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RAPE IN WARTIME:
REDRESS IN UNITED STATES COURTS
UNDER THE ALIEN TORT CLAIMS ACT

Susana Sá Couto *

I. INTRODUCTION

The history of rape and violent sexual abuse of women during armed conflict transcends religious, national, cultural, ideological, and temporal boundaries. Women have been raped intentionally, as a strategy of war, “in virtually all wars, by almost all military forces.”1 Notorious examples of this strategy of war have involved the rape of women on a massive scale. Within the first two years of the conflict in the former Yugoslavia, for example, estimates of the number of rape victims ranged from 20,000 to 50,000.2 Some of these women

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2See European Community Investigative Mission into the Treatment of Muslim Women in the Former Yugoslavia, Warburton Report, U.N. SCOR, 48th Sess., U.N. Doc. S/25240 (1993) (estimating 20,000 Bosnian Muslim victims of rape); Andrew Bell-Fialkoff, A Brief History of Ethnic Cleansing, 72 Foreign Affairs 110 (1993) (noting that estimates of women raped in the former Yugoslavia ranged from 30-50,000); Ex-Yugoslavia: Mass Rape, A Male Tool of War, WIN NEWS, Winter 1993, at 42 (noting that by the winter of 1993, the Bosnian government commission on war crimes in Sarajevo estimated 30,000 rape victims, while the Ministry for Foreign Affairs placed the total at 50,000). Although there has been some controversy over the reliability of these estimates, it is widely agreed that rape has occurred on a large scale in the former Yugoslavia. See Tadeusz Mazowiecki, Special Rapporteur of the Commission on Human Rights, Report on the Situation of Human Rights in the Territory of the Former Yugoslavia Pursuant to Commission Resolution
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were not only raped, but forced to bear the children of their rapists.\(^3\) During the civil war and mass violence that racked Rwanda for three months in the spring of 1994, hundreds of thousands of women were reportedly raped or forced into sexual servitude.\(^4\) Like the victims of rape in the former Yugoslavia, some of these women were forced to carry their pregnancies to term and give birth to unwanted children.\(^5\) During the August 1990 invasion of Kuwait, an estimated 5,000 Kuwaiti women were raped by Iraqi soldiers.\(^6\) As many as 200,000 to 400,000 women were raped by Pakistani soldiers during the nine-month war after Bangladesh declared independence from Pakistan in 1971.\(^7\) And during the Second World War, an estimated 200,000 women were kidnapped, imprisoned in brothels known as “comfort stations,” and repeatedly raped by Japanese soldiers.\(^8\)

Despite these and countless other examples of mass rape during internal and international conflicts across the globe, perpetrators of rape in armed conflict have rarely been brought

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\(^3\) See Christopher C. Joyner, *Enforcing Human Rights Standards in the Former Yugoslavia: The Case for an International War Crimes Tribunal*, 22 DENVER INT’L L. & POL’Y 235, 252 (1994) (noting that an estimated 1000 women were impregnated as a result of rape). *See also Third Report on War Crimes in the Former Yugoslavia*, DEPT ST. DISPATCH, Nov. 16, 1992, at 825 (“At least 150 Muslim women and teen-age girls—some as young as 14—who have crossed into Bosnian Government–held areas of Sarajevo in recent weeks are in advanced stages of pregnancy, reportedly after being raped by Serbian nationalist fighters and after being imprisoned for months afterwards in an attempt to keep them from terminating their pregnancies.”); Mazowiecki, supra note 2, Annex II, ¶ 9 (identifying 119 pregnancies resulting from rape in 1992 alone).

\(^4\) See Jan Goodwin, *Rwanda: Justice Denied*, ON THE ISSUES, Fall 1997, at 29 (“In the hundred days of genocidal nightmare, an estimated 250,000 women were raped or forced into sexual slavery.”); James C. McKinley, Jr., *Legacy of Rwanda Violence: The Thousands Born of Rape*, N.Y. TIMES, Sept. 23, 1996, at A1.

\(^5\) See id. (“By conservative estimates, there are 2,000 to 5,000 unwanted children in Rwanda whose mothers were raped during the civil war . . . .”)


\(^7\) See Brownmiller, supra note 1, at 78-80.

\(^8\) See *War Crimes on Asian Women: Military Sexual Slavery by Japan During World War II: The Case of the Filipino Comfort Women* (Dan P. Calica & Nelia Sancho eds., 1993).
to justice. While many perpetrators have been shielded from prosecution and punishment by their own governments, those who are pursued by their governments frequently seek refuge in other countries. Furthermore, the international community's attempts to redress these offenses have been, until recently, quite limited. The initial international response to reports confirming the brutal and systematic use of rape in the former Yugoslavia, for instance, was confined to expressions of public outrage and condemnation. Although the United Nations Security Council voted in 1993 to establish an international tribunal to prosecute abuses committed in the region, the International Criminal Tribunal for the former Yugoslavia is hindered by substantial legal and practical difficulties. Questions relating to resources, the identification, arrest and detention of accused persons, the gathering of proof on incidences of violence against women, and the rules of evidence and procedure have yet to be resolved for the Tribunal to become effective. Moreover, the jurisdiction of the Tribunal is

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9 See Helsinki Watch, Prosecute Now!, Aug. 1993, at 12, 13 (documenting an incident in 1992 when fifteen members of a Bosnian Croat paramilitary group allegedly gang-raped five Serbian women, but were released without prosecution by the Bosnian Croat police).

10 See Amy Ray, The Shame of It: Gender-Based Terrorism in the Former Yugoslavia and the Failure of International Human Rights Law to Comprehend the Injuries, 46 Am. U. L. REv. 793, 798 (1997) ("[D]espite the thousands of women raped and prostituted... no one ever had been tried for rape as a war crime until th[e] conflict [in the former Yugoslavia]."). Although rape was discussed by the International Military Tribunal for the Far East in the Tokyo Judgment after the Second World War, it was not expressly charged as a separate offense. Id. at 798 n.30.

11 See Ex-Yugoslavia: Mass Rape, supra note 2, at 42 (discussing the United Nations Security Council decision to unanimously and publicly condemn the "atrocities committed against women" in Bosnia and Herzegovinia).


13 The crime of rape is included in the Tribunal's Statute as a crime against humanity. Statute of the Int'l Tribunal for the Former Yugoslavia, art. 5(g), reprinted in 14 Hum. RTS. L.J. 211 (1993). Rape is, therefore, among the offenses which the Tribunal was set up to prosecute.

