

## **State Responses to Rape**

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## Introduction

The biggest fear for most women is to get raped by a stranger. However, national statistics in most countries show that the majority of the rapes are committed by a man who knows the victim by sight alone or knows her fairly well. This type of rape is called acquaintance rape. Further, most rape victims are between the ages of 16 and 24 and the majority of rape victims never report the crime to the police.<sup>1</sup>

Until recently rape laws have in effect been a means of protecting a man's or family's property rather than the integrity of a woman's body. Historically, women were seen as the property of men. Therefore, sexual abuse of a woman was a violation to a man's property and less of a violation of a "woman's bodily integrity." Meanwhile, through pressure from women's advocacy groups around the world, rape is no longer conceived as a violation of family or community honor, but as an abuse of the woman's bodily integrity.<sup>2</sup>

Violence against women is a manifestation of the historically unequal power relations between men and women, which have led to domination over and discrimination against women by men and to the prevention of women's full advancement. For instance, rape or threat of rape creates fear and insecurity among women. The fear of rape is a permanent constraint on the mobility of women and limits their access to resources and basic activities. The same fear of rape is not felt to the same extent by our male counterparts.<sup>3</sup>

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<sup>1</sup> United Nations, *Violence Against Women in the Family* (New York: United Nations, 1989), p.17; Rape in America, National Crime Victims Survey 1992, UNH, National Crime survey, 1989, and I Never Called it Rape; Lori Heise, *Freedom Close to Home: The Impact of Violence Against Women on Reproductive Rights, Women's Rights Human Rights*, Julie Peters and Andrea Wolpers, 1995.

<sup>2</sup> Rosemarie Tong, *Women, Sex, and the Law* 1984

<sup>3</sup> As stated in the Preamble to the United Nations Declaration on the Elimination of Violence Against Women, adopted by the United Nations General Assembly, December 20, 1993.

Violence against women is used to control female sexual behavior. Most abuses perpetrated against women derive from a desire to ensure women's chastity. Rape, sexual harassment, trafficking, female genital mutilation, all these violations are an assault of female sexuality.<sup>4</sup>

There are many different forms of rape, such as child rape, rape in custody, rape of prostitutes, marital rape, rape of homosexuals, etc. The primary focus in this report will be on rape of adult women in the community, during war and peacetime. The community includes the workplace, school or educational institutions, and "street" situations, such as universities, private companies, churches, sport facilities, markets, transportation facilities, and all other entities unrelated to family and state. This report does not focus on rape within the family and rape committed or condoned by state officials. (although the report briefly addresses marital rape and custodial rape). In the "community," the social, cultural, religious, ethnic, or racial reference groups from which people derive their sense of identity and key values play a critical role in reinforcing the structure of the family and the position of women within it.<sup>5</sup> These reference groups can perpetrate or condone certain forms of violence against women. For instance, in some countries women still are regarded as property of the husbands and marital rape is not recognized by the community as a crime.

Rape is considered an act of gender based violence. However, just because the victim is a woman does not automatically mean that the violence is gender based. In order to speak of gender based violence, it must constitute a type of harm that is particular to the person's gender, such as female genital mutilation, sex-selective abortions, and rape. Statistics around the world show that the majority of the rape victims are women. However, rape is also committed to men by women, or to women

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<sup>4</sup> See S. Brownmiller, *Against Our Will*, Hammondsworth, 1977. See also S. Firestone, *The Dialectic of Sex*, London's Women's Press, 1979.

<sup>5</sup> Women, Law and Development International, *State Responses to Domestic Violence: Current Status and Needed Improvements*, 1996.

by other women and effective international and national laws should be adopted to address these grave violations. However, rape is recognized as a crime mostly directed towards women, and this report, therefore primarily focuses on rape as a gender-based crime against women.

Unfortunately, gender specific violence is not explicitly mentioned in any international treaties binding on all states. However, recent reinterpretation of human rights law has led to the conclusion that violence against women, in peacetime and in war, is an affront to women's physical and moral integrity and to their dignity as human beings.<sup>6</sup> As a result rape is now viewed as a gender based violence and therefore, states are responsible to protect women against it, according the right to equal protection of the law.<sup>7</sup>

### ***Purpose of the study***

The primary focus of this report is to analyze how rape is addressed in national and international laws.<sup>8</sup> Although, women have long been viewed as property and rape seen as damage to property, rape is now considered a crime by most countries. Meanwhile, in some countries marital rape is still not being criminalized, and women are still being considered the property of their husbands. This report describes how the international community has only recently begin to recognize rape as a violation of human rights, through the principle of state accountability. Although, rape is still today only seen as a human rights violation where perpetrators act under higher orders to commit rape, and where there is a clear involvement of the state. Other rape cases

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<sup>6</sup> Elissavet Stamatopoulou, *Women's Rights and the United Nations, Women's Rights Human Rights*, Julie Peters and Andrea Wolpers, 1995.

<sup>7</sup> Coomaraswamy, Radhika, *Report on Violence Against Women: its causes and its consequences*, United Nations, 1995.

<sup>8</sup> In an earlier WLD International publication, *State Responses to Domestic Violence: Current Status and Needed Improvements*, marital rape and other forms of violence within the family were addressed.

are still considered mere violations instead of human rights violations.

The report describes the strategies used by countries around the world to address rape in their constitutional provisions, their penal and civil codes. The study revealed that even though most countries criminalize rape in their penal codes or statutes, countries are not necessarily effectively protecting woman against it. Whether rape crimes are effectively prevented and punished depends on adequate and effective laws, on the attitude of the police, prosecutors, judge and the general public. Moreover, in some countries the prosecution of rape crimes also depends on how the victim is perceived.

There are significant differences in the way countries define the crime of rape. In some countries the crime of rape is covered by a broader definition of sexual assault. Sexual assault covers different sexual offenses like abduction, defilement, indecent assault, unlawful detention for immoral purposes, and rape. Other countries define the crime of rape very narrowly, only recognizing forced penetration of the penis into the vagina. Some countries have reformed their rape laws and broadened the rape definition to include oral and anal penetration by the penis and penetration of an object or any part of the human body into the vagina or anus.

