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Rape: A Survey of Current International Jurisprudence

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Rape: A Survey of Current International Jurisprudence

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Over the last 20 years, international courts have increasingly recognized the severity of the physical and psychological scars that rape leaves with a victim and his or her community. The European Court on Human Rights (ECHR) and the Inter-American Commission on Human Rights (IACHR) heard the first charges of rape since the Nuremberg and Tokyo trials after World War II. Although the authorizing statutes of the ECHR and IACHR do not explicitly prohibit rape, the ECHR and IACHR construed rape as a statutorily prohibited human rights abuse by characterizing rape as inhumane treatment or as an abrogation of the right to privacy. By the mid-1990s, the ECHR and IACHR had also recognized rape as torture.

The advent of the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for the Former Yugoslavia (ICTY) in the 1990s dramatically advanced the development of international jurisprudence on rape. First, the authorizing statutes of both tribunals invited rape prosecutions by explicitly identifying rape as a crime against humanity. Second, the ICTR and ICTY statutes empowered prosecutors to charge individuals, while the IACHR and the ECHR were limited to hearing complaints against member states. Third, the jurisprudence of the tribunals has broadened the scope of crimes of sexual violence that can be prosecuted as rape to include forced vaginal, oral, and anal sex. Fourth, the tribunals have reinforced the recognition of rape as a form of torture. Ultimately, the ICTR recognized rape as a form of genocide.

The following article presents a brief overview of the landmark decisions that have contributed to the evolution of international jurisprudence on rape. The article then examines opportunities for the positive development of rape jurisprudence in the coming years.

Inter-American System

The Inter-American Court of Human Rights (IACtHR), established in 1979 by the Organization of American States (OAS), exercises jurisdiction over states who have signed onto the American Convention on Human Rights (American Convention). A state violates the American Convention if an agent of the state commits a prohibited human rights abuse or if the state fails to provide adequate redress at the national level to victims.

Although the IACtHR issues the only legally binding case law of the Inter-American system, the individual case resolutions of the IACHR have also influenced the development of international jurisprudence on rape. The IACHR's decision of *Raquel Martí de Mejía v. Perú*, issued in 1996, often is cited as the authoritative interpretation of the American Convention's prohibition of rape. Although the IACHR was created in 1960, before the entry into force of the American Convention in 1978, the IACHR draws its statutory authority today from the American Convention. Under the American Convention, the IACHR is authorized to consider complaints lodged by "any person or group of persons, or any non-governmental entity legally recognized in one or more member states of the OAS." Based on its findings, the IACHR issues recommendations to the defending state. Where appropriate, the IACHR also can present cases to the IACtHR and request that the court enter a legally binding judgment.

The IACHR has presented only one case of rape to the IACtHR to date—*Loayza Tamayo v. Peru*, decided in 1997. The IACHR charged Peru with abridging the "right to personal integrity, in violation of Article 5.1 of the Convention." According to the IACHR, members of a counter-terrorism unit of the Peruvian police repeatedly raped a female professor while detaining her for alleged communist sympathies. The IACtHR failed to find that Peru violated the American Convention. In a regrettably abbreviated explanation, the court summarily discarded the charges as "not proven." The IACtHR's decision in *Loayza Tamayo* dealt a substantial blow to the positive development of the case law governing rape in the Inter-American system. Nonetheless, the increasing willingness of the IACHR to recognize the severity of rape crimes offers hope that the it will present the IACtHR with additional opportunities to compel the punishment of rape crimes in the coming years.

In *Mejía*, the IACHR acknowledged that rape also could rise to the level of torture, an aggravated form of inhumane treatment, which is prohibited by Article 5.2 of the American Convention.