14 See Stephens, supra note 1, at 148-49. Although the United Nations Security Council also voted in 1994 to establish an international tribunal to prosecute abuses committed in Rwanda, Goodwin, supra note 4, at 30, that tribunal faces even greater difficulties. Located in the remote town of Arusha, Tanzania, the International Criminal Tribunal for Rwanda is poorly equipped and poorly
limited to offenses committed in the former Yugoslavia. Thus, women who were or may in the future be raped in other conflicts around the world may not rely on the Tribunal to seek redress for their injuries.\footnote{15}

The purpose of this article is to explore an alternative remedy now being pursued in United States courts by victims of these abuses: a private, civil action against the perpetrators under the Alien Tort Claims Act (ATCA). The ATCA permits a non-citizen to bring a civil action in United States District Courts for torts “committed in violation of the law of nations or a treaty of the United States.”\footnote{16} Women seeking relief under the ATCA must prove, therefore, that rape or other acts of gender-based violence committed in situations of conflict\footnote{17} violate either the “law of nations” or a “treaty of the United States.” Two different strategies potentially accomplish this goal.

The first strategy relies on existing international law, including human rights or humanitarian law treaties and customary international law,\footnote{18} which forbids torture, war crimes, crimes against humanity, and genocide. This strategy posits that, properly understood, this existing, so-called gender-neutral body of law prohibits rape and other forms of gender-based violence committed during wartime. The second strategy argues that the particular characteristics of rape and other acts of gender-based violence cannot and should not be subsumed under these broader international torts. Instead, these claims ought to be brought under the separate evolving international tort of gender violence. This article evaluates the strengths and weaknesses of managed. \textit{Id.} Indeed, despite the hundreds of thousands of women raped in the Rwandan conflict, by 1997 there had “not yet been a single rape indictment handed down by the [Tribunal].” \textit{Id.}

\footnote{15}See Chinkin, \textit{supra} note 1, at 339.


\footnote{17}Although both men and women can be and are raped, causing severe injury for both, this article deals exclusively with the rape of women. In the context of armed conflict, the numbers suggest that rape is essentially a crime committed against women. \textit{See} Chinkin, \textit{supra} note 1, at 326. Furthermore, women may be subject to particular injuries from rape, such as forced impregnation or forced maternity, that are not shared by men. \textit{See infra} notes 50-51 and accompanying text.

\footnote{18}Customary international law consists of norms that states follow as a general practice due to a sense of legal obligation. These norms are established from the “general and consistent practice of states,” but need not be articulated in a treaty in order to be binding. \textit{See} \textit{Restatement (Third) of the Foreign Relations Law of the United States} § 102(2), (4) (1987).
each strategy and suggests that, although neither approach is completely satisfactory, the most effective strategy employs gender-neutral international instruments while conveying the particular characteristics of gender-based violence through carefully crafted narratives.

II. THE ALIEN TORT CLAIMS ACT

The ATCA permits a non-citizen to bring a civil action in a United States District Court for torts “committed in violation of the law of nations or a treaty of the United States.”19 Originally a provision of the 1789 Judiciary Act, the ATCA remained in relative obscurity for nearly 200 years.20 In the 1980 landmark case, Filartiga v. Pena-Irala, the Second Circuit breathed new life into the statute by interpreting it to allow federal courts to adjudicate suits alleging tortious conduct proscribed by international law.21 The case was brought by a Paraguayan citizen against a former police inspector-general of Paraguay who had tortured the plaintiff’s son to death. The Filartiga court held that although the United States had not yet ratified a treaty prohibiting torture, “deliberate torture perpetrated under color of official authority violates universally accepted norms of the international law of human rights . . . . Thus, whenever an alleged torturer is found and served with process by an alien within our borders, § 1350 provides federal jurisdiction.”22 Filartiga opened the door for plaintiffs to argue that violations of international human rights law are actionable under the ATCA. Moreover, the case established that in ascertaining the content of the “law of nations,” courts must look to the “works of jurists . . . the general usage and practice of nations . . . [and] judicial decisions recognizing and enforcing that law.”23 Indeed, Filartiga made clear that courts are to “interpret the law not as it was in 1789, but as it has evolved and exists among the nations of the world today.”24

20See Filartiga v. Pena-Irala, 630 F.2d 876, 887 n.21 (2d Cir. 1980).
21See id. at 887.
22Id. at 878. Most courts have followed Filartiga in finding that the Alien Tort Claims Act grants both jurisdiction and a cause of action for torts cognizable in international law. See In re Estate of Ferdinand E. Marcos Human Rights Litigation, 978 F.2d 493, 498 (9th Cir. 1992) and Forti v. Suarez-Mason, 694 F. Supp. 707, 712 (N.D. Cal. 1988) [hereinafter Forti II].
23Filartiga v. Pena-Irala, 630 F.2d 876, 880 (2d Cir. 1980).
24Id. at 881.
Although plaintiffs have succeeded in obtaining relief under the ATCA, several significant obstacles restrict access to alien tort actions. Individual defendants must ordinarily be physically present within the district in which the suit is filed, at the time the suit is initiated, in order to satisfy the requirement of personal jurisdiction. Furthermore, the defendant must not be immune from suit by virtue of being, for example, a diplomat or head of state. Also, governments are immune from suit under the Foreign Sovereign Immunities Act. Despite these limitations, the ATCA has proven to be an invaluable tool in the effort to redress human rights violations. Since the Filartiga decision, multi-million dollar judgments have been awarded to victims of human rights abuses. In light of these decisions, women seeking a remedy for rape or other forms of gender-based violence may find the ATCA an important avenue of relief.

III. REDRESS UNDER THE ATCA USING GENDER-NEUTRAL INTERNATIONAL INSTRUMENTS

One method of bringing a wartime rape claim under the ATCA is to argue that existing international human rights or humanitarian law treaties and/or customary international law prohibit rape and other forms of gender-based violence committed during wartime. Given Filartiga's recognition of the torture of one Paraguayan individual as a violation of customary international law, it is arguable that the brutal violence against many women in situations of conflict falls within the conduct forbidden by treaties such as the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment, the 1949 Geneva Conventions, and the

25 See Stephens, supra note 1, at 153.
26 See id.
27 See id.
29 See RESTATEMENT OF FOREIGN RELATIONS, supra note 18, at § 102.
30 See Filartiga v. Pena-Irala, 630 F.2d 876, 878 (2d Cir. 1980).
31 See supra notes 1-8 and accompanying text.
32 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature Feb. 4, 1985, 23 I.L.M. 1027
Convention on Prevention and Punishment of the crime of Genocide, or by other international instruments which proscribe crimes against humanity. The question is whether these treaties, gender-neutral on their face, provide an adequate framework within which to address rape and other forms of gender-specific violence.

