

Rape is Rape, Ms Magazine, Spring 2011, p. 26

As the United States loses its place as the protector of human rights, it becomes more and more out of step with international law. Internationally rape is broadly defined and has been found to be a crime against humanity and a violation of the prohibition against torture. Therefore it cannot be ignored or minimized, put off as custom or a family or private matter.

The International Criminal Court Statute, which the U.S. has refused to sign, defines crimes against humanity to include “rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity . . . when committed as part of a widespread or systemic attack directed against a civilian population, with knowledge of the attack . . .” (Section 7(1)(g))

International jurisprudence through the ad hoc tribunals has recognized rape and other sexual offenses toward women for what they are—crimes. The East Timor Regulations promulgated by the United Nations Transitional Administration list sexual offenses as a serious crime (1.3(e)). As crimes against humanity, it includes rape, sexual slavery, enforced prostitution, and other forms of sexual violence of comparable style (5.1(g)). Torture is defined as the infliction of severe pain or suffering either physical or mental in custody or under the control of the abuser (5.2(d)). (Regulation No. 2000/15 On the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offenses.)

In 1998, the Rwanda Tribunal defined rape as a form of genocide (*Prosecutor v. Jean Paul Akayesu*, (1996) ICTR-96-4-T, (Rwanda)), and the Yugoslavia Tribunal defined rape as a form of torture in *Celebici* (*Prosecutor v. Zejnir Delalic, et al.*, (1998) IT-96-21-T, (Yugo.)) and *Furundzija* (*Prosecutor v. Anto Furundzija*, (1998) IT-95-17/1-T, (Yugo)). The statutes of both tribunals list rape among the crimes against humanity and through the jurisprudence of both, rape and other forms of sexual and gender-based violence have been recognized as genocide, torture, and other inhumane acts.

In another ICTY case, *Prosecutor v. Dragoljub Kunarac, et al.* (2001)IT-96-23/1-T (Yugo.) women were locked in an apartment with no access to the outside world. The men had knives, rifles and pistols. The women had to obey every command, including cleaning up after their tormenters and serving them food and drink. They were stripped and ordered to dance, and, ultimately, they were sold. The Tribunal found that such acts, “no doubt constituting serious violations of common Section 3, (Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135) entail criminal responsibility under customary international law.” (*Prosecutor v. Dragoljub*, supra at para. 408) The tribunal went further than the tribunal in *Furundzija* and discussed the issue of factors other than coercion or force or threat of force that would render sex non-consensual or non-voluntary on the part of the victim. The court found that the basic underlying legal principle was that sexual penetration is rape if it is not truly voluntary or consensual on the part of the victim, which goes beyond only looking at force but also looking at sexual autonomy. Sexual autonomy is violated

whenever the person has not freely agreed to it or is otherwise not a voluntary participant. (id at para 456)

The ICTY also concluded that the definition of rape meant more than just body parts but must include intimidation, degradation, humiliation, discrimination, punishment, control, or destruction of a person. Rape plainly constitutes torture. (*Aydin v. Turkey* (No. 50), 1996-VII Eur. Ct. H.R. 75 (1997); *Mejia v. Peru*, Case 10.970, Inter-Am. C.H.R., Report No. 5/96, OEA/Ser.L./V/II.91, doc. 7 at 182-188 (1996))

The absence of consent or voluntary participation was also discussed in *Dragoljub*. (*Prosecutor v. Dragoljub*, *supra* at para. 440) Looking at the circumstances that define the vulnerability or deception of the victim, the court concluded that the common denominator was that the behaviors of the perpetrator have an effect such that the victim's will was overcome or that her ability to freely refuse sexual acts was temporarily or more permanently negated. (para 452) The Tribunal found that alleged consent is not a defense under the Rules of Procedure. (para 464) No one can consent to be a victim of crime. The focus must remain on the criminal act not on the behavior of the victim.

In *Aydin v. Turkey*, the female detainee complained of rape and argued that it constituted torture. She had been stripped, put into a car tire and spun around, beaten, sprayed with cold water from a high-pressure hose, blindfolded, and raped. Medical evidence showed bruising and a torn hymen. The Court reiterated that there could be no derogation from the prohibition on torture. The Court found that rape is an especially grave and abhorrent act that leaves deep psychological scars that do not respond to healing as quickly as other types of injuries. Therefore, rape can be defined as torture rather than just inhuman and degrading treatment.

In the International Criminal Tribunal for Rwanda, Case No. ICTR-95-1B-T, *Prosecutor v. Mikaeli Muhimana*, Judgment of April 28, 2005, the court held that rape is a crime against humanity. It is more than just an enumeration of body parts and objects, it is more than non-consensual sexual intercourse, it is a degradation of the person and force is not an element of rape.

In the Special Court for Sierra Leone, *Prosecutor v. Issa Hassan Sesay, Morris Kallon, Augustine Gbao*, Case No. SCSL-04-15-T, Judgment of March 2, 2009, the court found that rape is a crime against humanity under customary international law. If a person is incapable of consenting e.g. in time of war, threat, age or when the male is exercising so-called "ownership" over the woman, lack of consent is found. The goal of rape is the humiliation, degradation and violation of the dignity of a person and those are the elements of rape, not body part, objects, use of force, or proof of resistance.

The CEDAW committee case of *Karen Tayag Vertido* in the Philippines directly challenged the stereotypes of rape. (Communication No. 18/2008, *Karen Tayag Vertido v. The Philippines*, 16 July 2010).

Vertido was raped by the former president of the City Chamber of Commerce and Industry where she was at that time the Executive Director. She was forced to quit her job and had to move to another city to avoid harassment. The man hired to replace her was paid twice her salary. The police refused to arrest the wealthy, well-known man for 80 days. The trial went on for more than eight years. He claimed consent and was acquitted as the judge used the rape myth that rape is easy to charge and hard to disprove. She was also blamed by the judge because she didn't act as he thought she should have. The CEDAW Committee said the decision was based on gender stereotypes, bad faith and myths. The court is prohibited from using gender stereotypes or set ideas of how women should react in violent situations. Taking eight years to prosecute the case by itself violated her rights and the state was guilty of lack of due diligence even though it was a non-state actor who raped her. The state was ordered to compensate her, change their legislation, stop the undue delays and train police and prosecutors.

The United States needs to live up to international law on the treatment of rape and rape victims. At the current time, it does not. The No More Excuses campaign by the Feminist Majority Foundation and Ms should focus on more than the FBI definition and testing kits but force the U.S. to meet its international obligations that include a broader definition of rape by looking at sexual autonomy of women not only force and violence.

Dianne Post
International Human Rights Attorney