The evolution of IACHR jurisprudence culminated in the IACHR's decision of *Raquel Martí de Mejía v. Perú*, issued in 1996. Raquel Mejía was a principal of a school for the handicapped in Peru who was raped by a member of a counterinsurgency unit of the Peruvian military. Prior to the *Mejía* decision, the IACHR had been willing only to recognize rape as an invasion of privacy, prohibited by Article 11 of the American Convention, or a relatively mild form of inhumane treatment, forbidden by Article 5 of the American Convention. In *Mejía*, however, the IACHR acknowledged that rape also could rise to the level of torture, an aggravated form of inhumane treatment, which is prohibited by Article 5.2 of the American Convention. The IACHR announced that a rape constitutes torture if the rape was: "1) an intentional act through which physical and mental pain and suffering is inflicted on a person; 2) committed with a purpose; and 3) committed by a public official or by a private person acting at the instigation of the former." The standard for torture articulated by the IACHR parallels the standard set forth in the United Nations Convention Against Torture and Other Cruel, Inhumane & Degrading Treatment or Punishment (Torture Convention). The IACHR ultimately found evidence of each required element of torture in *Mejía*. The IACHR explained, "Raquel Mejía was a victim of rape, which caused her physical and mental pain and suffering . . . . [She] was raped with the aim of punishing her personally and intimidating her . . . . [T]he man who raped [her] was a member of the security forces." Based on its analysis, the IACHR concluded that the rape in *Mejía* amounted to torture. Since an official of the Peruvian state perpetrated the rape, the IACHR attributed responsibility for the rape to Peru. The IACHR urged Peru to punish the perpetrators and pay the victim fair compensation.

The IACHR also emphasized in *Mejía* that rape not only constitutes a severe violation of Article 5 of the American Convention, but also amounts to a violation of Article 11 of the American Convention. Article 11.1 guarantees the right to privacy by safeguarding the right to have "honor respected" and "dignity

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recognized." The IACHR explained that it "considers that sexual abuse . . . implies a deliberate outrage to [the victim's] dignity. In this respect, it becomes a question that is included in the concept of 'private life.'" The IACHR concluded that the offender abrogated Raquel Mejía's right to privacy when he raped her. It attributed responsibility for the Article 11 violations

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to the Peruvian state because a public official perpetrated the rape and encouraged Peru to hold the offenders accountable.

European Court on Human Rights

The Council of Europe established the ECHR in 1970, when the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention) entered into force. The ECHR exercises jurisdiction over "all matters concerning the interpretation and application of the Convention and the protocols" that are referred to it by a state party to the European Convention or any person, non-governmental organization, or group of non-governmental organizations victimized by one of the state parties. The ECHR has held state parties responsible for rape crimes where agents of the state perpetrated the rapes or where the state failed to provide an adequate remedy at the national level. The European Convention, like the American Convention, never explicitly references the right to be free from sexual violence. As a result, the ECHR initially characterized rape as a violation of the right to privacy. Later, the ECHR followed the progression of the IACHR's jurisprudence and also recognized rape as torture, a severe form of inhumane treatment.

In *X & Y v. Netherlands*, handed down in 1985, the ECHR determined that rape abridges the right to privacy. The petitioners alleged that the son-in-law of a directress of a privately run home for mentally handicapped children in the Netherlands raped a sixteen-year-old resident of the home. The ECHR found that private life, as defined in Article 8, "covers the physical and moral integrity of the person, including his or her sexual life." Even though an agent of the Dutch government did not perpetrate the rape, the ECHR held the Dutch government responsible because it failed to provide an adequate remedy at the national level. The ECHR ordered the Dutch government to pay the victim 3,000 Dutch gilders in damages.

In *Aydín v. Turkey*, decided in 1997, the ECHR found that rape also can constitute a violation of Article 3 of the European Convention, which prohibits torture, because rape can amount to torture in certain situations. In *Aydín*, the ECHR considered charges that a member of a local Turkish gendarme raped a seventeen-year-old Kurdish girl while she was illegally detained. The ECHR announced that the "special stigma of torture" would only attach to "deliberate inhumane treatment causing very serious and cruel suffering." The standard for torture articulated by the ECHR deviates substantially from the standard adopted by the IACHR, the ICTY, and the ICTR. Most notably, the ECHR standard does not explicitly require that a public official perpetrated the rape for the violation to rise to the level of torture. The ECHR, however, noted that "rape of a detainee by an official of the State must be considered to be an especially grave and abhorrent form of ill-treatment given the ease with which the offender can exploit the vulnerability and weakened resistance of his victim." The ECHR considered state action in *Aydín* a crucial factor in meeting the severity requirement of the standard. The ECHR continued to explain that rape "leaves deep psychological scars on the victim which do not respond to the passage of time as quickly as other forms of physical and mental violence." The ECHR also stressed that a victim suffers "the acute physical pain of forced penetration, which [leaves] her feeling debased and violated both physically and emotionally." The ECHR held that "the especially cruel act of rape to which [the detainee] was subjected" warranted attaching the "special stigma of 'torture.'" Concluding that Turkey breached its obligations under the European Convention by failing to provide adequate redress at the national level, the ECHR ordered Turkey to pay 25,000 pounds sterling and attorneys' fees in damages.