The strategy of using gender-neutral treaties to pursue wartime rape claims under the ATCA has significant advantages. Many of the norms embodied in these treaties have either been adopted by the United States through ratification of these treaties or have, arguably, become part of customary international law. Notably, plaintiffs who have succeeded in obtaining relief under the ATCA have relied almost exclusively on these widely accepted international treaties. Indeed, while the Filartiga court left open whether a more expansive reading


35Crimes against humanity are defined by various international human rights instruments, including the Charters for the International Military Tribunals of Nuremberg and the Far East, see Charter of the International Military Tribunal, annexed to Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, Aug. 8, 1945, art. 6(c), 59 Stat. 1544, 82 U.N.T.S. 279 and the Charter of the International Military Tribunal for the Far East, Jan. 19, 1946, amended April 26, 1946, art. 5(c), T.I.A.S. No. 1589, and the statute establishing the international tribunal to prosecute violations in the former Yugoslavia, see Statute of the Int'l Tribunal for the Former Yugoslavia, supra note 13, at art. 5.


37The 1949 Geneva Conventions, which provide for humane treatment of noncombatants in wartime and prohibit war crimes, and the Genocide Convention, which proscribes genocide, are widely regarded to have achieved the status of customary international law. See Report of the Secretary-General, supra note 12, at 65 (discussing acceptance of these Conventions as customary international law).

of the ATCA is possible, it emphasized that its reading of the statute merely opened "the federal courts for adjudication of the rights already recognized by international law." Thus, if plaintiffs are able to demonstrate that the wrong they suffered has been expressly condemned by the international community through international treaties or international customary law, the ATCA will likely reach their claim.

This strategy of redress for the violence women suffer in times of war is not without difficulties, however. First, violence against women, including rape and other forms of gender-based violence, has received very little attention from international human rights scholars and organizations. Until very recently, violations of human rights suffered predominantly by women because of their gender were not classified as human rights abuses. When women were raped or violated in ways specific

39Filartiga, 630 F.2d at 887 (emphasis added). More specifically, the court noted that "[i]t is only where the nations of the world have demonstrated that the wrong is of mutual, and not merely several, concern, by means of express international accords, that a wrong generally recognized becomes an international law violation within the meaning of [the ATCA]." Id. at 888.

40Some wrongs are not only prohibited by customary international law, but are also described as violations of jus cogens. The concept of jus cogens is defined in the Vienna Convention on the Law of Treaties as "a peremptory norm of general international law[, that] is[,] a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." 1155 U.N.T.S. 331, 344 (art. 53), 63 Am. J. Int'l L. 875, 891 (1969). The doctrine of jus cogens is, therefore, viewed as "guarding the most fundamental and highly-valued interests of international society, as an expression of a conviction, accepted in all parts of the world community, which touches the deeper conscience of all nations . . . ." Hilary Charlesworth and Christine Chinkin, The Gender of Jus Cogens, 15 Hum. Rts. Q. 63, 66-67 (1993) (internal citations omitted). The American Law Institute has categorized genocide, slave trade, murder, torture, prolonged arbitrary detention and systematic racial discrimination as violations of jus cogens. Restatement (Third) of the Foreign Relations, supra note 18, at § 702.


42See Margareth Etienne, Addressing Gender-Based Violence in an International Context, 18 Harv. Women's L.J. 139, 143 (1995) (discussing reluctance by the United Nations to classify gender-based abuses "within the nexus of existing human rights doctrines."). See also Charlesworth and Chinkin, supra note 40, at 67-72 (arguing that jus cogens norms reflect a male perspective of what is fundamental to international society).
to their gender, the offenses were often categorized as private wrongs, not within the domain of public and universal condemnation and, consequently, not cognizable under traditional international human rights law.  

On the other hand, when women were beaten or tortured or otherwise violated in the same way that men are, the fact that the victims were women was "not registered in the record of human atrocity." Rather, the women were "counted as Argentinian or Honduran or Jewish" victims of human rights abuses. The result has been, as Catharine MacKinnon has aptly noted, that "[w]hat is done to women is either too specific to women to be seen as human or too generic to human beings to be seen as specific to women." This legacy of women's invisibility within the international human rights system presents the first in a long road of complex challenges in the effort to pursue gender-based violence claims under so-called "gender neutral" treaties.

Second, because gender-neutral treaties proscribing international human rights or humanitarian law violations primarily reflect male experiences, they fail to capture the distinct injuries that result from rape and other forms of gender-based violence. The physical pain and suffering experienced by a woman during a rape attack arguably fits within the existing definitions of torture, war crimes, or crimes against humanity. However, the continuing injury sustained by a woman forced to carry a fetus, endure labor, and give birth to a child conceived as a result of rape, is not ordinarily

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44 MacKinnon, supra note 43, at 5.

45 Id.

46 Id. at 6.


48 See Stephens, supra note 1, at 156 (arguing that understood as a crime of violence involving physical and psychological abuse, rape by a public official meets the international definition of torture).

characterized or included as a human rights violation. Nor is the permanent stigma, trauma, and degradation experienced by women who live in societies that brand sexually violated women as "damaged property" recognized as such. Feminist human rights advocates have argued that the effort to subsume female experience of sexualized violence in warfare to male-centered norms reflected in international legal instruments does women a grave disservice. Indeed, some advocates argue that pursuing this strategy only heightens women's invisibility within the international human rights sphere.

A third problem with bringing gender-based violence claims under gender-neutral treaties concerns the difficult interpretive gymnastics required to fit crimes of sexual violence against women under the existing categories of torture, war crimes, crimes against humanity, or genocide. The Geneva Conventions, for example, contain a provision listing particularly serious violations of humanitarian law that qualify as "grave breaches" or war crimes. Yet, the Geneva Conventions do not expressly list rape as a "grave breach." Only recently have international scholars and organizations begun to argue that, under a broad construction of the Geneva Conventions, rape may be included as a "grave breach" on the grounds that the list was not intended to be exhaustive, and that


51Susan Brownmiller, Making Female Bodies the Battlefield, in MASS RAPE, supra note 50, at 180-81. Several reports have documented that women have been violently abused by their spouses or families after revealing that they had been raped. Ray, supra note 10, at 805 (discussing reports that husbands killed or abandoned their wives who were raped and that families disowned young unmarried women who were raped).