First, the report discusses the international legal instruments dealing with human rights, including provisions that provide legal redress to women in order to combat rape. Moreover, the report describes the available international human rights mechanisms for rape victims when all the domestic options are exhausted.

Second, the report analyzes 26 national constitutions and 24 penal codes. The research covers countries with a civil law system, such as most European countries, and some Asian and African countries. It also analyzes rape statutes in countries with a common law system, such as the United States, the United Kingdom and the Commonwealth countries.



Third, the report reviews the existing criminal procedures regarding rape. Rape is often viewed differently from other crimes as states do not always view rape as a public problem that needs to be prevented and punished to protect society. In many countries a woman needs to initiate a private action in order to start the prosecution, whereas in other countries the prosecution depends on public initiation. The prosecutor then decides whether the case should be prosecuted, regardless of the victims wishes.

Fourth, the report also analyzes the evidentiary rules applicable in rape cases. Research revealed that rules of evidence are often disturbingly discriminatory against victims. Lastly, this report will briefly discuss the sentencing of rapists and the available punishments, and the available remedies. As well as touch on other relevant legal issues regarding rape.

### ***Methodology***

The research for the report is based on primary sources, such as UN treaties, authoritative interpretations, jurisprudence, national laws, regional human rights instruments, and secondary sources, such as, literature, reports, law journals, periodicals, newspapers, information provided by specialists in the field and the Internet. The Library of Congress, the United Nations Information Center and various public libraries proved very helpful in the pursuit of this research.

## **International Legal Instruments and Standards**

Traditionally, rape was not recognized as an abuse of women's human rights. Until recently, the rights guaranteed in international human rights law have not been interpreted, by governments, international organizations and non-governmental organizations (NGOs), to include the right to be protected from acts of rape or other forms of violence against women. The conflict situation in Bosnia called international attention to the atrocities committed against women. An unclear number of women and girls were raped by soldiers, police, civilians and others during the conflict. Due to the war in Bosnia and the attention paid to gender-

based violations in the Fourth World Conference on Women in Beijing, the international community has begun to recognize rape as a violation of human rights due to pressure exerted by women's rights groups from all around the world.

### ***State Responsibility in International Law***

Traditionally international human rights law held states responsible for the acts or omissions of their agents or organs against individuals.<sup>9</sup> Therefore, states were directly responsible for acts of violence committed against women in custody or in detention and for violence against women in armed conflicts. However, states have ignored this violence and have never considered themselves accountable for gender-based violence. Reinterpretation of human rights, due to decades of pressure from women's human rights groups, now holds states responsible for gender based violations by state agents or organs. Today, when a policeman or a soldier rapes a woman in custody, that rape is no longer an individual act of violence of one man against one woman but an act of torture for which the state bears responsibility.<sup>10</sup>

The United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment explicitly holds states accountable for violations of certain rights committed by private individuals but condoned or supported by the state.<sup>11</sup>

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<sup>9</sup> Brownlie, I. *Principles of Public International Law*, 4<sup>th</sup> Edition (Oxford: Clarendon Press, 1990); Rebecca Cook, *State Responsibility for Violation of Women's Human Rights* (7 Harvard Human Rights Journal) 1994.

<sup>10</sup> See more on state responsibility: Rebecca J. Cook, *Human Rights of Women: National and International Perspectives*, University of Pennsylvania Press, 1994; Amnesty International, *Women in the Front Line: Human Rights Violations Against Women* (New York: Amnesty International, 1991); Catherine MacKinnon, *Towards a Feminist Theory of the State* (Cambridge, MA: Harvard University Press, 1989).

<sup>11</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, A/RES/39/46, 10 December 1984, (hereinafter Torture Convention)

### *State Complicity*

Most states considered acts of violence against women to be "private" and therefore not of concern to the state. Moreover, the international human rights instruments were not interpreted to hold states accountable for violations of human rights by private actors. The pressure of women's groups around the world resulted in a broader interpretation of international human rights protections which obliges states to take certain actions, such as arresting, prosecuting and punishing private parties who violate the human rights of women. The broader interpretation considers gender based violations a violation of women's human rights and the state failure to protect these rights establishes state responsibility.<sup>12</sup> State responsibility requires states to enact effective laws and enforcement mechanisms and to eliminate social and cultural practices that discriminate against women. It also requires states to provide remedies to women if their human rights are violated.

### *Equal Protection*

The concept of state responsibility obliges states to enact adequate legislation that is non-discriminatory and that provides equal rights for women and men. Equality for women and men is a human right and a condition for social justice. The principle of non-discrimination on the basis of sex is explicitly enshrined in international law. The United Nations Charter, the Universal

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<sup>12</sup> The state responsibility according to customary international law has been expanded by international and regional human rights law. In the Velásquez Rodríguez case The Inter-American Court of Human Rights held that under Article 1 of the American Convention on Human Rights: Honduras was responsible for politically motivated disappearances not overtly carried out by government officials. The failure to prevent the disappearances or to punish those responsible is a failure of the Honduran Government to implement its human rights obligations under Article 1 of the American Convention. The Court held that the Government is responsible for this failure even when the disappearance was not carried out by an state agent. The interpretation of the Court provides the mechanisms for holding states responsible for failing to prevent and punish violence against women perpetrated by private actors. This judgment is very important as an authoritative interpretation of international customary law. This interpretation does not have the binding force of a treaty but it does express a consensus on state responsibility for private actions.

Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights<sup>13</sup>, all contain the principle of non-discrimination based on sex. This imposes a duty on the State Parties to enact legislation and to enforce equal protection to men and women. This implies that in order to guarantee men and women the same life in dignity and free from discrimination, violence against women should be prevented, investigated and prosecuted. Failure to fulfill this duty constitutes a violation of women's human rights.

