

4. UN General Assembly Resolution 51/210 (1997)

This Resolution, also titled “Measures to Eliminate International Terrorism,” makes several minor suggestions and urges countries to sign the major conventions if they have

⁴⁰ *Id.* at ¶ 8.

⁴¹ *Id.* at “*Reaffirming.*”

⁴² G.A. Res. 49/60 Measures to Eliminate International Terrorism (Feb. 17, 1995).

⁴³ *See Id.* at Section I, ¶ 3.

not already done so.⁴⁴ The main point of interest is that this resolution gave the go-ahead for a special committee to draft a new international terrorist convention.⁴⁵

5. United Nations Resolutions Post 9/11

After the terrorist attacks of September 11, 2001, the United Nations General Assembly and the UN Security Council issued resolutions against the attacks.⁴⁶ One item of note is that the completion of the new International Terrorism Convention was given further urgency by these attacks.⁴⁷ This convention is a work in progress, but its proposed language varies little from previous terror conventions. The major difference is in the definition of an offense. The definition is broader; it covers acts intended to kill, or damage any number of categories of property.⁴⁸ It can be seen as a catch-all provision, encompassing any acts not defined in the previous terrorism conventions. Article 4 of the proposed convention states that if an act is defined within one of the previous conventions, the old convention will take precedence.⁴⁹ The proposed convention includes no language regarding the rights of victims.

II. MISCELLANEOUS CONVENTIONS AND LAWS

A. *Convention of the Organization of the Islamic Conference on Combating International Terrorism*

This Convention has only three signatory countries: Algeria, Saudi Arabia, and Egypt.⁵⁰ The signatories promise

⁴⁴ G.A. Res. 51/210, § I ¶ 6, Measures to Eliminate International Terrorism (Jan. 16, 1997).

⁴⁵ *Id.* at § III, ¶ 9-10.

⁴⁶ G.A. Res. 56/1, ¶ 1, Condemnation of Terrorist Attacks in the United States of America (Sept. 18, 2001).

⁴⁷ Rep. of the Ad Hoc Comm. established by General Assembly resolution 51/210 of 17 Dec. 1996, A/68/37 (Apr. 812, 2013).

⁴⁸ *Id.* at Article 2, ¶ 1-4.

⁴⁹ *See Id.* at Article 4.

⁵⁰ Adopted in Ouagadougou on July 1, 1999.

to cooperate amongst themselves to fight terrorism. The Convention is far reaching; it touches on extradition, protection of witnesses, and seizure of terrorist assets. Article 2 of the Convention states: “People’s struggle including armed struggle against foreign occupation, aggression, colonialism, and hegemony, aimed at liberation and self-determination in accordance with the principles of international law shall not be considered a terrorist crime.”⁵¹

Thus, after a survey of all relevant international conventions and UN Resolutions, a recognition of the human dignity of the person is missing from the condemnations of terrorism.

B. Rape as a War Crime

The prosecution of perpetrators and legal protection of civilians from war time rape is the result of a concerted effort by nations in international organizations and tribunals. Rape was considered a war crime at the Nuremberg War Crimes Trials, but not a part of the judgments.⁵² At the Tokyo War Crimes Trials, Japanese military leaders were found responsible for rapes committed by the soldiers under their command.⁵³ Rape is prohibited by the Geneva Conventions. Convention (IV) relative to the Protection of Civilian Persons in Time of War, adopted in Geneva on August 12, 1949, states:

Part III. Status and Treatment of Protected Persons

Section I. Provisions common to the territories of the parties to the conflict and to occupied territories

⁵¹ *Annex to Res. 59/26-P Convention of the Organisation of the Islamic Conference on Combating International Terrorism*, Article 2 ¶ a (July 1, 1999), <https://www.refworld.org/docid/3de5e6646.html>.

⁵² See Trial of the Major War Crimes Tribunals Before the International Military Tribunal, Nuremberg, Germany: Secretariat of the International Military Tribunal; 1947; 6:393, 404-407; 7:456-457.

⁵³ Pritchard R.J., Magbanua, Zaide S., eds., TOKYO WAR CRIMES TRIAL 784-85, 791-92, 815-16, 820-21 (1981).

Art. 27. Protected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity.

Women shall be especially protected against any attack on their honor, in particular against rape, enforced prostitution, or any form of indecent assault.

Without prejudice to the provisions relating to their state of health, age and sex, all protected persons shall be treated with the same consideration by the Party to the conflict in whose power they are, without any adverse distinction based, in particular, on race, religion or political opinion.

However, the Parties to the conflict may take such measures of control and security in regard to protected persons as may be necessary as a result of the war. (Emphasis added).⁵⁴

Rape is explicitly enumerated as crime against humanity in the enabling statutes for the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). The ICTY provides:

Having been established by the Security Council acting under Chapter VII of the Charter of the United Nations, the International Tribunal for the Prosecution of Persons Responsible for Serious

⁵⁴ Geneva Convention Relative to the Protection of Civilian Person in Time of War, 75 U.N.T.S. 287 (August 12, 1949).

Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (hereinafter referred to as "the International Tribunal") shall function in accordance with the provisions of the present Statute.⁵⁵

In *Prosecutor v. Kunarac, Kovac, and Vukovic*, trying war crimes committed during the war in the Balkans, the ICTY held that rape is a war crime.⁵⁶ The ICTY convicted three Serbian defendants, Dragoljub Kunarac, Radomir Kovac, and Zoran Vukovic, of raping women in the town of Foca in Bosnia-Herzegovina during the war in 1992.⁵⁷ It is believed that over 20,000 women were raped in the conflict in the former Yugoslavia.⁵⁸ In this case, the ICTY took the opportunity to enumerate a definition of rape in international law.⁵⁹

In its ruling, the ICTY relied on Article 3 of the Geneva Conventions⁶⁰ and the ICTY enabling statute. Article 3 of the Geneva Convention states:

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

1. Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any

⁵⁵ *Updated Statute of the International Criminal Tribunal for the Former Yugoslavia*, UN (Sept. 2009), https://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf.

⁵⁶ *The Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*, ICTD, <http://www.internationalcrimesdatabase.org/Case/97/Kunarac-et-al/> (last visited Feb. 24, 2020).

⁵⁷ *Id.*

⁵⁸ See Marlise Simons, *3 Serbs Convicted in Wartime Rapes*, NYT (Feb. 23, 2001), <https://www.nytimes.com/2001/02/23/world/3-serbs-convicted-in-wartime-rapes.html>.

⁵⁹ See Kunarac, Kovac and Vukovic, IT-96-23 at ¶ 437.

⁶⁰ See *supra* note 39, at ¶ 408.

other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(b) Taking of hostages;

(c) Outrages upon personal dignity, in particular humiliating and degrading treatment;

(d) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

2. The wounded and sick shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.⁶¹

Article 3 of the ICTY Statute, Violations of the laws or customs of war, states:

⁶¹ See *id.* at ¶ 405 (quoting Article 3 of the Geneva Conventions).

The International Tribunal shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, but not be limited to:

- (a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering;
- (b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity;
- (c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings;
- (d) seizure of, destruction or wil[[]]ful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science;
- (e) plunder of public or private property.⁶²

The ICTY enabling statutes reference the 1907 Hague Convention and the Regulations annexed to it.⁶³ The ICTY Appeals Chamber described Article 3 as follows:

[I]t can be held that Article 3 is a general clause covering all violations of humanitarian law not falling under Article 2 or covered by Articles 4 or 5 [of the Statute of the Tribunal], more specifically: (i) violations of the Hague law on international conflicts; (ii) infringements of provisions of the Geneva Conventions other than those classified as Grave breaches by those Conventions; (iii) violations of common Article 3 [of the Geneva

⁶² Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, U.N. Doc. S/25704 at 36, annex (1993) and S/25704/Add.1 (1993), adopted by Security Council on 25 May 1993, U.N. Doc. S/RES/827 (1993).

⁶³ See *supra* note 1.

Conventions] and other customary rules on internal conflicts; [and] (iv) violations of agreements binding upon the parties to the conflict, considering *qua* treaty law, *i.e.*, agreements which have not turned into customary international law⁶⁴

The ICTY held that the crime of rape is one against personal dignity under the rubric of Article 3(c) of the Geneva Conventions.⁶⁵ Article 3 possesses the status of customary international law.⁶⁶ The requirements for Article 3 to apply to rape are:

- (1) The violation must constitute an infringement of a rule of international humanitarian law.
- (2) The rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met.
- (3) The violation must be serious, that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim.
- (4) The violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.
- (5) There must be a close nexus between the violations and the armed conflict.
- (6) The violations must be committed against persons taking no active part in the hostilities.⁶⁷

⁶⁴ See *supra* note 1 (citing Prosecutor v. Tadic, Case IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 Oct 1995, ¶ 89; confirmed in Prosecutor v. Delalic and Others, Judgement, 20 Feb 2001, pars 125 and 136).

⁶⁵ See *supra* note 1.

⁶⁶ See *id.* at ¶ 406 (citing Prosecutor v Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 Oct 1995, ¶¶ 98 & 134; Prosecutor v Delalic and Others, Judgement, 20 Feb 2001, ¶ 143).

⁶⁷ See *id.* at ¶ 407 (citing Prosecutor v Delalic and Others, Case IT-96-21-A, Judgement, 20 Feb 2001, ¶ 420).