52See Katherine Lusby, Hearing the Invisible Women of Political Rape: Using Oppositional Narrative to Tell a New War Story, 25 U. TOL. L. REV. 911, 912, 952-53 (1995) (arguing that this kind of analysis has rendered women's particular experience invisible); Ni Aolain, supra note 50, at 288 (discussing author who argues that the danger in categorizing rape as a crime of genocide is making "invisible acts of sexual violence and subsum[ing] them in the wider category of human destruction.").

the gravity of the offense merits its inclusion. That this argument has only recently received significant attention is troublesome, given that the history of sexual violence against women in situations of conflict is as old as the incidence of armed conflict itself. The international community's delay in perceiving rape as a "grave breach" suggests the risk of leaving the "[e]nforcement of women's rights and recognition of the nature of gender-based violence . . . to argument and interpretation."

Fourth, even if plaintiffs are able to squeeze their particular experience into existing doctrinal cubbyholes, they face the further challenge of meeting all of the elements of internationally recognized torts. Establishing the elements of these gender-neutral torts will often require female plaintiffs to demonstrate not only that they were raped, but also that the rape was committed in furtherance of some other unacceptable goal, such as intimidation, coercion, or the destruction of a particular ethnic group.

For instance, under the Convention Against Torture, the definition of torture includes three components: 1) an act causing severe physical or mental suffering, 2) committed with the intent to obtain information, to punish, intimidate or coerce, or for any discriminatory reason, 3) by a government official. Thus, if an official rapes a woman without an intent to extract information from, intimidate, coerce, or punish her, the act may not be considered torture. Further, even if the act is committed with the requisite intent, it does not constitute torture if it is committed by someone other than a public official.

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54 Meron, supra note 49, at 426.
55 See Brownmiller, supra note 1, at 31-113.
56 PANEL DISCUSSION ON HUMAN RIGHTS VIOLATIONS AGAINST WOMEN, supra note 47, at 323.
57 Convention Against Torture, supra note 32, at art. 1(1).
58 It is worth noting, however, that the Inter-American Court of Human Rights, responsible for interpreting the provisions of the American Convention on Human Rights, Nov. 22, 1969, reprinted in 9 INT'L LEGAL MAT'LS 673 (1970), has held that while international law generally does not recognize state responsibility for the conduct of private parties, violations of human rights by private actors become imputable to the state when a state abandons its responsibility to take adequate measures to prevent, investigate, and punish these violations. Velasquez Rodriguez Case, Judgment of July 29, 1988, Inter-Am. C.H.R. (ser. C, no. 4) para. 172 (1988), ("An illegal act . . . which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but
This requirement is particularly onerous for women in situations characterized as civil or internal armed conflicts. If the perpetrators of rape in those conflicts belong to an armed opposition group not yet recognized as a state, they are normally not considered state, or public, officials. Consequently, victims are unable to establish one of the elements of torture necessary to support their claim under the ATCA.\textsuperscript{59} A recent case filed by two separate teams of feminist lawyers in the United States on behalf of victims of rape and other abuses allegedly committed under the command of Radovan Karadzic, President of the self-proclaimed Bosnian-Serb republic of "Srpska," illustrates this point.\textsuperscript{60} Finding that the "current Bosnian-Serb warring military faction does not constitute a recognized state,"\textsuperscript{61} the court concluded that the acts alleged were committed by non-state actors.\textsuperscript{62} The absence of state action barred the plaintiffs from proceeding with their claims under the pre-existing international tort of torture. Although the decision was later reversed and the plaintiffs were given an opportunity to prove that Karadzic's regime satisfied the international definition of statehood,\textsuperscript{63} the Court of Appeals stressed that torture is condemned by international law "only when committed by state officials or because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention."). \textit{See also} Anthony Ewing, \textit{Establishing State Responsibility for Private Acts of Violence Against Women Under the American Convention on Human Rights}, 26 \textit{COLUM. HUM. RTS. L. REV.} 751, 767-68 (1995); Rebecca Cook, \textit{State Responsibility for Violations of Women's Human Rights}, 7 \textit{HARV. HUM. RTS. J.} 125, 142, 151-52 (1994). Although Velasquez Rodriguez constitutes persuasive authority for the interpretation of other international conventions, whether plaintiffs seeking redress under the ATCA would succeed by relying on this case remains an open question. As commentators have noted, despite its discussion of state responsibility for private conduct, "the Court was convinced that state actors were responsible for the disappearances in th[at] case, and the standard for state responsibility may amount to broad dictum." Michelle Lewis Liebeskind, \textit{Preventing Gender-Based Violence: From Marginalization to Mainstream in International Human Rights}, 63 \textit{REV. JUR. U.P.R.} 645 (1994).

\textsuperscript{59}See MacKinnon, \textit{supra} note 43, at 15 (noting that because international human rights instruments generally regulate the conduct of states and not private individuals, "[t]he more a conflict can be framed as within a state—as a civil war, as domestic, as private—the less effective the human rights model becomes.").

\textsuperscript{60}Doe v. Karadzic, 866 F. Supp. 734 (S.D.N.Y. 1994).

\textsuperscript{61}Id. at 741

\textsuperscript{62}Id. at 739.

\textsuperscript{63}See Kadic v. Karadzic, 70 F.3d 232, 245 (2d Cir. 1995).
under color of law," and that plaintiffs must make a preliminary showing of state action before a court can entertain the claim.

Moreover, feminist scholars have noted that even when the doctrinal elements of torture are present, additional elements have been required. For example, the international community has sometimes imposed a requirement that the torture take place while the victim is detained in an official setting. Amnesty International, while recognizing rape as torture when the act takes place in areas under police or military control, has failed to recognize that "women's detention and rape in non-traditional settings such as fields, road sides, village squares and their own homes is also torture." In light of the fact that the torture of women often takes place in settings other than prisons or traditional places of detention, this extra requirement severely limits the recognition of rape as torture.