In spite of the internationally recognized right for women to be treated equally as men and the prohibition of discrimination based on sex, women still face a discrimination. The right to equal protection of the law should protect female victims of violence equally as other victims of violence. However, laws that could provide protection against violence are often less strictly enforced in cases of violence against women. Or national laws provide no or a lesser punishments for gender specific assaults, such as rape, sexual harassment and domestic violence compared to similar non-gender specific assaults.<sup>14</sup> For instance, in some countries wife beating contains a lesser punishment than the assaulting of a stranger.<sup>15</sup>

### ***International Human Rights Instruments and Enforcement Mechanisms***

During the last few decades there have been heated debates within the international community regarding the

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<sup>13</sup> The international covenants refer to the International Covenant on Civil and Political Rights, Dec 16, 1966, (hereinafter ICCPR); International Covenant on Economic, Social and Cultural Rights, 16 Dec 1966, (hereinafter ICESCR)

<sup>14</sup> For instance, in Cyprus no special legislation exists to address the issue of sexual harassment in the workplace; According to the United Nations Report of the Committee on the Elimination of Discrimination Against Women (Fifteenth session), Ethiopia, Ukraine, Hungary and Paraguay have inadequate legal and administrative measures to combat violence against women.

<sup>15</sup> Cambodia does not have domestic violence laws.

recognition of women's rights as human rights. NGOs around the world pressed for the acknowledgment of gender-based abuses, such as rape and domestic violence, as a violation of women's human rights. In the 1980s, violence emerged as an issue on the agenda within the United Nations system. In 1985, the United Nations Economic and Social Council recognized that violence in the family was "a grave violation of the rights of women."<sup>16</sup> The violence issue received further attention as part of the Nairobi-Forward-Looking Strategies in 1985. In Nairobi, violence was acknowledged to be a significant barrier to women's enjoyment of their rights. In 1993, delegates to the World Conference on Human Rights in Vienna declared that the rights of women are an inalienable, integral and indivisible part of universal human rights. This was an important victory as it enables women to hold governments and other parties accountable to international standards. Also in 1993, the United Nations General Assembly adopted the Declaration on the Elimination of Violence Against Women.<sup>17</sup> With the encouragement of the Conference, the UN Commission appointed, in March 1994, a UN Special Rapporteur on Violence Against Women. Further, the Beijing Conference held in 1995 established the Beijing Platform for Action which reiterates the commitment of governments to protect women's human rights, and outlines special action for governments to protect and enhance those rights.

The international community has now recognized that women's rights are human rights. However, the concept of women's rights as human rights is still undermined by some countries which argue that human rights must be subject to the interest of national security, economic strategy and local traditions. Furthermore, not all states are willing to accept all the provisions as stipulated. For instance, despite the fact that CEDAW, Article 28, paragraph 2 stipulates that " a reservation incompatible with

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<sup>16</sup> The Economic and Social Council, Violence in the Family Resolution 1984/18 of May 23, 1986.

<sup>17</sup> Declaration on the Elimination of Violence Against Women, A/C.3/48/L.5, 1993, (hereinafter DEVAW)

the object and purpose of the present Convention shall not be permitted", several states justify the reservations concerning particular women's rights for supposedly cultural, social and political reasons.

Human rights for women originate in different sources: treaties and conventions, either bilateral or multilateral, customary law (*jus cogens*), and a body of authoritative interpretations and policies. The authoritative interpretations can include decisions, reports, policy statements, declarations, recommendations or proposals for new standards of behavior, produced by a UN body or body of a regional organization, such as the Inter-American Court on Human Rights.<sup>18</sup> Together these form the primary sources of international law. The treaties and conventions are only binding on those states which ratified them. Customary law (norms derived from universal practice of states) is binding on all states whether or not explicitly accepted by them, and is derived from the general and consistent practice of states. An authoritative interpretation is not a binding source of international law, but as an expression of international consensus, it can become a binding norm for states. This report analyzes the available international human rights mechanisms available to rape victims.

### *Universal Declaration on Human Rights*

The Universal Declaration of Human Rights sets out minimum conditions for a dignified life and sets out these requirements in the form of rights.<sup>19</sup> The Declaration is not a binding set of rights in itself, but it outlines the minimum standards. These standards are internationally recognized in consequent treaties that are binding for states upon ratification. The standard practice of states is to consider both the norms of the Universal Declaration and the Covenants as binding.

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<sup>18</sup> Women, Law & Development, *State Responses to Domestic Violence: Current Status and Needed Improvements*, 1996

<sup>19</sup> Universal Declaration of Human Rights, A/RES/217 A (III), 10 December 1948, (hereinafter Declaration)

The guarantee to equal rights and the prohibition of discrimination are established in the Declaration. Article 1 states:

All human beings are born free and *equal* in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

Declaration, Article 2 states:

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.<sup>20</sup>

With regard to violations committed by private actors against women the Declaration does not include a specific provision to protect women against violence in general or rape in particular. However, Article 3 states that "everyone has a right to life, liberty and security". Moreover Article 5 states that "no one shall be subjected to torture or cruel, inhuman or degrading treatment or punishment". When States Parties fail to protect these rights they can be held accountable. Everyone is entitled to these rights without discrimination.

The Declaration does not contain a provision that explicitly obliges states to take affirmative steps to protect women against violence. However, the broader interpretation of international human rights hold states accountable for failure to protect women's human rights, such as equal rights and non-discrimination provisions.

States have a duty to provide remedies for those individuals whose human rights have been violated. Article 8 of the Universal Declaration provides that "everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law".

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<sup>20</sup> Moreover, Article 7 of the Declaration guarantees that "all are equal for the law and are entitled without any discrimination to equal protection of the law."

### *International Covenant on Civil and Political Rights*

Article 26 of the International Covenant on Civil and Political Rights ICCPR states<sup>21</sup>:

all persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as....sex.

This means that States Parties should protect women against unequal treatment in the national laws and abolish discriminatory provisions. For instance, sexual assault crimes against women should carry the same and not a lesser punishment as other assault crimes.

The ICCPR does not include a specific provision to protect women against the crime of rape. However, it does provide the basic human rights to "life, liberty and security of person," and the right to be free from "torture, cruel, and degrading treatment." Everyone is entitled to these rights without discrimination.<sup>22</sup>

Since women's rights are finally recognized as human rights, international laws oblige states to investigate, prosecute, punish and provide remedies when these rights are violated. For instance, when a woman is raped her right to life, liberty and to be free from torture or cruel, inhuman or degrading treatment are violated. The state's responsibility for violations of human rights by acts of both private and public person's imposes the duty to investigate, prosecute and punish the crime in the same way as it would handle any other crime. If the state fails to do so it breaches the obligation set forth in Article 2 and 3 of the ICCPR. The ICCPR imposes duties on States Parties to undertake action when the rights set forth in the ICCPR are violated by either private or public persons.

