

Defining Rape as Torture: *Contribution of the International Criminal Tribunals*

– Ms. Geeta Pathak Sangroula

*"[Rape is] some thing you never forget.
I carry it around with me in my heart...
I think of it when I go to bed and
I think of it when I get up.
It doesn't let you go..."*

Rape Survivor, Yugoslav Conflict¹

1. Introduction

Sexual assault, sexual violence and sex crimes are often interchangeable terms. "Rape" falls within any of these terms. In war or in peace, rape is a crime under domestic as well as international criminal law. Although, the Nuremberg Charter did not specifically enumerate and prosecute sexual assault, article II of Control Council Law No. 10,² explicitly classified "rape" as a crime against humanity. Nevertheless, while rape was not specifically enumerated in the Tokyo Charter, the International Military Tribunal for Far East (IMTFE) treated sexual violence as secondary crime falling under its provision "inhuman treatment", "ill treatment", and "failure to respect family honour and rights". The case of **General Yamashita**, who was in fact not involved directly, however, punished under the command responsibility for rape and other sexual violence, is an obvious example.³

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¹ Kelly Dawn Askin, "War Crimes Against Women", (Kluwer Law International; 1997) p261

² Id p590

³ Friedman (ed.), The Law of War (1972), vol. II, p1597

After a long time, in 1993, the UN Security Council set up the International Criminal Tribunal for Former Yugoslavia (**ICTY**)⁴ and subsequently, the International Criminal Tribunal for Rwanda (**ICTR**)⁵ in 1994. These *ad hoc* tribunals' statutes explicitly enumerate "rape" and "torture" under the crime against humanity.⁶ In addition, the tribunal incorporates rape, torture and other forms of violence common to the Geneva Convention 1949 and Additional Protocols II, 1977.⁷ Other provisions, such as article 2 of the ICTY on "grave breaches" implicitly provides margin of appreciation to constitute sexual violence falling under more than one of these provisions as well.

The Rome Statute of the International Criminal Court 1998⁸ has also covered a wide range of sexual violence including rape.⁹ It took a long time to establish a permanent International Criminal Court as the Rome Statute entered into force only very recently on July 1, 2002.¹⁰ Though the metamorphosis process is over, the progressive achievement of this mechanism yet to be seen. Thus, it is very important to assess the contribution of the ad hoc international Criminal Tribunals that have left some future marks for ICC.

2. Background

The idea, considering *rape as torture* took momentum following the promulgation of the Convention against Torture (CAT)¹¹. Since 1986, the reports of the UN Special Rapporteur on Torture officially addressed this issue.¹² Similarly, in the context of Yugoslav conflict, the report of the UN Secretary- General clearly stated, "Rape constitutes an extremely grave violation under the humanitarian law".¹³ The special Rapporteur on contemporary forms of slavery and systematic rape also reported to the Committee on CEDAW stating, "In many cases the discrimination prong of the definition of torture in the Torture Convention provides an additional

⁴ SC Res. 827 (May 25, 1993)

⁵ SC Res. 955 (Nov 8, 1994)

⁶ See Articles 5(g) of ICTY, 3(g) of ICTR and 7(g), ICC

⁷ See Article 4, ICTR

⁸ Adopted by UN diplomatic Conference on 17 July 1998

⁹ See Article 7,8 of the Rome Statute of the International Criminal Court

¹⁰ Currently the Rome Statute of the ICC has 139 Signatories and 79 Ratifications (for more detail, see at www.icc.org)

¹¹ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984 (UNGA. Res. 39/46)

¹² E/CN.4/1992/SR.21, para.35,E/CN.4/1995/34,para 16

¹³ E/CN.4/1994/4 paras 16-17, 30 June 1993

basis for prosecuting rape and sexual violence as torture".¹⁴ Eventually, the Human rights NGOs involved in this issue, lobbied for proper recognition of sexual violence.¹⁵ As results, the tribunals, reviewing their indictments, have rendered this issue taking progressive step.

In this regard, the notion of rape as torture (provided with some circumstances) has now been fully, accepted in international arena. For example, In **Aydin v Turkey**¹⁶, a 17 years old girl was taken into custody by the Turkish security forces.

Her clothes were forcibly taken off and subsequently she was taken to another room where a man in military raped her. In this case, the European Court recognizing certain circumstances noted that the rape of the victim while in detention by an official of the state was especially serious and an abhorrent form of ill treatment. The court, under article 3 of the European Convention acknowledged that rape, unlike other forms of ill treatment, left psychological scars and thus amounted rape as torture.