Important to the inquiry here is that Article 3 of the Geneva Conventions requires a causal connection between the perpetrator.⁶⁸ Thus, as in the case of terrorism, lone wolves or terrorist groups unaffiliated with a state party may not be prosecuted under Article 3.⁶⁹

III. FORMALIZING RAPE AS AN ACT OF TERRORISM IN INTERNATIONAL CONVENTIONS

A. *Focus on the Individual Within the Conventions*

The main focus of these major conventions is state responsibility. There is little focus on the rights of individuals, but with a few exceptions. In the 1963 Aircraft Convention, acts which jeopardize the safety of “persons” are offenses.⁷⁰ Also, individual passengers receive the same safeguards from liability as an air crew or commander for acts done to apprehend a terrorist.⁷¹

The 1970 Seizure of Aircraft Convention likewise includes acts of violence “against a person on board an aircraft” as an offense.⁷² Other than a minor provision where signatory states pledge to facilitate the continuation of a passengers journey, there is little mention of individuals within this convention. The 1971 Civil Aviation Convention has no focus on the individual passenger except a minor provision that States should aid further travel of passengers whose flights have been interrupted because of a terrorist act.⁷³

⁶⁸ *See id.*

⁶⁹ *See generally* Marc Sageman, *Leaderless Jihad: Terror Networks in the Twenty-First Century* (2008).

⁷⁰ *Convention on offences and certain other acts committed on board aircraft*, Sept. 14, 1963, U.N. No. 10106, <https://treaties.un.org/doc/db/Terrorism/Conv1-english.pdf>.

⁷¹ *Id.*

⁷² *Convention for the suppression of unlawful acts against the safety of civil aviation*, Sept. 23, 1971, U.N. No. 14118, <https://treaties.un.org/doc/Publication/UNTS/Volume%20974/volume-974-I-14118-English.pdf>.

⁷³ *1971 Convention for the Suppression of Unlawful Act Against the Safety of Civil Aviation*, Sept 23, 1971.

The 1979 Hostage Convention focuses more on the person in the case of hostages, but the rights and duties of States are preeminent. There is no mention of rights of former hostages to gain redress against either their captors or States, which may have sponsored or facilitated the taking of hostages. The 1997 Bombing Convention makes no mention of victims' rights, and the 1999 Terror Finance Convention's only provision for the individual defines offenses by providing funding for any acts intended to cause death or bodily harm.⁷⁴ A sampling of other conflicts, the cases of the Iraq War, the Algerian Civil War, and the Palestinian-Israel Conflict, demonstrate that rape and attacks on the dignity of the person are instruments of terror. Often, the domestic law of these countries specifically defines and addresses these circumstances.

B. *The Iraq War*

During the Iraq War, women were specifically targeted by insurgents in acts of terror.⁷⁵ These women were from all walks of life: political activists, civic leaders, business owners, and cleaners for foreigners.⁷⁶ The reasons ranged from connections with foreigners to not conforming with Islamic dress, like the wearing of the hijab, or appearing to display, what the attackers believed to be, immoral behavior.⁷⁷

These attacks included kidnapping, assault, murder, and rape.⁷⁸ Women for Women International reported that “[f]ear of violence, abduction and rape have emptied the streets of women and caused disruptions to education as children are

⁷⁴ G.A. Res. A/52/653, at Article 3 (Nov. 25, 1997), *International Convention for the Suppression of the Financing of Terrorism*, Dec. 9, 1999, <https://www.unodc.org/documents/treaties/Special/1999%20International%20Convention%20for%20the%20Suppression%20of%20the%20Financing%20of%20Terrorism.pdf>.

⁷⁵ *A Face and a Name: Civilian Victims of Insurgent Groups in Iraq*, HUMAN RIGHTS WATCH (Oct. 2, 2005), <https://www.hrw.org/report/2005/10/02/face-and-name/civilian-victims-insurgent-groups-iraq>.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

also increasingly kept at home.”⁷⁹ Most of the attacks went unreported because they involved “social taboos, especially those involving crimes of sexual violence.”⁸⁰

C. *Israel*

Israeli domestic law recognizes rape as an act of terrorism. The Compensation for Victims of Hostile Actions law provides for monies to be paid to victims of violence perpetrated by groups intending to do harm to Jews, Israel, and Israeli citizens.⁸¹ The Israeli law defines hostile acts as “the purpose of which is to harm a person due to his ethnic-national affiliation, with the attack stemming from the Israeli-Arab conflict.”⁸² In the first instance, the Israeli Ministry of Defense recognized a sexual assault as a terrorist act, and ordered compensation to the victim.⁸³ In 2006, a woman was raped by four Palestinian youths.⁸⁴ The woman was cornered by the four Palestinians in the Pisgat Zeev neighborhood of Jerusalem.⁸⁵ They beat her and then raped her.⁸⁶ The Defense Ministry concluded that the violence was because the victim was Jewish.⁸⁷

In another incident, the Defense Ministry declared a woman raped in Tel Aviv to be a victim of terror under the

⁷⁹ *Id.*

⁸⁰ *A Face and a Name: Civilian Victims of Insurgent Groups in Iraq*, HUMAN RIGHTS WATCH (Oct. 2, 2005), <https://www.hrw.org/report/2005/10/02/face-and-name/civilian-victims-insurgent-groups-iraq>.