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<sup>21</sup> International Covenant on Civil and Political Rights, A/RES/2200 A (XXI), 16 December 1966, (hereinafter ICCPR).

<sup>22</sup> ICCPR, Article 6, 7 and 9.



Article 2 (1) of the ICCPR states:

each state party undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind....

After the Velásquez Rodríguez case before the Inter-American Court of Human Rights, Article 2 of the ICCPR has been interpreted to hold states responsible for failure to protect civilians against violence by private and public persons.

ICCPR, Article 3 states:

The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present covenant<sup>23</sup>.

*Convention on the Elimination of All Forms of Discrimination Against Women*

Until recently human rights instruments were assumed to provide both men and women the same protection. These instruments failed to acknowledge that women face violations that are specific to their gender. The principle of non-discrimination on the basis of sex, became the object in the 1979 United Nations Convention on the Elimination of all Forms of Discrimination Against Women.<sup>24</sup> The purpose of CEDAW is to reaffirm the provisions of already contained in international instruments dealing specifically with women's rights.

Article 1 of the CEDAW defines discrimination against women as follows:

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<sup>23</sup> ICCPR, art. 3; see similar provisions ICESCR art. 2(2),3;CEDAW art.1,2,3,4,15;European Convention art.14; American Convention art.1,24; African Charter articles 2,3,18,19; UDHR articles 1,2,7; ADRDM art. 2,12.

<sup>24</sup> Convention on the Elimination of All Forms of Discrimination Against Women, A/RES/34/180, 18 December 1979, (hereinafter CEDAW).

Any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on the basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

Although violence is not expressly mentioned in the Convention, interpretation of Article 1 allows it to be included. Because gender-based violence has the effect or purpose of impairing or nullifying the enjoyment by women of the human rights, such as right to life and liberty. Article 2 of the Convention requires states to protect women from discrimination through effective and adequate legislation, competent tribunals, and other public institutions, and by modifying discriminatory social and cultural patterns. Article 3 of the Convention obligates Member States to “take all appropriate measures, including legislation, to ensure the full development and advancement of women for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.”

The adoption of CEDAW has proved inadequate in protecting women against the crime of rape. As stated above, although the non-discrimination provision could provide protection against rape as gender based violence, the Convention does not specifically prohibit gender-based violence or place any explicit responsibilities on states parties to take action to reduce violence against women. The lack of a provision that prohibits violence against women in the Convention is seen as a major obstacle to women's enjoyment of rights guaranteed in the Convention.

#### *CEDAW General Recommendation No. 19*

General Recommendation No. 19 was adopted by the Committee on the Elimination of Discrimination Against Women (hereinafter referred to as the Committee)<sup>25</sup> in 1992. General

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<sup>25</sup> The Committee is the body established to monitor the implementation of the CEDAW.

Recommendation No. 19 was adopted to remedy the lack of specific provisions against violence in CEDAW and defines violence as " a form of discrimination which seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men."

It affirms that violence against women constitutes a violation of their rights regardless of whether the perpetrators are public officials or private individuals. Moreover, it confirms that states are responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence. It recommends that State Parties adopt legal measures, including criminal sanctions, civil remedies and compensatory provisions to safeguard women's rights, including sexual assault and sexual harassment in the workplace. It also urges Member States to remove the "defense of honor" in cases of assault or murder of female family members and to create centers for victims of domestic violence. The General Recommendation is an authoritative interpretation of CEDAW and not binding on the States Parties.

#### *Declaration on the Elimination of Violence Against Women*

On December 20, 1993 the United Nations General Assembly adopted the Declaration on the Elimination of Violence Against Women.<sup>26</sup> This was the first statement by the General Assembly on the unacceptability of violence against women and the first international human rights document to deal exclusively with violence against women. It is also the first international instrument to establish that states have human rights obligations to prevent violence and to redress harm.

The DEVAW is also an authoritative interpretation of international law, and therefore, not binding on states. It expresses an international consensus that states have a normative obligation to protect women against the crime of rape

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<sup>26</sup> United Nations Declaration on the Elimination of Violence Against Women, 48th Sess., U.N. Doc. A/Res/48/104 (23 Feb. 1994)(hereinafter "DEVAW").

but the obligation cannot be enforced. DEVAW does explicitly list the crime of rape. Article 2 of DEVAW lists specific forms of violence, such as violence in the family, the community and violence committed or condoned by the government. The DEVAW does not clarify the level of accountability of the state for violence against women by private individuals.

Rape is a gender-based violent sexual act prohibited under Article 1. Article 1 of DEVAW provides a clear and comprehensive definition of violence against women:

Any act of gender-based violence that results in, or is likely to result in, physical, sexual, or psychological harm or suffering to women, whether occurring in public or private life.

Article 2, DEVAW includes marital rape, rape occurring within the community and rape perpetrated or condoned by the State.

Article 4 of the DEVAW spells out the obligations of the state with regard to the elimination of violence against women. The state is obliged to condemn violence against women and is expected not to invoke custom, tradition, or religion to avoid the obligation. This is the first international instrument that expressly prohibits violence against women based on traditions and culture. It requires states to take measures, such as health and social services, counseling, preventive, punitive, and remedial measures, to eliminate violence against women.

Moreover, it requires states to prevent, investigate and, in accordance with national legislation, punish acts of violence against women. However, the strength and effectiveness of this article depends on the national legislation, which can be totally inadequate in the protection of women against violence. Furthermore, the Declaration does not fully clarify the scope of state obligations to eliminate gender based violence and it does not fully clarify the standard to be applied in defining state responsibility for violence by non-state actors. Nevertheless, DEVAW shows a significant step towards building the normative framework applicable to violence against women.

In conclusion the Declaration is an important international human rights instrument to combat rape. It requires states to prevent, investigate and punish rape crimes. States can now be held responsible for failure to provide recourse against rape.