International Criminal Tribunal for Rwanda

The UN Security Council established the ICTR in 1994 and vested it with the power to prosecute individuals for violations of humanitarian law committed in Rwanda during 1994. Notably, in contrast to the IACHR and ECHR, the ICTR has the power to punish individual rape offenders. Moreover, unlike the authorizing statutes of the IACtHR and ECHR, the Statute for the International Tribunal for Rwanda (ICTR Statute) explicitly names rape as a crime against humanity. The ICTR also has recognized rape as a form of torture. In addition, the ICTR most dramatically advanced the development of international criminal law governing rape by recognizing rape as a form of genocide.

In *Prosecutor v. Jean-Paul Akayesu*, decided in 1998, the ICTR reviewed charges that a Rwandan *bourgmestre* ordered and witnessed the widespread rape of Tutsi women. In this landmark decision, the ICTR convicted Akayesu under Article 3(g) of the ICTR Statute, which explicitly identifies rape as a crime against humanity if the rape was "committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds." The ICTR defined rape as a "physical invasion of a sexual nature, committed on a person under circumstances which are coercive." The ICTR found sufficient evidence of a number of sexual violations and

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noted that coercion was inherent in the attacks because of the hostile military presence. Because Tutsi women were exclusively targeted based on their ethnicity, the ICTR concluded that the rapes formed part of a widespread and systematic attack on a civilian population because of their ethnicity and that the rape crimes in *Akayesu* were punishable as crimes against humanity. Although the ICTR failed to find that Akayesu personally raped Tutsi women, it concluded that Akayesu ordered, instigated, and aided and abetted multiple acts of rape. The ICTR explained that Akayesu, "by allowing [the rapes] to take place on or near

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the premise of the bureau communal, and by facilitating the commission of such sexual violence through his words of encouragement, . . . by virtue of this authority, sent a clear signal of official tolerance for sexual violence, without which these acts would not have taken place." The ICTR therefore attributed individual criminal responsibility to Akayesu for crimes against humanity.

In addition to reinforcing the *Čelebići* holding on torture, the *Furundžija* opinion also advanced international jurisprudence on rape by expanding the legal definition of rape.

Perhaps the most important aspect of the *Akayesu* decision, however, was the ICTR's recognition of rape as a form of genocide, which is prohibited under Article 2 of the ICTR Statute. In reaching its conclusion, the ICTR relied upon the definition of genocide set forth in Article 2. According to the ICTR Statute, genocide is "a) killing members of the group; b) causing serious bodily or mental harm to members of the group; c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; d) imposing measures intended to prevent births within the group; [or] e) forcibly transferring children of the group to another group" if "committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group." The ICTR indicated that, in its opinion, "[rape crimes] constitute genocide in the same way as any other act so long as they were committed with specific intent to destroy, in whole or in part, a particular group, targeted as such. . . . Indeed, . . . rape and sexual violence . . . are even . . . one of the worst ways of inflicting harm on the victim as he or she suffers both bodily and mental harm." The ICTR concluded that the acts of rape instigated by Akayesu were "an integral part of the process of destruction, specifically targeting Tutsi women." The ICTR explained that "the rape of Tutsi women was systematic and was perpetrated against all Tutsi women and solely against them . . . [t]hese rapes resulted in physical and psychological destruction of Tutsi women, their families and their communities." The ICTR concluded that the rapes in Akayesu constituted genocide. The ICTR attributed responsibility for genocidal rape to Akayesu because he encouraged the rapes "by his presence, his attitude and his utterances." For his participation in genocide crimes and crimes against humanity, Akayesu will serve a life sentence in prison.