The case of *Raquel Martin de Mejia v Peru*¹⁷ is another landmark interpretation made by the Inter-American Commission on Human Rights. In this case, a member of the army was charged for raping the wife of a political activist suspected of subversive activities. Under article 5 of the inter- American Convention to Prevent and Punish Torture, which laid down the elements needed to constitute torture broadened the issue with depth analysis of the links between rape and torture, the Commission observed *rape as torture* accordingly.

The standards set forth in *Mejia's* view are parallel to article 1 of the Convention against Torture discussed below.

In order to constitute rape as torture, the international criminal tribunals have frequently referred the principles laid down by these regional mechanisms.

3. Contribution of the ICTY and ICTR

The tribunals' judgments considering both subjective and objective satisfaction of issues relating to sexual violence provided a benchmark in international criminal law. The following rules for procedure and evidence,

¹⁴ See CELEBICI case, 16 November 1998, para 493 (www.un.org/icty)

¹⁵ See HRW report, September 1996 at http://www.hrw.org/hrw/summaries/s_rwanda969.html

¹⁶ *Aydin v Turkey*, ECHR, (1996) 3 BUTTERWORTHS HUM.RTS.CASES 300

¹⁷ *Mejia v Peru*, IACHR, Case 10.970, Report 5/96, 1 March 1996, (1996) 1 BUTTERWORTHS HUM.RTS.CASES 229

adjudicating and enforcement mechanism process of the tribunals are important in this regard:

3.1. Rules for Procedure and Evidence:

Under article 14 of the ICTR and article 15 of the ICTY statutes, both tribunals have adopted their rules. Taking into account the coercive nature of systematic rape, the tribunals have adopted Rule 96. The rule stipulates "**Evidence in Cases of Sexual Assault**" as follows:

In cases of sexual assault:

- (i) *Notwithstanding Rule 90(C), no corroboration of the victim's testimony shall be required;*
- (ii) *Consent shall not be allowed as a defence if the victim*
 - (a) *Has been subjected to or threatened with or has had reason to fear violence, duress, detention or psychological oppression, or*
 - (b) *Reasonably believed that if the victim did not submit, another might be so subjected, threatened or put in fear;*
- (iii) *before evidence of the victim's consent is admitted, the accused shall satisfy the Trial Chamber in camera that the evidence is relevant and credible;*
- (iv) *prior sexual conduct of the victim shall not be admitted in evidence.*

The above mentioned Rule 96 is one of the most progressive rules in the history of gender jurisprudence. Under this rule, unlike other crimes, sexual assault does not require corroboration of the victim's testimony and the consent is not an element in the case of threaten and some other circumstances. Moreover, the rule allows for in *Camera hearings* to protect and encourage victims for fair trial. The effectiveness of this rule can be seen in many cases. For example, in **Kunarac's case**¹⁸, the victims testified in camera court without requiring facts to be corroborated. The ICTY using this rule 96 for the tribunals rendered a landmark verdict, by which all three defendants were convicted.¹⁹

3.2. Adjudication:

In 1998, in the case of **Jean Paul Akayesu**,²⁰ for the first time, the **ICTR** considered *rape as a torture* and other forms of sexual violence and punished under crime against humanity. In this case the Rwandan Tribunal observed:

¹⁸ Prosecutor v Kanarac and others, 22 February 2002

¹⁹ "Heart of darkness" The Sydney Herald, 24 February 2001, p30

²⁰ THE PROSECUTOR v JEAN-PAUL AKAYESU, 2 September 1998, <http://www.icty.org/>

"Like torture, rape is used for such purposes as intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person. Like torture, rape is a violation of personal dignity, and **rape in fact constitutes torture** when inflicted by or at the instigation of or with the consent or acquiescence of public official or other person acting in an official capacity."²¹ (emphasis added)

After Akayesu, subsequently, in the case **Delalic** (known as Celebici case), the chamber found rape as torture falling under the "grave breaches" and violation of customs of war under article 2 and 3 of the statute of ICTY.²² Referring to International customary practices, case law and the UN reports, **the Furundzija** case follows the Akayesu principle accordingly.²³