### *Customary Law*

Some human rights violations are so universally condemned that the rights violated have been officially recognized by the majority of governments in the world and have become part of customary human rights law. These laws are enforceable in every country, whether or not that country has signed a treaty or agreed to the international instrument. Moreover, most human rights law instruments contain codified customary law norms.

Recently, more countries started to regulate the procedures of enforcement officers to handle women's sexual abuse complaints. This practice is being encouraged by women's rights groups around the world in order to increase reporting of rape crimes by victims. The procedures outline the police officer's duties and the victim's rights in sexual assault cases. Hopefully, this practice will become more accepted and seen as a right of sexual abuse victims. If the international community recognizes that such procedures should be adopted by governments around the world than this "customary practices" may be ultimately codified as international human rights law.

Moreover, the last five years the international community finally paid attention to domestic violence. Especially since the Fourth World Women's Conference in Beijing, China, more and more governments acknowledge that wife beating is unacceptable and that it violates women's rights to life and dignity enshrined in international human rights law. This consensus should now be codified in international human rights treaties with special reference to violence in the family.

### *Enforcement Mechanisms*

International treaties apply to and can be utilized only in the states that have signed the treaty. It is important for women

around the world to be aware of the available international enforcement mechanisms which they can use when their rights guaranteed in international human rights instruments are violated. The international mechanisms are only available after all domestic remedies have been exhausted. For example, when the state does not sentence a rapist after he is proven guilty, the abused woman can use the available international mechanisms to hold the state accountable for the failure to protect her right to equal protection for the law.

The enforcement of international women's human rights is still a hard task in many parts of the world. The effective use of international remedies is limited in some countries due to entered reservations or non-ratification of the Optional Protocol of the ICCPR.

Although over 120 states have ratified the CEDAW, many have done so with reservations.<sup>27</sup> These states are not internationally bound to implement and enforce the reserved articles. Some countries entered general reservations to Article 2 which obliges states to condemn discrimination against women in all its forms and to pursue a policy of non-discrimination using all appropriate means. Other countries entered reservations on more specific provisions, such as, Article 16, concerning non-discrimination against women in all matters relating to marriage and family relations. These general and specific reservations to CEDAW affect the intended object to end all discrimination against women and restrict women's recourse to combat rape.<sup>28</sup>

The Optional Protocol to the ICCPR provides an individual complaint procedure for individuals or groups of individuals to the Human Rights Committee.<sup>29</sup> The complaint procedure provides an avenue for legal redress of rights violations. Rape victims seeking legal redress who have exhausted the available domestic

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<sup>27</sup> Around 40 states entered the CEDAW with reservations.

<sup>28</sup> Anne F. Bayefsky, General Approaches to Domestic Application of International Law, Rebecca J. Cook, *Human Rights of Women*, 1994

<sup>29</sup> The Committee was established under the ICCPR.

remedies may use the individual complaint procedure to enforce their rights. However, this individual complaint procedure is only available to rape victims in countries that have ratified the Optional Protocol to the ICCPR.<sup>30</sup> For instance, in the Middle East only two countries have ratified the Optional Protocol. The opinion of the Human Rights Committee after the complaint procedure is not formally binding. However, it may be expected that states ratifying the Protocol will follow the decision.

Both the CEDAW and the ICCPR have established supervisory bodies for monitoring the implementation of their provisions. The Human Rights Committee is established to monitor state compliance with the ICCPR and make general comments to the States Parties. The body to monitor compliance of the Member States to the CEDAW is the Committee on the Elimination of Discrimination Against Women. The Committee has the power to issue general comments and recommendations to the General Assembly based on the reports submitted by countries, and it can make suggestions to Member States on particular courses of action that might be followed to implement the Convention. It does not have the jurisdiction to force states to implement the CEDAW and women have no individual right to start a complaint procedure when the rights guaranteed in the CEDAW are violated. Fortunately, the norms found in the articles of CEDAW are also to be found in every major human rights instrument. Therefore, women's rights can also be enforced through other human rights instruments with better enforcement mechanisms.

## **Regional Human Rights Instruments and Enforcement Mechanisms**

Advocacy at the regional level provides opportunities that do not necessarily exist at the international level. This report analyzes the regional human rights instruments and the available enforcement mechanisms. The report describes how effective the

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<sup>30</sup> The Optional Protocol to the ICCPR is ratified by nearly seventy countries.

mechanisms are in providing legal redress for rape. There are three regional human rights system with each their own enforcement mechanism: the Inter-American system, the Africa system, and the European system.

### *American Convention on Human Rights*

The American Convention on Human Rights is a regional instrument without an explicit provision which provides legal redress to rape.<sup>31</sup> However, through the broader interpretation of human rights, gender based violence is prohibited under the right to life, to humane treatment, and personal liberty that are included under the American Convention.<sup>32</sup> Article 24 of the American Convention guarantees that all persons are equal before the law and are entitled, without discrimination, to equal protection of the law. Article 25 of the American Convention obliges states to investigate and provide remedies when women's human rights are violated. States are responsible for failure to provide recourse for protection against acts that violate fundamental rights.

The American Convention is a regional instrument with its own enforcement mechanisms to protect women's human rights. The Inter-American Commission on Human Rights<sup>33</sup> is an autonomous entity of the Organization of American States whose principal function is to promote the observance and defense of human rights. Within the Inter-American system, the Commission has the authority to monitor states compliance not only with respect to their obligations arising from the American Convention but also to CEDAW or other international treaties. If a petition to the Commission is made by an abused woman, the Commission can issue recommendations in a report to remedy the situation.

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<sup>31</sup> American Convention on Human Rights (Pact of San Jose), 22 November 1969, (hereinafter *American Convention*).

<sup>32</sup> American Convention art. 4, 5, 7

<sup>33</sup> Inter-American Commission on Human Rights (hereinafter Commission)



The Inter-American Court of Human Rights<sup>34</sup> is an autonomous judicial institution whose purpose is the application and interpretation of the American Convention. The Court can only hear a case after the procedure before the Commission is completed and the Commission or a state has submitted the case to the Inter-American Court. Moreover, the Inter-American Court has jurisdiction only in those States Parties that have recognized the jurisdiction of the Inter-American Court. The Inter-American Court has two types of jurisdiction, a contentious jurisdiction and an advisory one. The Inter-American Court can order protective and preventive measures only to States Parties to the American Convention. It can also order compensation or grant temporary injunction. Moreover, it can order the national courts to investigate, prosecute and punish human rights violators. The judgments of the Inter-American Court are binding on the state that is the respondent in the case. In the states that have signed and ratified the American Convention on Human Rights, communications by individuals alleging violations of the principle of non-discrimination and the specific provisions on sexual discrimination can be lodged with the Inter-American Commission that could later be decided by the Inter-American Court of Human Rights.