International Criminal Tribunal for the Former Yugoslavia

The UN Security Council established the ICTY in 1993. The Security Council authorized the ICTY to "prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991." The ICTY, like the ICTR, has the power to punish individuals for rape crimes. The Statute of the International Tribunal (ICTY Statute) also explicitly identifies rape as a crime against humanity, but the ICTY has chosen so far to punish rape crimes as a form of torture. The jurisprudence of the ICTY also has advanced the recognition of forced oral sex and coerced anal intercourse as rape.

In *Prosecutor v. Delalic [et al]*, (*Čelebići*), decided in 1998, the Prosecutor charged that Hazim Delic, a Serbian prison camp guard, repeatedly raped two non-Serbian female prisoners, and that these rapes amounted to torture, in violation of Articles 2 and 3 of the ICTY Statute. Article 2(b) identifies "torture or inhumane treatment" as a grave breach of the Geneva Conventions. Article 3 of the ICTY Statute prohibits violations of the laws and customs of war, including torture. In concluding that the rape in *Čelebići* rose to the level of torture, the ICTY articulated a standard based on the Torture Convention, which parallels the standard articulated by the IACHR in *Mejía*. The ICTY stated that rape constitutes torture if it "1) causes severe pain or suffering, whether mental or physical, 2) which is inflicted intentionally; 3) and for such purposes as obtaining information or a confession from the victim, or a third person, punishing the victim for an act he or she or a third person has committed or is suspected of having committed, intimidating or coercing the victim or a third person, or for any reason based on discrimination of any kind, 4) and [is] committed by, or at the instigation of, or with the consent or acquiescence of, an official or other person acting in an official capacity." The ICTY commented, however, that rape perpetrated by a state agent will almost always rise to the level of torture because "it is difficult to envisage circumstances in which rape, by or at the instigation of a public official or with the consent or acquiescence of an official, could be considered as occurring for a purpose that does not, in some way, involve punishment, coercion, discrimination, or intimidation." Because the ICTY found that a public official committed the rapes in *Čelebići*, it determined that the rapes amounted to torture. As a result, the ICTY convicted Delic of violations of Articles 2 and 3 of the ICTY Statute and sentenced Delic to four 15-year sentences; one sentence for each violation in each case of rape.

In *Prosecutor v. Furundžija*, issued in 1998, the ICTY reiterated the standard for torture it adopted in *Čelebići*. In *Furundžija*, the

International courts have increasingly recognized the severity of rape crimes over the last 20 years and will likely continue to positively develop international jurisprudence on rape in the coming years. In the near future, the ICTY will have the opportunity to recognize rape as a form of sexual enslavement in the pending *Foča* case.

ICTY Trial Chamber II examined allegations that Furundžija, a Croatian local commander was present for and authorized another soldier to rape a female Bosnian Muslim vaginally, orally, and anally. The ICTY noted that "International case law . . . evinces a momentum towards addressing through the legal process, the use of rape in the course of detention and interrogation as a means of torture." In particular, the ICTY referenced the IACHR's decision of *Mejía* and the ECHR's holding in *Aydín*. In concluding that the "elements of torture were met" in *Furundžija*, the ICTY explained, "the physical attacks as well as the threats to inflict severe injury, caused severe physical and mental suffering to [the victim] . . . The intention of the

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however, often are forced onto prisoners in exchange for food, drugs, or other scarce goods. In the case where there is a failure to separate juveniles from adult prisoners, guards, members of the *consejos de reclusos*, as well as other adult prisoners target those juveniles for forced sexual relationships. Usually, the youngest prisoners are the most frequent victims of sexual abuse.

Recognizing that different categories of prisoners should be treated and punished differently, paragraph 8(d) of the Standard Minimum Rules specifically provides that juveniles must be separated from adult offenders. The rationale for such a provision is to protect the juveniles from physical and sexual abuse. Furthermore, separating juveniles from adults assures them equal access to food and other necessities that might be compromised by mixing them with adult prisoners. Cuba fails to meet its obligations to protect juvenile criminals when it allows juveniles to be held in the same prisons as adults.