The **Kunarac** case mentioned above,²⁴ analyzing the materially distinct elements of article 3 vis-à-vis article 5, and finds the nexus between two articles and finally considers the convictions for rape, torture and enslavement under both articles.²⁵ In this way, after Akayesu, Kunarac case made another history for the first time constituting **rape as a war crime and a crime against humanity**. The human rights groups including Amnesty International also welcomed this precedent-setting verdict. Indeed, this is a significant step mainstreaming women's human right into human rights regime.²⁶

4. Elements of Rape

Prior to constitute rape as torture; it was necessary for tribunals to identify the elements of rape. Since, there was no definition of rape in international laws; the tribunals observed the definition and elements as a subject of consideration. In this context, the **Akayesu case** defines rape as "a physical invasion of a sexual nature committed under circumstances, which are coercive"²⁷

While observing the issue of rape the tribunals have considered article 38(1) of the ICJ in order to perceive the principles of criminal law common to the major legal systems of the world. In this way, analyzing the elements

²¹ Id. para 597

²² CELEBICI case, 16 November 1998, paras 440, 494-496

²³ Prosecutor v Furundzija, Case IT-95-17/1-T, Judgement, 10 Dec 1998, para 163

²⁴ p 145, para 436

²⁵ Id paras 556-557

²⁶ See Sydney Morning Herald 24 Feb 2991, p15

²⁷ Supra note 19

considered in **Furundzija case**, the **Kunarac case** of the ICTY, finds three broad categories of the sexual activity accompanied by:

- (i) force or threat of force to the victim or a third party;
- (ii) force or a variety of other specified circumstances which made the victim particularly vulnerable or negated her ability to make an informal refusal; or
- (iii) occurs without the consent of the victim

The consent, however, had been considered in accordance with ruled 96 mentioned above.

5. Rape as torture under the Torture Convention

The CAT neither catalogues specific acts in its definition of torture nor specifically enumerates rape, focusing rather on the conceptual framework of state-sanctioned violence, it reflects customary international laws.²⁸ Thus, it is important for rape to be characterized as torture because the consequences of rape clearly meet the elements of torture.

While assessing rape as torture, following three substantive elements of article 1 of the CAT has been adopted by the tribunals:

1. Severity
2. Intent; and
3. Purpose

5.1. Severity:

The doctrine of "severity" clearly characterizes rape as torture because like torture, rape produces severe pain or even worst. According to the testimonies of rape victims during Bosnian conflict, most of women had long-lasting gynecological damage, infection and other injuries.²⁹ Apart from physical severity, the consequence of rape is so traumatic to women that they never forget it. Its consequences may be particularly severe in traditional, patriarchal society. For example, during Yugoslav conflict, due to traditional Muslim perception of virginity and chastity, the Muslim women faced various problems such as:³⁰

²⁸ Supra 20

²⁹ Supra note 16

³⁰ See for more detail: Supra note 1, p269

- Perceived as soiled and unmarriageable
- Target of societal ostracism
- Trauma and humiliation
- Fear of Divorce, Honour killing, etc.

5.2. Intent:

Since the convention does not specify the specific intent, the voluntary performance of an act with foreseeable consequences amounting to torture meets the intent requirement. Thus, it does not matter that the perpetrator or his superior does not consider rape to be a form of torture. It is the objective character of the acts and suffering that they cause and are likely to cause that determines whether the crime is characterized as torture. The *Akayesu* case deals with this matter of intent thoroughly.³¹

5.3. Purpose:

Rape is often used as a means to punish, intimidate or coerce the victim or a third person.³² "Ethnic cleansing" has been proved the most obvious reasons of such barbaric acts. The European Commission report estimated that in the conflict of Bosnia, as many as 20,000 people, mainly Muslim women and girls were raped for this purpose.³³ In addition, "a brutal expression of discrimination" against women also qualifies as torture. For example, widespread and systematic rape of *Tutsi* women, who were raped both, for their ethnicity and for their gender during Genocide in Rwanda is an obvious example of such ethnic conflict.³⁴

6. Legal Consequences of "rape as torture"

The prohibition against torture inherently acquires the status of *jus cogens*,³⁵ one of the most fundamental standards of the international community. That is why, the concept of torture, under the customary international law, incorporated either in the CAT or Geneva Conventions or any other international instruments justify the doctrine of universal jurisdiction that is binding upon "all legal systems, all persons". Under these preemptory norms, in spite of possible national authorization by legislative or judicial

³¹ Supra note 16

³² Supra note 13

³³ Supra note 19

³⁴ Supra note 15

³⁵ See Furundzija case paras 155-156

bodies to violate the principle banning torture, individual remain bound to comply with *jus cogens* and states are bound to try or extradite the perpetrator.³⁶ Hence, it is important rape and other forms of sexual violence to be characterized as torture in order to ensure judicial scrutiny and accountability.