*Inter-American Convention to Prevent, Punish and Eradicate Violence Against Women*

One regional instrument that provides legal redress to rape, is the Inter-American Convention to Prevent, Punish and Eradicate Violence Against Women, adopted by the Organization of American States in Brazil on June 9, 1994.<sup>35</sup> Article 1 of the Convention of Belem Do Para defines violence against women as:

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<sup>34</sup> Inter-American Court of Human Rights (hereinafter Inter-American Court)

<sup>35</sup> Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, OEA/ser.L/II.7.4.CIM/doc. (1992), (hereinafter Convention of Belem Do Para). The countries in the Inter-American system (which includes North, South and Central American and the Caribbean) that have ratified the Convention as of March 1995 include: Venezuela, Brazil, El Salvador, Guyana, Ecuador, Bolivia, Bahamas, Barbados, Costa Rica, Dominica, Dominican Republic, Guatemala, Nicaragua, Uruguay, Paraguay, Honduras, Trinidad and Tobago, Panama, St. Kitts and

any act or conduct, based on gender, which causes death or physical, sexual or psychological harm or suffering to women, whether in the public or the private sphere.

Article 2 states that violence against women "shall be understood to include physical, sexual and psychological violence", it may include rape, battery or sexual abuse, torture, trafficking in persons, forced prostitution, kidnapping, sexual harassment in the workplace or educational institutions, health facilities or any other place.

The Convention of Belem Do Para does not provide a rape definition, which leaves it open to states own judgment to define rape. States are free to define rape in the way they may perceive as most appropriate and effective. Naturally, this may result in definitions that are varied.

The Convention of Belem Do Para calls on States Parties to pursue policies with the intent to prevent, punish and eliminate violence against women. In particular, states are obliged to include in their domestic penal, civil and administrative legislation any legal provisions needed to prevent and punish violence. Moreover, States Parties have to undertake special measures, such as awareness raising programs, education and training, research, and services for victims, to reduce the number of rape crimes and support victims of rape.<sup>36</sup>

The Convention of Belem Do Para has its own mechanism to protect women against violence. The States Parties have to adopt measures to prevent and punish violence against women, and to assist women affected by violence. They have to inform the Inter-American Commission of Women in their report how they complied to these requirements. The Commission of Women creates an extra legal avenue for women to address violations of the Convention of Belem Do Para. Within the Inter-American

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Nevis, Saint Vincent and the Grenadines, and St. Lucia. Other countries have signed the convention but have not ratified it as of March 1995. They include: Argentina, Chile, Mexico, and Peru.

<sup>36</sup> Convention of Belem Do Para, art. 7, 8

system all members of the Organization of American States are subject to the jurisdiction of the Inter-American Commission on Human Rights. With regard to alleged violations of a human rights recognized in the Convention of Belem Do Para (but also a violation of rights recognized in the American Convention on Human Rights or in the American Declaration of the Rights and Duties of Man), a woman can file a complaint with the Inter-American Commission on Human Rights alone or in cooperation with the Inter-American Commission for Women. According to the Convention of Belem Do Para Article 12 can "Any person or group of persons, or any non-governmental entity legally recognized by one or more OAS member states or by a state may lodge petitions with the Inter-American Commission of Human Rights containing denunciations or complaints of violations of Article 7 of the Convention of Belem Do Para."<sup>37</sup> This means that the Commission has jurisdiction in cases where states fail to pursue, by all appropriate means and without delay, policies to prevent, punish and eradicate such violence and fail to undertake the required activities as listed in Article 7. The Commission may decide to bring a case before the Inter-American Court. The Inter-American Court has advisory jurisdiction over all OAS member states. The advisory jurisdiction allows the Inter-American Court to interpret Article 64(1) of the American Convention or "other treaties concerning human rights in the American States."<sup>38</sup>

#### *African Charter of Human and People's Rights*

The African Charter of Human and People's Rights is a regional instrument which could be an instrument for legal redress to combat rape.<sup>39</sup> Although the African Charter does not contain an explicit provision to protect women against rape, it does include

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<sup>37</sup> Convention of Belem Do Para, art.12

<sup>38</sup> Cecilia Medina, Toward a More Effective Guarantee of the Enjoyment of Human Rights by Women in the Inter-American System, Rebecca J. Cook, *Human Rights of Women*, 1994.

<sup>39</sup> African Charter on Human and People's Rights, June 1981, (hereinafter African Charter).

Article 18(3) which provides that "the State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the women and the child as stipulated in international declarations and conventions." Article 1 obliges States Parties to adopt legislation and measures to protect the rights guaranteed in the African Charter. The African Commission on Human and Peoples' Rights is the body that monitors the implementation of the African Charter to ensure the protection of the rights stipulated in the Charter. Only women in countries that signed and ratified the African Charter of Human and People's Rights receive protection from the provisions in the Charter. The African Commission can receive communications submitted by individuals or states which allege human rights violations after domestic remedies are exhausted.<sup>40</sup> The African Commission may investigate the violation but cannot make legally binding decisions.

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<sup>40</sup> see C. Beyani, *Toward a More Effective Guarantee of Women's Rights in the African Human Rights System*.

### *European Convention for the Protection of Human Rights and Fundamental Freedoms*

Another regional human rights convention that can be a tool in the fight against rape is the European Convention for the Protection of Human Rights and Fundamental Freedoms, which contains provisions that protect women's right not to be subjected to torture or to inhumane or degrading treatment or punishment and the prohibition of discrimination.<sup>41</sup> There are no provisions in the European Convention that explicitly protect women against gender based violence, but broader interpretation of human rights guaranteed in the European Convention holds States Parties accountable for gender based violence committed by both private and state actors.