Similar barriers against establishing the elements of a claim arise when victims of rape or other forms of gender-based violence attempt to categorize their injury as genocide or a crime against humanity. Crimes against humanity are defined to include "enslavement . . . and other inhumane acts committed against any civilian population." Under this definition, rape will be considered a crime against humanity only if it is committed because of the victim's membership in a targeted civilian population. Thus, while a commission of experts appointed by the Secretary-General of the United Nations defined crimes against humanity to include rape and mentioned forced prostitution as a related offense, the acts meet the definition only if they are committed "as part of a widespread or systematic attack against any civilian population on national,

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64 Id. at 243-44.
65 See Lusby, supra note 52, at 939.
66 Id.
67 See id. (citing Deborah Blatt, Recognizing Rape as a Method of Torture, 19 N.Y.U. REV. L. & SOC. CHANGE 821, 850 (1992) (noting that torture often takes place in the home because "'intimidation of the populace . . . is most effectively accomplished when officials rape women in their homes because family members often witness the attack and share in the feeling of degradation and powerlessness.'").
68 Charter of the International Military Tribunal of Nuremberg, supra note 35 at art. 6(c) and Charter of the International Military Tribunal for the Far East, supra note 35, at art. 5(c).
70 See Report of the Secretary-General, supra note 12, at 13.
political, ethnic, racial or religious grounds." Similarly, acts "causing serious bodily or mental harm to members of [a] group" or intended to "forcibly transfer . . . children of [one] group to another group" are defined as genocide only when committed with the intent to destroy, in whole or in part, a national, ethnic, racial or religious group. These definitions appear to exclude contexts in which rape is neither widespread nor linked to "ethnic cleansing."

Indeed, under these definitions, rape and other forms of gender-based violence are perceived as international torts only when they are the vehicles for some other form of persecution. Feminist international scholars caution that there are long-term consequences in seeking a remedy for these wrongs under gender-neutral international instruments. Not only does this strategy obscure the gender dimension of rape and sexual violence against women, it enhances the risk that rape in war will be perceived and treated as "a product of exceptional circumstances." This approach would minimize the protection for women who are raped in situations of conflict, but not in the context of genocide or as part of a widespread and systematic attack against an entire population. As feminist scholars have noted, women are raped in war for many reasons. They are raped "as a prize, like a fine painting, a chest of gold, for which the war is fought;" "for sexual gratification, to boost male ego and differentiate male and female;" "to reconnect with humanity, as inhuman as that is;" and "to disconnect the men from humanity, to better enable the warrior to commit other atrocities." Overemphasizing the horrors of genocidal rape or rape related to ethnic cleansing is likely to result in the exclusion of women's claims of rape in war for purposes of domination, booty, or revenge.

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71 Id. (definition within the commentary). Similarly, the Statute of the International Tribunal for the Former Yugoslavia grants the Tribunal the power to prosecute rape "when committed in armed conflict . . . and directed against any civilian population." Statute of the Int'l Tribunal for the Former Yugoslavia, supra note 13, at art. 5.
72 Genocide Convention, supra note 34, at art. 2.
74 Lusby, supra note 52, at 952.
75 See Dorothy Q. Thomas and Regan E. Ralph, Rape in War: Challenging the Tradition of Impunity, SAIS Rev., Winter-Spring 1994, at 81, 86 ("Th[e] emphasis on rape's scale as to what makes it an abuse demanding redress
Finally, plaintiffs seeking relief under gender-neutral treaties face a fifth concern. They may discover that widely read international scholars or judges, both sources of law under the ATCA that courts must look to when deciding whether international human rights have been violated, will continue to perceive and portray rape and gender-based violence as outside the reach of gender-neutral international torts. If so, the application of gender-neutral treaties to gender-based acts of violence, even when such acts meet the doctrinal elements of the international tort in question, may result in a discriminatory impact on claims brought by female plaintiffs under the ATCA. Although not enough ATCA cases brought by female plaintiffs have been decided since 1980 to assess whether application of gender-neutral treaties has resulted in gender discrimination, the few cases where women have been plaintiffs suggest that courts are unwilling to grapple with the gender issue.

In Kadic v. Karadzic, for instance, where plaintiffs specifically alleged rape among a list of other offenses, the court never directly addressed the question of whether rape amounts to torture. Similarly, in a case where a nun was kidnapped, raped, and otherwise tortured by security forces under the command of a Guatemalan official, the court failed to discuss how, if at all, the act of sexual violence fell within the definition of torture. Instead, in finding for the plaintiff, the court referred collectively to the “acts of torture” inflicted upon the plaintiff by the defendant. Courts’ unwillingness to come to terms with the gender issue may indicate a reluctance to find for plaintiffs in cases where the only tortious act alleged is a gender-based act or where the acts, other than those which are gender-based, are not severe enough to trigger the protections of international treaties. Thus, although they may meet the doctrinal elements of a gender-neutral tort, claims brought by female plaintiffs alleging gender-based acts of violence may not succeed as readily as those alleging other types of acts which distorts the nature of rape in war by failing to reflect both the experience of individual women and the various functions of wartime rape.”

See Filartiga v. Pena-Irala, 630 F.2d at 880.

See Kadic v. Karadzic, 70 F.3d at 241-44.

See Xuncax v. Gramajo, 886 F. Supp. at 178 (finding, without further explanation, the “factual allegations ... as admitted by virtue of defendant’s default ... more than sufficient to establish that Gramajo [defendant] did under color of law (by his order and command) subject Ortiz [plaintiff] to torture ... ”).

Id. at 198.
have traditionally been recognized as violations of international law.\textsuperscript{80}

In light of courts' unwillingness to recognize the gender-based aspects of rape and sexual violence against women, some feminist scholars have proposed that storytelling be used to increase judges' understanding of the complexity of these crimes and, thereby, to "counteract the resistance [they have] to siding with the victim."\textsuperscript{81} Using what one author has termed "oppositional narrative,"\textsuperscript{82} stories can be constructed that relate women's particular experiences and allow a judge to "re-evaluate his world view and restructure his ears to become . . . better able to hear that which is beyond personal experience"\textsuperscript{83} and the narrow categories of gender-neutral law. By drawing attention to the "diverse, multifarious and complex"\textsuperscript{84} character of rape and gender-based violence, storytelling can also be used to overcome the risk, which the gender-neutral strategy engenders, of obscuring the gender dimension of these crimes.