7. Problems and Prospects

7.1. Definition of Rape:

The question has been raised by the critiques that whether the issue "rape" covers the rape against male or not. Most of the domestic laws explicitly define rape as a crime against women. For example, in New Zealand, rape is defined as "penetration of the women".³⁷ Whereas some jurisdiction such as in Australia, The Crimes Act defines rape against any persons.³⁸

It is true that during war (perhaps in peace also), there have been some accounts of men being sexually abused.³⁹ However, as men, women did not rape them; it was rather the same sex rape. For example, in Bosnia conflict, two brothers were forced to undress and perform oral sex. Similarly, we can see some incidents of same sex rape between females who were actually forced to do so.⁴⁰ These are, indeed, entirely the inhuman and degrading treatment against dignity, humanity and worth of human values. The issue rape as gender-based violence, further justifies, with a specific context, as a crime against women and the violation of women's human rights.

The issue "rape" can also be contextualized from the perspectives of international human rights framework. The Convention on the Elimination of all forms of Discrimination against Women lacked incorporating the term violence and thus the committee on CEDAW on its general recommendations no. 12 and 19 has interpreted gender-based discrimination is a gender-based violence⁴¹. General Recommendation 19 is a historical recommendation of the Committee that has further reaffirmed by the first world conference on human rights held in Vienna in 1993 and the subsequent Declaration on the Elimination of Violence against women.

³⁶ See Attorney - General of govt. of Israel v Adolf Eichman 36 I.L.R. 298, p612

³⁷ Section 128(1), New Zealand Crimes Act, 1961

³⁸ Supra note 22 para 455

³⁹ Human right Watch/Helenski: War Crimes in Bosnia-Herzegovina, April 1994, Vol. 6 No 5, at 12

⁴⁰ Supra note 1, p271

⁴¹

Nevertheless, the international human rights standards have recognized all forms of gender-based violence occurred at family, community and the state are regarded as gender-based discrimination. The standards include rape as one of the heinous forms of violence against women.

Either in the wars or in peace, there have always been the mass rape and other sexual violence against women because of their ethnicity and gender. Obviously, being women is always a risk factor as historically it is an issue of power and control over sexuality of men against women. For example, no "rape stations" were set up against male and because of rape; no men are traumatized as women. The degree of vulnerability is always overwhelming. In this context, the tribunals' definition is justifiable. Despite this fact, until now, rape has not been declared as a crime against women, which is being demanded by the women's coalitions in national and international arena.

7.2. Definition of torture:

The criminal tribunals have not completely embraced the definition of torture under the CAT convention because initially, the CAT was drafted as a result of the state practice. Therefore, the language of Article 1 of the CAT requires state involvement, whereas the official involvement is not an essential element of torture under humanitarian law.

Unlike the CAT, the Geneva Conventions do not define torture in terms of purpose, so the torture convention's definition does not limit the concept of torture under humanitarian law. However, the purpose "*or any reason based on discrimination*" articulated in the CAT, as we can see in the *Akayesu* judgment, has left some positive impacts.

7.3. Purpose of rape:

Apart from the above-mentioned case, the language used in the CAT requires specific purpose, and crime against humanity covers only the "systematic or widespread" acts are troublesome for some sexual violence such as "opportunistic rape", which occurs without plan and specific prohibited purpose. For example, in Balkan Conflict, one of the victims said that she was followed by one soldier and raped brutally. As a result, she became pregnant and gave birth to a child. She was forcibly raped though

there was no specific intention or the issue of mass rape.⁴² In this situation, I believe, the doctrine of severity alone is sufficient to constitute their isolated rapes as torture.

In addition, the language "against the civilian population" also discards the women victims other than "civilians". Perhaps it justifies the context, but it is suggested that all kinds of rape including against belligerents should be covered under crime against humanity accordingly.

7.4. Gravity:

Although, Article 27 of the Geneva Convention 1949 and its additional Protocols (1977) I, II specifically prohibit **rape**, these provisions do not specify rape as a grave breach. Article 147 of the Geneva Convention 1949 characterizes "**torture**" as a grave breach, which has been incorporated in article 8 of the ICC and article 2 of the ICTY statutes. The language used in article 7(2) (e) of the ICC defining "torture" under crime against humanity clearly meets this grave breaches provision.