Also, the European Convention imposes duties on States Parties to prevent and respond to breaches of certain rights guaranteed in the Convention. According to the Convention, everyone is secured of the rights set forth in the Convention without discrimination and the States Parties need to provide effective remedies before a national authority in case these rights are violated by either a private person or persons acting in an official capacity.<sup>42</sup>

Article 25 of the European Convention allows individuals and non-governmental organizations to issue a petition to the European Commission that their rights have been infringed by a contracting state after all domestic remedies have been exhausted. Similar to the Inter-American Commission, the European Commission has the authority to monitor the state's compliance. In case a petition to the Commission is made by an abused woman the European Commission can issue

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<sup>41</sup> Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), 4 November 1950, (hereinafter *European Convention*).

<sup>42</sup> European Convention, art. 13, 14

recommendations in a report for the Committee of Ministers. The Committee decides whether a breach of the European Convention occurred. The state, the individual or the European Commission may refer the case to the European Court of Human Rights<sup>43</sup> which can make legally binding decisions.

## **National Laws and Enforcement Mechanisms**

Following the signing and ratification of international human rights instruments, many states have an international legal obligation to investigate rape, and prosecute and punish rapists. As discussed earlier, women's rights to be free from rape is recognized as a human right by the international community and the principles of state complicity and equality hold states responsible for violation of these rights. As stated before, most countries have criminalized rape. A review of national laws of countries around the world identifies how countries address the crime of rape.

The position of women in society is well reflected in the legal order of their country's legal systems. In a wide range of countries, rape of women is treated less serious than other assault crimes. For example, rape may not be prosecuted or carries lower penalties. In some countries, the crime of spousal rape carries a no or a lesser punishment than for the rape of a woman who is not married to the perpetrator. In order to provide married women the same protection against the crime of rape, these laws should be amended. In fact this distinction between spousal rape and rape outside the marriage constitutes discrimination of married women.

There are several myths and beliefs about rape that are unfairly judgmental about women. One myth is that "women ask for it" or "women are seductive and secretly enjoy rape". It is obvious that these biased perceptions have severe consequences for the way rape cases are treated by the police, the prosecutor, the judge and society in general. This report will describe how these prejudiced attitudes affect female victims of rape.

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<sup>43</sup> European Court of Human Rights (hereinafter European Court).

## **Constitutions**

Constitutions are a fundamental source of law. A constitution sets forth a national principle to which states can be held accountable. There are four primary ways in which countries respond to rape in their constitutions.

- the constitution includes specific provisions referring to violence against women;
- the constitution contains general provisions on violence against human beings;
- the constitution makes no reference to violence at all;
- the country has no constitution.

Most constitutions reviewed in this study contain general provisions on violence against human beings and do not specifically refer to rape or more general to violence against women. The provisions include the rights of freedom from torture; inhuman or degrading treatment.<sup>44</sup> Other constitutional provisions that provide protection from violence without specific reference to women<sup>45</sup> are the right to integrity of the body<sup>46</sup> and right to life.<sup>47</sup> Sometimes the constitution simply states that all forms of physical or moral violence are forbidden.<sup>48</sup>

Some countries have provisions in their constitutions that specifically protect women from violence. For example, the

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<sup>44</sup> see Constitutions of India (1951), art. 15, South Africa (1996), art 12; Lithuania (1992), art.21; Kenya (revised 1992), art.74; Bolivia (1967), art.12; Belize (1981), art.7; Gambia (1970), art.17; Ghana (1992), art.15; Czech Republic (1992), art.7; Albania (1993), art.3; The Bahamas (1973), art.17

<sup>45</sup> see Constitution of Cambodia (1993)

<sup>46</sup> see Constitution of the Royal Kingdom of the Netherlands (1850), art. 11; Constitution of Peru (1991), art.2; Constitution of South Africa (1996), art.12

<sup>47</sup> see Constitutions of Colombia (1991), art.11, Greece, art.5; Iran, art 22; Pakistan, art.9; Lithuania, art.29; Bolivia (1967), art.7; Belize (1981), art.3; Gambia (1970), art.13

<sup>48</sup> see Algerian Constitution, art.33

constitution of Brazil specifically requires the state to combat violence against women. Other countries constitutions contain no provisions concerning violence at all.

Most countries prohibit discrimination but do not specifically name sex as the grounds for it. For example, the Kenyan Constitution section 82, which prohibits the enactment of any law that is discriminatory either in itself or in its effect, does not explicitly prohibit discrimination on grounds of sex. The omission of discrimination based on sex from the Constitution ensures that when such discrimination occurs, no existing laws in Kenya can challenge it.<sup>49</sup>

Most countries also have "equality" provisions in their constitutions. Some of the equality provisions refer specifically to women<sup>50</sup> but most countries use more neutral terms such as "citizen", "everyone" or "persons" in their constitutions.<sup>51</sup> When a country's constitution does not contain an equality provision, as in the case of Australia<sup>52</sup>, or when a country does not have a constitution, as in the case of Israel and the United Kingdom, equal rights provisions can often be found in ordinary or special laws.<sup>53</sup>

The provisions that provide for equality and prohibit discrimination can be used to protect women from violence in the absence of specific provisions to this end. But even if constitutions acknowledge equal rights for men and women and prohibit discrimination on the grounds of sex, they may still recognize the

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<sup>49</sup> Koki Muli, "Help me Balance the Load": Gender Discrimination in Kenya, *Women's Rights Human Rights*, Julie Peters and Andrea Wolper, 1995.

<sup>50</sup> see Constitutions of People's Republic of China (PRC); Greece; Poland, art.78

<sup>51</sup> see constitutions of Myanmar, Canada, Egypt, France, Iran, India, Bangladesh, Algeria

<sup>52</sup> In Australia provisions on women's rights are laid down in ordinary federal and state laws.

<sup>53</sup> Israel lacks a formal constitution but the Women's Equal Rights Law of 1951 protects women rights in Israel; In the UK equal rights are protected by the Sex Discrimination Acts of 1975 and 1986.



principles of the country's national religion, such as Islamic Law.<sup>54</sup> Although equal rights before the law are guaranteed in Egypt, the same constitution also requires that their status should follow Islamic standards, which assign women a lower status than men. Further, personal laws and customary practices in some countries may contain discriminatory elements that conflict with the constitution.