\textbf{IV. REDRESS UNDER THE ATCA USING THE GENDER-SPECIFIC APPROACH}

\textsuperscript{80}Since 1976, statutes with a discriminatory impact have become extraordinarily difficult to challenge. After \textit{Washington v. Davis}, where the Supreme Court held that proof of disproportionate impact was insufficient to establish an equal protection violation, a plaintiff must prove discriminatory motivation. \textit{See} \textit{Washington v. Davis}, 426 U.S. 229, 239 (1976). \textit{See also} Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979) (holding that although a civil service preference scheme for veterans had a devastating impact upon the employment opportunities for women, the plaintiffs failed to prove intent). It would be an almost impossible task to prove that the drafters of gender-neutral international conventions were motivated by a discriminatory intent. Yet, if plaintiffs rely solely on gender-neutral treaties to bring gender-based claims under the ATCA, later advocates may be stymied by the difficulty of challenging the statute as discriminatory. Thus, although it may prove successful for individual plaintiffs, pursuing gender-based claims under a gender-neutral approach may present significant challenges as a long-run strategy for advocates concerned with maintaining the ATCA as an avenue of relief for women whose primary or only allegations are gender-based acts.

\textsuperscript{81}Lusby, \textit{supra} note 52, at 953.

\textsuperscript{82}Lusby describes the term "oppositional narrative" as the presentation "in narrative or story form the realities of people, in this case women, which are different from the realities or stock stories understood by most. The narratives are oppositional because they cause the reader to react initially as though the stock story and the oppositional narrative were polarities, although the goal is integration of stories by the reader." \textit{Id.} at 913 n.6.

\textsuperscript{83}\textit{Id.} at 953.

\textsuperscript{84}\textit{Id.} at 952.
In light of the difficulties discussed above in seeking a remedy for rape and other gender-based acts of violence under the gender-neutral strategy, international feminist scholars have begun to explore an alternative approach: bringing gender-based violence claims under gender-specific international instruments. There are primarily three international documents that proscribe violence against women: 1) General Recommendation No. 19 adopted by the Committee on the Elimination of Discrimination Against Women;85 2) the 1993 Declaration on the Elimination of Violence Against Women;86 and 3) specific provisions under the Geneva Conventions and Two Additional Protocols proscribing rape in times of war.87

These international instruments define violations of human rights with respect to women's experiences. The Declaration on the Elimination of Violence Against Women (DEVAW), for instance, defines violence against women as "any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life."88 Specific forms of violence are identified as falling within the scope of this definition, including "physical, sexual and psychological violence occurring within the general community" or "perpetrated or condoned by the State, wherever it occurs."89 The definition addresses some of the serious shortcomings of the so-called gender-neutral treaties. It incorporates the distinct injuries that result from sexual violence

88 DEVAW, supra note 86, at art. 1.
89 Id. at art. 2.
against women, encompasses violence by non-state actors, and reaches acts outside of traditional centers of detention. The definition relieves plaintiffs from having to engage in the interpretive gymnastics required to bring a claim under gender-neutral treaties. Furthermore, seeking redress for gender-based violence under gender-specific treaties "surfaces" women, acknowledging the gender dimension of rape and sexual violence and countering women's invisibility in the international human rights sphere.

While this strategy may have far-reaching effects on the world community's awareness of the particular injuries women face when violated in times of war, obtaining an actual remedy using these gender-specific instruments under the ATCA may prove difficult, if not impossible. Furthermore, even if successful in obtaining relief using these instruments, women may find that reliance on gender-specific provisions will result in reinforcing traditional sex stereotypes and marginalizing women's rights as a "specialized" and less significant branch of international human rights or humanitarian law.

The most serious drawback to pursuing an ATCA claim using gender-specific international instruments is that the international tort of gender violence has not yet reached the level of universality required to meet the definition of customary international law or jus cogens, which would trigger the protection of the statute. As discussed above, Filartiga held that only where a wrong is either recognized by international law or condemned by the nations of the world by "means of express international accords" does that wrong become "an international law violation within the meaning of the statute." While unanimity among nations is not required, "[a]n international tort which appears and disappears as one travels around the world is clearly lacking in that level of common understanding necessary to create universal consensus." Although the empirical evidence of violence against women is strong, the proscription of gender-based violence has not yet been allocated the status of a fundamental tenet of international law. As one scholar notes, "[t]he doctrine of jus

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90 The term "surface," meaning to make visible, was borrowed from Rhonda Copelon who uses it in her article, Surfacing Gender: Reconceptualizing Crimes Against Women in Time of War, in MASS RAPE, supra note 50, at 197.
91 Filartiga v. Pena-Irala, 630 F.2d at 888.
92 Forti II, 694 F. Supp. at 712.
cogens, with its claim to reflect central, fundamental aspirations of the international community, has not responded at all to massive evidence of injustice and aggression against women.93 Although Geneva Convention IV and the Additional Protocols explicitly condemn rape and other forms of gender-violence,94 these offenses are not listed among the Convention's grave breaches, the particularly serious violations of humanitarian law which require states to sanction or extradite the perpetrator.95 That DEVAW, one of the three available international documents addressing violence against women, has been drafted as a non-binding "declaration" rather than a "convention" carrying sanctions for non-compliance, further reveals the lack of global consensus necessary to elevate the tort of gender violence to the status of customary international law or jus cogens. Of course, a tort need not be prohibited by customary international law in order to be actionable under the ATCA if it is expressly prohibited by a treaty of the United States.96 However, the U.S. has not yet ratified the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW),97 the only binding treaty proscribing gender-based violence.

