**Rape: Evolution of the International Framework**

1. The first evolution is through International Humanitarian Law (IHL) (e.g. Lieber Code; Hague Regulations, article 46; Geneva Convention IV, 1949, article 27; Additional Protocol I, 1977 article 76 and Additional Protocol II, 1977, article 4 (2).
2. Evolution within international human rights law before the 1990s:

* Forward Looking Strategies, 1985: para 258: ‘Violence against women exists in various forms in everyday life in all societies. Women are beaten, mutilated, burned, sexually abused and raped. Such violence is a major obstacle to the achievement of peace and the other objectives of the Decade and should be given special attention.’
* Report of the Secretary-General on the efforts to eradicate violence against women within the family and society (1987) E/CN.6/1988/6.
* Economic and Social Council, Resolution 1988/27, *Efforts to eradicate violence against women within the family and society*: ‘violence against women is an issue of equal rights that derives from a power imbalance between women and men.’
* Economic and Social Council Resolution 1990/15, *Recommendations and conclusions arising from the first review and appraisal of the implementation of the Nairobi Forward-looking Strategies for the Advancement of Women to the year 2000*.
* Economic and Social Council Resolution 1991/18, *Violence against women in all its forms*.
* CEDAW, GR 12, 1989: (‘incidence of all kinds of violence in everyday life (including sexual violence …’)).

1. The 1990s saw major developments whereby state responsibility for the commission of an international wrongful act attributable to the state was applied to human rights law to encompass acts committed by state agents and the duty of due diligence with respect to prevention, prosecution and punishment of gender-based violence against women, including rape, committed by non-state actors whether in public or private.

* CEDAW GR 19, 1992: gender-based violence against women as a form of discrimination under CEDAW, article 1; rape spelled out as a form of family violence and states parties recommended to ensure protection and support services for victims.
* Vienna Declaration and Programme of Action (1993): rape and sexual violence in armed conflict recognised as a violation of IHL and international human rights law.
* DEVAW, 1993: rape included as violence against women within the family (marital rape) and as violence against women within the community.
* CHR, Resolution 1994/45 (mandate of the SR VAW).
* Beijing Declaration and PFA: rape as violence against women in the family (marital rape), in the community and systematic rape in armed conflict.

1. The normative international human rights framework has further evolved through a range of soft law instruments at the international level, including General Comments or Recommendations of the UN human rights treaty bodies (e.g. Human Rights Committee, GC 28, 2000; CESCR GC 16, 2005; CAT, GC 2, 2008) and CEDAW Committee, General Recommendation No 35 updating General Recommendation 19, 2017.
2. These instruments have been fleshed out and contextualised in concluding observations, individual communications and inquiries by the treaty bodies, in particular the CEDAW Committee, and reports of the UN Human Rights Council special procedures, in particular the special rapporteur on violence against women and the special rapporteur on torture.
3. As well as being a free-standing violation of human rights (and an international crime when other definitional elements are satisfied) rape is a constituent element of other human rights violations, for instance torture, slavery and sexual slavery; genocide; forced and child marriage; trafficking; forced prostitution. Legal instruments appertaining to such human rights violations are thus also relevant to the international regulation of rape (e.g. Genocide Convention; Torture Convention). At the same time gender analysis of these other legal frameworks is required and rape as a component of such violations must not be lost sight of.
4. At the regional level human rights institutions at first made determinations with respect to rape under the general human rights treaties (ECHR; IACHR; AfCPHR).

* ECHR, article 3 (torture, cruel inhuman treatment) and article 8 (privacy and family life) but interestingly not article 14 (discrimination).
* IACHR, article 5 (1) and (2) (right to physical, mental and moral personal integrity and prohibition of torture).

1. Specialist treaties on violence against women have been adopted at the regional level that supplement the general human rights treaties.

* Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women (Convention of Belém do Pará) 1994: rape in family and community.
* Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) 2003.

4 (2) (a): enact and enforce laws to prohibit all forms of violence against women including unwanted or forced sex whether the violence takes place in private or public;

11 (3): States Parties undertake to protect asylum seeking women, refugees, returnees and internally displaced persons, against all forms of violence, rape and other forms of sexual exploitation, and to ensure that such acts are considered war crimes, genocide and/or crimes against humanity and that their perpetrators are brought to justice before a competent criminal jurisdiction.

14 (c ): protect the reproductive rights of women by authorising medical abortion in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus.

* *African Commission on Human and Peoples’ Rights, General Comment No. 2* on Article 14 of the Maputo Protocol, 2014: ‘Sex-related violence against women is widespread in almost all African countries, including rape, incest, violence by a partner in the intimate space, including marital rape and first sexual experiences that occur by coercion.’
* Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention) 2011.

**Article 36 – Sexual violence, including rape**

Parties shall take the necessary legislative or other measures to ensure that the following intentional conducts are criminalised:

A engaging in non-consensual vaginal, anal or oral penetration of a sexual nature of the body of another person with any bodily part or object;

B engaging in other non-consensual acts of a sexual nature with a person;

C causing another person to engage in non-consensual acts of a sexual nature with a third person.

2 Consent must be given voluntarily as the result of the person’s free will assessed in the context of the surrounding circumstances.

3 Parties shall take the necessary legislative or other measures to ensure that the provisions of paragraph 1 also apply to acts committed against former or current spouses or partners as recognised by internal law.