⁸¹ Compensation for Victims of Hostile Actions Law, 5730-1970 (the Law), SEFER HAHUKIM [BOOK OF LAWS, the official gazette, SH] No. 600 p. 126, *as amended*; Compensation for Victims of Hostile Actions (Amendment No. 34) Law 5777-2017 (Amendment Law), SH 5777 No. 2622 p. 558, Knesset website (in Hebrew).

⁸² *Id.*

⁸³ Gili Cohen, “For First Time, Sex Assault Victim Recognized as ‘Hostile Action Casualty,’” *Haaretz* (October 21, 2015), <https://www.haaretz.com/sex-assault-victim-recognized-as-hostile-action-casualty-1.5411547> (Last Viewed on January 17, 2019).

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

law.⁸⁸ A Jewish couple were attacked in a mall parking lot by a young Palestinian armed with knife who forced them to engage in sexual intercourse, and subsequently raped the woman.⁸⁹ While sentenced to 30 years in prison, the court did not find that it was a terrorist incident. The Defense Ministry based its finding on the fact that the man had a prior indictment by a military court for stone throwing.⁹⁰

D. *Algeria*

The crisis in Algeria began in 1992 when the military-led government canceled free elections, which the Islamic Salvation Front (FIS) was poised to win, and, subsequently, outlawed the group altogether leading to armed conflict. The goal of the Islamic Salvation Front (FIS) and the Armed Islamic Group (GIA) was the establishment of a theocratic Muslim state in Algeria.⁹¹ To this end, feminists and other women who did not conform to the precepts of FIS and GIA were targeted. Women leading Western lifestyles deemed to conflict with traditional Islamic values were also disproportionately victimized by the groups. The terrorist acts perpetrated by these groups included assassination, executions, mutilations, hostage taking, and rape. Such acts against women included the beheading of a young girl who appeared in public without a veil, and the kidnapping, rape, murder of young women who were forced into “temporary marriages.” There were an estimated 1,600 cases of rape by terrorists according to actual filed reports with the government. Unreported instances and murders lead to the conclusion that this number may be much higher.

⁸⁸ Gili Cohen, “Woman Raped in Tel Aviv Declared Victim of Terror Attack,” *Haaretz* (March 12, 2015), <https://www.haaretz.com/israel-news/premium-woman-raped-in-tel-aviv-declared-victim-of-terror-attack-1.5430380> (Last Viewed on January 17, 2019).

⁸⁹ Alona Ferber, “When Israel Classifies Rape as Terror - and Not,” *Forward* (December 15, 2015), <https://forward.com/sisterhood/327230/what-does-it-mean-when-rape-is-reclassified-as-terrorism/> (Last Viewed on January 17, 2019).

⁹⁰ Cohen, *supra* note 88.

⁹¹*Id.*

1. Algeria's Civil Harmony Act

The Algerian Civil Harmony Law provided amnesty after the conclusion of that country's civil war in the 1990s.⁹² Certain criteria had to be met for lessened forms of punishment for criminal acts committed during the war.⁹³ Certain acts, however, fall outside the scope of the law. For example, if the subject had participated in terrorist acts causing death and rape, among others, were not exempt from prosecution.⁹⁴ Individuals who had committed terrorist acts of rape also would not be given amnesty, but could be eligible for mitigated sentences if they fulfilled the requirements of the statute.⁹⁵

CONCLUSION

The conduct of wartime rape has extended to non-state actor Terrorist groups. A review of the relevant international treaties and conventions demonstrates that international law contemplates terrorism as crimes against the state, not individuals. Rape is already recognized as a war crime under the Geneva Convention and the enabling statutes of the International Criminal Tribunals for the Former Yugoslavia and Rwanda. Some states also recognize rape as an act of Terrorism in domestic law. Accordingly, the international community should work toward an international convention on the protection of personal dignity.

⁹² Also known as The Act of Civil Concord, July 13, 1999.

⁹³ C.S. Maravilla, et. al., Middle Eastern Commercial Law, *THE INTERNATIONAL LAWYER*, Vol. 36, No.3, at 98 (2001).

<https://scholar.smu.edu/cgi/viewcontent.cgi?article=2156&context=til> (Last Viewed on January 19, 2019).

⁹⁴ See Article 3 of The Civil Harmony Act.

⁹⁵ See Article 27 of The Civil Harmony Act.