93Charlesworth and Chinkin, supra note 40, at 72.
94See Geneva Convention IV, supra note 53, at art. 27(2) ("[W]omen shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault."); Protocol I, supra note 87, at art. 76(1) ("[W]omen shall be the object of special respect and shall be protected in particular against rape, forced prostitution and any other form of indecent assault."); Protocol II, supra note 87, at art. 4(2)(e) (prohibiting "[o]utrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault.").
95Geneva Convention IV, supra note 53, at arts. 146, 147. See also Krill, supra note 53, at 341. But see supra note 54 and accompanying text (noting that scholars have begun to argue that, under a broad construction of the Geneva Conventions, rape should be considered a grave breach).
9628 U.S.C. § 1350 (1994) (the act reaches violations of international law that are proscribed either by the "law of nations or a treaty of the United States") (emphasis added).
Given the evolving nature of international law and courts' express recognition that they must interpret the ATCA in its modern context, plaintiffs can argue that the prohibition against gender-based violence has now attained the status of a customary international norm. However, for a plaintiff to establish a customary norm, she must prove that the norm is not only universal, but also "definable and obligatory." This presents a difficult hurdle in light of courts' demonstrated reluctance to recognize even widely accepted international human rights violations as meeting these requirements. In Forti II, for instance, the court found that although all international legal authorities which prohibit torture also prohibit cruel, inhuman or degrading punishment or treatment, the latter offense was "too abstract" to meet the "definability" requirement of an international customary norm. The court emphasized that the parties had failed to offer a concrete definition of "cruel, inhuman or degrading treatment" and that, absent universal consensus as to what conduct falls within its contours, the tort is not actionable under the ATCA.

Similarly, the court in Xuncax refused to recognize plaintiff's claim of "constructive exile" as actionable under the statute, noting that "caution is required in identifying new
violations of *jus cogens*.\textsuperscript{104} Although the court acknowledged the international prohibition against discriminatory deportation or expulsion,\textsuperscript{105} it refused to interpret this prohibition as encompassing acts which did not literally expel the plaintiff, but nonetheless "had the effect of forcing [him] into exile."\textsuperscript{106} The court admonished that the ATCA "does not provide warrant for judges to engage in law-making when divining the 'law of nations.' To recognize 'constructive expulsion' as a tortious violation of international law would involve such law making."\textsuperscript{107} Given this reluctance to identify new violations of customary international law, courts are unlikely to recognize violations of women's human rights based on gender, independent of their connection to genocide or torture, as actionable international torts under the ATCA.

Plaintiffs opting to bring gender-based violence claims using gender-specific provisions of international instruments also run the risk that courts will perceive the offenses prohibited by those provisions as less egregious than the offenses prohibited by gender-neutral provisions. Blatt's discussion illustrates this point:

While several international human rights bodies have acknowledged that rape is a human rights abuse, rape has consistently been analyzed apart from other forms of torture or abuse, both semantically and substantively. As a result, rape is the only form of physical aggression that a torturer may employ which has not been consistently identified as torture ..... When rape has been identified as a human rights abuse it is labeled as "ill-treatment" rather than torture.\textsuperscript{108}

Thus, distinguishing rape from the gender-neutral provision proscribing torture places an additional burden on women to demonstrate that the sexually violent attack they endured was no

\textsuperscript{104} Id. at 189.
\textsuperscript{105} See id. at 188.
\textsuperscript{106} Id. at 189.
\textsuperscript{107} Id.
\textsuperscript{108} Blatt, supra note 67, at 843 (citations omitted).
less severe than the abuse experienced by one who was tortured.\textsuperscript{109}

Even if the prohibition against gender-based violence were to be accepted as a customary international norm and the gender-specific treaty approach proved successful, the strategy raises deeper, longer-term concerns for advocates seeking to enhance the recognition of and respect for women’s rights. The gender-specific strategy may actually marginalize women’s rights cases as a separate, and implicitly less important, set of human rights cases and aggravate the already entrenched sex stereotypes that historically have worked to women’s disadvantage.

Feminist scholars have observed that international instruments charged with addressing gender-specific issues not only have weaker compliance obligations and monitoring procedures, but are also inadequately funded.\textsuperscript{110} CEDAW’s only enforcement mechanism, for instance, is the filing of an annual report with the General Assembly of the United Nations.\textsuperscript{111} Unlike other international committees that monitor compliance with provisions of gender-neutral treaties,\textsuperscript{112} the Committee on the Elimination of Discrimination Against Women, which considers the reports submitted by states parties, is confined to meeting for “two weeks annually.”\textsuperscript{113} The Committee is also geographically segregated from other committees charged with eliminating discrimination.\textsuperscript{114} Because it is not officially connected with other human rights committees within the United Nations structure, the Committee receives less financial support and has fewer resources with which to carry out its functions.\textsuperscript{115} Similarly, as commentators have noted, the development of DEVAW “raises the general problem of compartmentalisation of women’s rights in

\textsuperscript{109}\textit{See also}, Fitzpatrick, \textit{supra} note 97, at 544 (positing that when torture and rape are identified as two separate offenses, rape may be perceived as “something different” or less grave than torture or ill-treatment).

\textsuperscript{110}\textit{See} Charlesworth, \textit{supra} note 41, at 59.

\textsuperscript{111}\textit{See} CEDAW, \textit{supra} note 97, at art. 17.


\textsuperscript{113}CEDAW, \textit{supra} note 97, at art. 20.

\textsuperscript{114}\textit{See} Etienne, \textit{supra} note 42, at 149.

\textsuperscript{115}\textit{See} Meron, \textit{supra} note 112, at 214.
national law” and “reinforces the United Nations tendency to relegate women’s human rights to a special, under-resourced, sphere.” If CEDAW and DEVAW are indications of how marginalized women’s international human rights instruments can become, it follows that the pursuit of gender-based violence claims solely under gender-specific instruments could eventually lead to the subordination of women’s rights cases among the “mainstream” human rights community.

Moreover, the language used in international documents that specifically addresses gender-based violence is also troubling. Article 27 of Geneva Convention IV, for instance, provides that “[w]omen shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault.” Similarly, Article 76(1) of Additional Protocol I provides that “women shall be the object of special respect and shall be protected in particular against rape, forced prostitution, and any other form of indecent assault.” The use of the terms “attack on their honour” and “indecent assault” to describe what most women would identify as an act more akin to torture suggests, as one scholar has aptly noted, that the provisions have “more to do with how men perceive rape than how women do themselves.” Viewed in light of other Geneva Convention provisions, such as the obligation to treat women “with all consideration due to their sex,” the proscriptions against rape and other forms of gender-based violence appear to rest upon stereotypes regarding women’s special vulnerability and inherent weakness. Indeed, as one commentary to the Second Geneva Convention makes clear, the gender-specific provisions were added to the Conventions because “every civilized country [accords special consideration] to beings who are weaker . . . and whose honour and modesty call for respect.”