1. From the 1990s onwards there has been significant evolution in international criminal law (ICL) through the Statutes and jurisprudence of the ICTY (1993) and ICTR (1994) and the Rome Statute of the ICC (1998) and Elements of Crime and Rules of Court.
2. In addition the UN Security Council has developed its agenda on Women Pace and Security (WPS) from Resolution 1325, 2000. SC Resolution 1820 recognises sexual violence as a tactic of war as an impediment to the restoration of international peace and security and notes that that rape and other forms of sexual violence can constitute a war crime, a crime against humanity, or a constitutive act with respect to genocide. There are now 10 WPS Resolutions through which the pillars of prevention of and protection against sexual violence in armed conflict are advanced, as well as measures to be taken by states and other actors in relief and recovery.
3. The CEDAW Committee has asserted that the WPS agenda must be implemented in accordance with the provisions of CEDAW and has also developed state obligations with respect to sexual violence in conflict prevention, conflict and post-conflict (CEDAW, GR 30 on women in conflict prevention, conflict and post-conflict situations).

**Some points of note in the Evolution of the International Framework**

1. In the international instruments rape is not in general dealt with separately but is integrated into the development of norms relating to gender-based violence against women, sexual violence or violence against women and primarily within the framework of non-discrimination, inequalities and power relations. Rape is expressly itemised in categories of violence against women in some such instruments as violence within the family – notably marital rape – or within the community but surprisingly is not spelled out as a form of violence used by state agents. This general framing raises the important question: what makes rape distinctive from other forms of gender-based violence and what particular aspects require specific legal regulation?
2. In the regional framework where rape first evolved through case law under the general human rights treaties the facts required rape to be addressed explicitly. In cases like *Aydin* v *Turkey*, *MC v Bulgaria*, *Rosenda Cantu v Mexco*, the framing was primarily through articles of the relevant Convention relating to torture and cruel, inhuman degrading treatment and privacy and family rights.
3. The Vienna Declaration and Programme of Action broke the traditional categorisation of IHL applicable to conflict and human rights law applicable to everyday violence with its assertion that ‘Violations of the human rights of women in situations of armed conflict are violations of the fundamental principles of international human rights and humanitarian law.’
4. There have been parallel developments in ICL and human rights law. The factual situation in many of the early human rights cases brought before the human rights courts was one of conflict (e.g. *Aydin v Turkey* (ECtHR), *Raquel Mejía Egocheaga v Peru* (IACmHR)) or extreme and long lasting violence against women (e.g *Gonzales v Mexico* (*Cottonfield)*) (IACtHR)). In the SC WPS agenda however where rape is addressed as a tactic of war human rights are given little traction and there is a presumed divide between conflict-affected rape and everyday rape
5. Legal issues relating directly to rape that have received attention and where there are many contested aspects outstanding include:

* Direct attribution to the state through commission by state officials (*Aydin v Turkey*; *Raquel Mejía Egocheaga v Peru*; *Rosenda Cantu v Mexco; EIPR and Interights v Egypt*) and indirect attribution through state failure to exercise due diligence to investigate and prosecute allegations of rape by non-state actors (e.g. *MC v Bulgaria*, *Cottonfield*, *Linda Soto v Venezuela*). The latter cases raise particular questions about what constitutes adequate investigation by law enforcement officials; when the obligation to investigate arises and assessment of risk, for instance when women and men are forcibly separated (e.g. UNMIK, Human Rights Advisory Panel, *Kostić and Others*, nos. 111/09 *et al*, 23 October 2015, §§ 322-334).
* Definitions of rape in domestic laws including the issues of force/consent; coercive circumstances that negate consent and where these are applicable outside the framework of ICL; level of penetration. (e.g. GR 35 para 33; *Vertido v the Philippines* (CEDAW); *RPB v the Philippines* (CEDAW); *Prosecutor v Kumarac* (ICTY); *Prosecutor v Akayesu* (ICTR); ICC Elements of Crimes; *MC v Bulgaria* (ECtHR); *J v Peru* (IACtHR).
* Issues of secondary victimisation in rape trials; denial of access to protection and to equality before the law through the pervasive negative impact of gendered myths and stereotypes (*Vertido v the Philippines*; *RPB v the Philippines*; *Linda Soto v Venezuela* (IACtHR)); see also Council of Europe Committee of Ministers Recommendation on Preventing and Combating Sexism, CM/Rec(2019)1; and SC Resolution 2467, 2019 on women peace and security and sexual violence para 14.
* Issues relating to burden of proof, standard of proof, rules of evidence etc:
* State obligations with respect to the right to a remedy; state obligations with respect to provision of services, including abortion following rape. (e.g. Human Rights Committee, GC 36, 2019 para 8:’ States parties must provide safe, legal and effective access to abortion where the life and health of the pregnant woman or girl is at risk, or where carrying a pregnancy to term would cause the pregnant woman or girl substantial pain or suffering, most notably where the pregnancy is the result of rape or incest or where the pregnancy is not viable’).

1. Many of these issues go to that of prevention and the use of law as a tool to shift mindsets and the culture of rape sustained by structural and intersecting inequalities such as those based on race, class, sexuality, disability, etc. Although the CEDAW Committee draws attention to diversity between women and their situations the legal framework in general does not take sufficient account of them.

Christine Chinkin

LSE

27 May 2020