Political Prisoners. Imprisonment is a popular punishment for political dissidents in Cuba who exercise their rights of free association, free expression, free opinion, and free movement. In addition to suffering the same effects that all prisoners suffer, HRW has noted that political prisoners also are frequently singled out for systematic psychological intimidation and physical abuse due to their status as dissidents or their speech activities while in prison. Prison guards regularly beat political prisoners and frequently put them into isolation cells to punish them for their political opinions, contrary to paragraph 31 of the Standard Minimum Rules, which prohibits isolation as a form of punishment for prisoners.

The current state of Cuban prisons shows that Cuba is in violation of its obligations under the various human rights instruments such as the CAT, the UDHR, and the Standard Minimum Rules for the Treatment of Prisoners.

Such treatment of political prisoners also violates paragraph 6(1) of the Standard Minimum Rules, which holds that protection is afforded to all prisoners without discrimination as to political opinion. Cuba violates this principle when it singles out political prisoners for harsh treatment. Moreover, the UDHR and the CAT also afford political prisoners the same freedom from cruel, inhuman, or degrading treatment or punishment as regular prisoners.

Conclusion

The current state of Cuban prisons shows that Cuba is in flagrant violation of its obligations under the various human rights instruments such as the CAT, the UDHR, and the Standard Minimum Rules for the Treatment of Prisoners. Although it is important that Cuba ratify treaties such as the ICCPR, Cuba needs to focus on its violations of current obligations under international law.

Cuba must provide prisoners with proper access to clean food and water and to medical attention when it is necessary. Furthermore, Cuba must take measures to ensure that prison violence is kept to a minimum, while protecting the special interests of juveniles and political prisoners. It is incumbent on the Cuban government, during this process, to allow human rights and humanitarian groups access to its prisons so that they can evaluate the situation and offer their cooperation to help improve prison conditions through effective reform.

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accused . . . was to obtain information." The ICTY noted that "as the interrogation intensified, so did . . . the rape." Furthermore, the ICTY noted that a military officer perpetrated the rapes. Although Furundžija did not personally commit the rapes, the ICTY found that "the accused is a co-perpetrator of torture [so] he is individually responsible for torture." As such, he is "guilty of a violation of the law or customs of war (torture)," in violation of Article 3 of the ICTY Statute. For Furundžija's violations, the ICTY sentenced him to eight years in prison.

In addition to reinforcing the *Čelebići* holding on torture, the *Furundžija* opinion also advanced international jurisprudence on rape by expanding the legal definition of rape. The ICTY drew on the basic definition of rape articulated by the ICTR in *Akayesu* and the definitions of rape set forth in various penal codes. The ICTY concluded that the elements of rape common to most legal systems are: "1) sexual penetration, however slight; a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator, or b) of the mouth of the victim by the penis of the perpetrator; 2) by coercion or force or threat of force against the victim or a third person." Using this definition, the ICTY broadened the scope of rape crimes to include forced oral and anal sex.

Prospects for Jurisprudential Development in the Future

International courts have increasingly recognized the severity of rape crimes over the last 20 years and will likely continue to positively develop international jurisprudence on rape in the coming years. In the near future, the ICTY will have the opportunity to recognize rape as a form of sexual enslavement in the pending *Foča* case. The ICTY Statute prohibits enslavement as a crime against humanity, but to date no international court has acknowledged that rape can rise to the level of sexual enslavement. The Prosecutor in the *Foča* case has asked the ICTY to expand its understanding of enslavement to include sexual enslavement. If the ICTY recognizes rape as a form of sexual enslavement, the ICTY would add momentum to the positive development of the international jurisprudence on rape.

In addition, the International Criminal Court (ICC) may be able to contribute to the international jurisprudence on rape in the coming years. Although the ICC will not be formally established until 60 signatory nations ratify the Rome Statute of the International Criminal Court (ICC Statute), the ICC will have the statutory authority to adjudicate rape cases. The ICC Statute explicitly invites the prosecution of rape as a crime against humanity, under Article 7 of the ICC Statute, and as a war crime, under Article 8 of the ICC Statute. The ICC, however, also could draw on the jurisprudence discussed above to prosecute rape as torture or genocide. Once established, the ICC could join the IACHR, ECHR, ICTR, and ICTY in promoting accountability for rape crimes internationally.

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