117 Geneva Convention IV, supra note 53, at art. 27.
118 Protocol I, supra note 87, at art. 76(1).
121 International Comité for the Red Cross, COMMENTARY ON THE II GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED,
reliance on language that is steeped in paternalistic visions of women’s inferiority runs the risk of reinforcing traditional sex stereotypes that have historically been used to women’s disadvantage.\textsuperscript{122}

An examination of the language used in decisions upholding the constitutionality of gender-based rape laws reveals that pursuing a gender-specific strategy may, in fact, result in exacerbating sexual stereotypes of female vulnerability and male protective power. For instance, in holding that the “state is justified in subjecting only male offenders who attack female victims to additional sanction[s] over and above the penalties imposed on a female for comparable conduct,” the court in \textit{Country v. Parrat} emphasized that “the equality of the sexes expresses a societal goal, not a physical metamorphosis.”\textsuperscript{123} The court explained that “[i]t would be anomalous indeed if our aspirations toward the ideal of equality under the law caused us to overlook our disparate human vulnerabilities.”\textsuperscript{124}

Although it may seem inappropriate to quarrel with a court that recognizes the unique harm women suffer as a result of rape,\textsuperscript{125} the emphasis on women’s special “vulnerabilities” poses the danger that this same characteristic will later be used as a rationalization for laws that disadvantage women.\textsuperscript{126}


\textsuperscript{122}In analyzing a number of other Geneva Convention provisions designed to protect pregnant women or mothers of dependent children, Fitzpatrick similarly concluded that “the maternity-oriented provisions of humanitarian law . . . reflect . . . rather Victorian views of women as being the equivalent of children in their weakness and need for special care.” Fitzpatrick, \textit{supra} note 97, at 548. \textit{See also} Etienne, \textit{supra} note 42, at 142 & n.20 (referring to People v. Mario Liberta, 474 N.E.2d 567, 576 (N.Y. 1984), \textit{cert. denied}, 105 S. Ct. 2029 (1985), where the court noted that “the purpose behind [early rape laws] was to protect the chastity of women and thus their property value to their father or husbands,” and suggested that the rationale behind the recognition of rape as a war crime was, similarly, “a way to protect husbands and fathers from the loss of devaluation of their 'property interests' in their women”).


\textsuperscript{124}\textit{id.} (emphasis added).

\textsuperscript{125}See \textit{id.} at 592 (noting that only women can be subjected to the “fear of and, in some cases, the actuality of an unwanted pregnancy. . . or be forced to undergo the physical, emotional, ethical, and financial consequences of such a pregnancy.”).

\textsuperscript{126}For instance, women’s “special” health needs were once used to rationalize limiting women’s right to work. \textit{See} Muller v. Oregon, 208 U.S. 412, 421-23 (1908) (upholding a maximum working hours statute which applied only to women on the grounds that women needed special protection to safeguard their
In sum, although intergovernmental and non-governmental organizations may ""generate pressure and create constituencies that will encourage the crystallization of a customary norm prohibiting violence against women,""\(^{127}\) the international tort of gender violence has not yet reached the level of universality or definability required to meet the definition of a customary international norm. As such, it is unlikely to provide an adequate basis for a successful ATCA claim. Moreover, even if the gender-specific treaty approach were successful, the strategy raises deeper, long-term difficulties for advocates seeking respect for women's rights. The gender-specific strategy may have the unintended effects of isolating women's rights cases and aggravating stereotypes that may eventually work to women's disadvantage.

V. CONCLUSION

Given that perpetrators of human rights abuses are often shielded from prosecution by their own governments and that the potential for redress in international fora is hindered by inadequate resources and lack of political consensus, victims of human rights and humanitarian law violations face limited options. Bringing gender-based violence claims as civil suits under the ATCA remains a valuable tool for those who find other options unavailable. However, women seeking to be made whole under the ATCA for rape and other forms of gender-based violence in situations of conflict face an additional hurdle. They must either attempt to persuade judges that their experience of gender-based violence fits within existing, male-centered norms prohibiting torture, war crimes, crimes against humanity or genocide, or convince the human rights community that the prohibition of gender-based violence is a fundamental and basic tenet which ought to be recognized as a customary international norm. In light of the fact that all major

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health and that of their offspring). The fallout of this ""protective legislation"" was to limit the ""number of hours women could work, the type of work they could do, and the conditions under which they could labor."" Judith Olans Brown, Wendy E. Parmet and Phyllis Tropper Baumann, The Failure of Gender Equality: An Essay in Constitutional Dissonance, 36 BUFF. L. REV. 573, 575-76 (1987).

\(^{127}\)Liebeskind, supra note 58, at 645 (citing Theodor Meron, State Responsibility and Violence Against Women, in COMBATTING VIOLENCE AGAINST WOMEN: A REPORT BY THE INTERNATIONAL LEAGUE FOR HUMAN RIGHTS 47, 49 (1993)).
international human rights fora are currently dominated by men, the task of persuading individual judges that gender-based violence is tantamount to torture may prove easier than that of convincing the entire international human rights community that gender-based violence ought to be acknowledged as a violation of customary international law.

Although neither the gender-neutral nor the gender-specific approach is completely satisfactory, the strategy that will most likely yield women a tangible remedy is bringing the claim under so-called gender-neutral treaties. Adopting this strategy may avoid the unintended effects of isolating women’s rights cases and aggravating gender stereotypes that inevitably flow from the gender-specific approach. On the other hand, the gender-neutral strategy has the potential of perpetuating the invisibility of the gender dimension of rape and other forms of gender-based violence. However, if plaintiffs make use of storytelling or “oppositional narrative,” the invisibility of women’s particular experience can be avoided. Through narrative accounts of the reality of their experiences, victims of rape or other forms of gender-based violence who bring their claims under gender-neutral treaties may succeed both in obtaining tangible monetary damages and countering the invisibility of women’s rights in the international sphere.

128See id. (noting that the “overwhelming majority of U.N. delegates are male”). “For example, within the United Nations, apart from the Committee on the Elimination of all Forms of Discrimination Against Women . . . there are a total of 13 women out of 90 ‘independent experts’ on specialist human rights committees.” Charlesworth and Chinkin, supra note 40, at 68 n.29. Similarly, as of 1995, not one of the sixty judges elected to the International Court of Justice since 1947 or the 123 members elected to the International Law Commission since 1949 was a woman. Richard B. Bilder and Martti Koskenniemi, Book Review, 89 AM. J. INT’L L. 227, 227 (1995).

129See supra notes 82-84 and accompanying text.