We can also analyze this issue from *Furundzija and Kunarac case* mentioned above. The *Furundzija* case finds the nexus between article 2 and 3 of the ICTY and clearly considers rape as a grave breach and violation of custom of war.⁴³ Whereas, In *Kunarac* case, the tribunals inter-links article 3 vis-à-vis article 5 of crime against humanity but does not find nexus with article 2 of grave breaches. In so far, the trend shows that, still, the tribunals are not clear (the ICTR statute even lacks to incorporate grave breaches) to recognize rape as "*grave breaches*" under *crime against humanity*. I hope that the International Criminal Court will bridge this gap positively.

7.5. Compensation to victims:

The international criminal tribunals did not provide any compensation to victims, in other words there had not been any reparation provision in the ad hoc tribunals statutes, which is a failure of adequate justice towards victims. There is a traditional notion of criminal justice system that justifies only the crime control model. However, the victim's justice is an integral

⁴² Supra note 1, p288

⁴³ Supra note 22, Para 172

part of criminal law and justice system. Hence, the victim justice system requires adequate legal measures, judicial proceedings and effective legal mechanism, including socio-economic guarantees to victims.⁴⁴ Looking towards a way forward, Article 75 of the statute for ICC can be considered as a landmark provision to respect victims. The provision enumerates compensation for any damage, loss and injury including rehabilitation for victims. Similarly, Article 79 deals with the trust fund for this purpose. The implementation of provision regarding effective and adequate remedy to victims yet to be seen, if implemented properly this provision will bring a great achievement towards victims' justice system.

The International Criminal court is a complementary mechanism which requires state parties to take first hand measures and mechanism to be taken at domestic level. There is a scope of internalization of humanitarian norms at domestic level and for this the statute needs to be ratified by countries with full commitment.⁴⁵

In conclusion, due to limited jurisdiction, however, these tribunals were not competent enough to try the perpetrators of sexual violence of all over the world; they have contributed some progressive (despite some criticisms) precedents. Unlike the European Court of Human Rights and Inter-American Court of Human Rights and other International Mechanism established within the United Nations, these tribunals played most powerful role to enforce their verdicts, as they were competent enough to punish the individuals. As a result, most of the perpetrators have already been imprisoned, which is the most significant impact towards ending impunity. In addition, through the judgments, to some extent, the international humanitarian and human rights laws such as Torture and Genocide Conventions, ICCPR and CEDAW have been explicitly and implicitly enforced and acknowledged and interpreted linking with the humanitarian laws. In doing so, the tribunals also got some support (or pressure) from the UN and NGOs. For example, the "Women's Caucus for Gender Justice",

⁴⁴ see generally, Dr. Shankar Kumar Shrestha; "A step towards Victim Justice System", Nepalese Perspective (Pairavi Prakashan, 2001)

⁴⁵ There are 94 state parties of the Rome Statute of International Criminal Court (As of 25.05.2004), Source; www.icrc.org (Date visited, 26.05.2004)

(credited for inclusion of women's issue in the Rome Statute of ICC), is increasingly concerned on strengthening the ICC in this regard.⁴⁶

Finally, since, many jurisdictions do not account rape under serious crime⁴⁷ and treat victims inhumanly⁴⁸ and lack uniformity, therefore, the international criminal law should have clear provision defining rape and other sexual assault as grave breaches so that there will be no risk of overlapping crimes. Furthermore, the recognition of such sexual violence as "grave breaches" that justifies peremptory norms of *jus cogens* will make the states obliged to try or extradite the perpetrators. I hope that the international community will take this matter seriously and the permanent international criminal court will perform effectively. Unlike ICTY and ICTR, the International Criminal Court has wide range of jurisdiction all over the world and thus ICC can be accepted as a complementary mechanism for ending impunity in all crimes, including crimes against women respectively.



⁴⁶ See: <http://www.iccwomen.org/icc/pc200003/report.htm>

⁴⁷ See: *E/CN.4/2000/68/Add.3 para 37* (e.g. in Haiti, rape is defined merely as a moral crime)

⁴⁸ In Pakistan, rape conviction requires four male witnesses, if rape is not proved she could be sent to jail for adultery. (see for detail: Radhika Coomaraswamy, to bellow like a cow; Human rights of women 50 (Rebecca Cook (ed), 1994)