Following the Indian constitution of 1975, women are guaranteed equality to men and the right not to be discriminated against because of their gender. Following the principle of state responsibility, the Indian State has to enact legislation to secure compliance with the provisions in the constitution. When the state refrains to enact effective legislation and it fails to protect these rights stipulated in the constitution, it can be held responsible for violations.

When a constitution lacks equality or non-discrimination provisions there is no constitutional obligation to enact non-discrimination provisions. However, the state may have international obligations as a State Party to international human rights instruments to adopt non-discrimination provisions.

### ***Criminal Laws***

Although most countries criminalize rape, the level of protection varies greatly in each country. The protection guaranteed by rape legislation largely depends on the definition of the crime of rape in the criminal code. Many countries around the world have reformed their rape laws during the last few decades. This report first identifies the three most commonly used strategies by common and civil law countries to define rape:

- (1) rape falls under the broader definition of sexual assault.
- (2) rape is covered under a narrow definition

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<sup>54</sup> These constitutions may provide equal rights to women but also recognize Islamic law, which rejects the concept of equality between men and women.

### (3) rape is covered under a broad definition

#### *Scope of Rape*

Over the last decade various reforms have taken place in the laws regarding rape. One issue that causes heated debates is "the scope of rape." In national and international debates regarding the scope of the crime, legislators and activist attempted to decide whether rape should include rape within a marriage, rape of prostitutes, or statutory rape, and whether trafficked women are being raped every time they have sex in a brothel.

The debate on trafficked women is a particularly sensitive one. The area of debate concerns determining when sexual intercourse constitutes rape in cases of trafficked women and girls. When a woman is forced to work in a brothel, she may try to resist the forced sexual intercourse for the first few weeks. As long as the woman tries to resist, the forced sexual intercourse clearly constitutes rape, according to the non-consent element which is part of most rape definitions. When the same woman no longer resists because she realizes that it does not stop the forced sexual intercourse, does that mean that she consents to sexual intercourse, and that she is not being raped every time the brothel owners forces her to receive clients? International human rights law clearly should be interpreted to include protection for trafficked women against forced intercourse in brothels and states should be held responsible for the failure to protect the rights of trafficked girls and women.

Of the countries that have broadened their rape laws, most of them have enacted provisions that go beyond the traditional definition of rape that only covers penetration of the vagina by the penis or that is sex specific (a man rapes a women). The broader rape definition includes oral and anal penetration by the penis or penetration of an object or any part of the human body into the vagina or anus, and ejaculation is not necessarily required.<sup>55</sup>

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<sup>55</sup> See Fiji Penal Code which includes a wide definition of rape. In practice however, it is given the narrow interpretation by the courts that rape must involve

## ***Sexual Assault***

The concept of rape differs greatly in each country. Some countries treat rape under sexual assault laws instead of a separate act of rape. For instance, in the United States and Canada the act of rape is covered under the sexual assault provision. The sexual assault provision also includes other forms of sexual abuses which were not criminalized before. Women are therefore better protected against acts of sexual violence.

There are advocates who prefer to see rape included under sexual assault laws because in these laws the corroboration rules are excluded, consent is defined as "the voluntary agreement of the complainant to engage in the sexual activity in question." As well it outlines specific situations which do not constitute consent by the complainant, such as when there is incapacity to consent due to intoxication, revoked through force, or when agreement to sexual activity is extracted by someone in a position of authority. This definition also restricts the admissibility of the sexual history in most cases unless the judge determines, according to a legal test which balances relevance, fairness and other considerations, that the advantage of admitting the evidence outweighs the disadvantages. Again the greatest advantage of a sexual assault provision is that women are protected against a variety of sexual abuses which were not covered by law in the past. The negative side of rape being included under sexual assault laws according to some women's groups is the lack of a specific provision providing legal redress to rape.

### ***Narrow Definitions of Rape***

However, most countries still use a narrow definition of rape, such as "sexual intercourse with a woman, against her will and without her consent." This definition only considers rape in cases of forced penetration of the penis into the vagina. For example, the Indian penal code defines rape as "a man has

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penetration of the vagina by the penis. Any other type of sexual assault is regarded as being indecent assault which carries a much lighter sentence. A wider definition of rape is given in the Sexual Offenses Act, 1992, Barbados; Penal Code of Nicaragua, art. 195

sexual intercourse with a woman against her will either with or without her consent," and the act is defined as "penetration of the penis in the vagina." It thus excludes penetration of an object or any part of the human body into the vagina or anal or oral sex. Most narrow definitions are silent on whether ejaculation is required for the act to constitute rape.

These narrow definitions exclude the possibility that men rape other men, women rape other women or when women rape men. A narrow definition of the rape crime is often gender specific. A gender specific definition of rape considers the rape crime to be inflicted only on women by a male perpetrator.<sup>56</sup> For example, the Nigerian Criminal Code describes the crime of rape as follows:

Any person who has unlawful carnal knowledge of a woman or girl, without her consent, or with her consent, if the consent is obtained by force or by means of threat or intimidation of any kind, or by fear of harm.....etc.

### ***Broad Definitions of Rape***

#### *Gender Neutral versus Gender Specific Definitions of Rape*

Women's groups around the world still debate whether rape should be defined as a gender neutral or a gender specific crime. The argument against it being defined as a gender neutral crime is this definition ignores the fact that rape is a crime mainly perpetrated by men against women. An often heard critique against a gender specific definition is that it is discriminatory towards women who are raped by other women, men raped by other men, or men raped by women.

In contrast to the narrow definition of rape as forced upon a woman by a male perpetrator, an example of a gender neutral approach is article 316 of the Colombian Penal Code which describes the crime of rape as follows:

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<sup>56</sup> The Brazilian Penal Code has a gender specific rape definition which considers the rape crime to be inflicted on women by a male perpetrator.

Anyone who subjects another to sexual relations without his or her consent by physical violence or by psychological torture, shall be subject to punishment of imprisonment....etc.<sup>57</sup>

### *Consent*

In most countries rape is defined as: "sexual intercourse without the consent of or against the will of the victim," which indicates that the prosecution must prove that the complainant did not consent to sexual contact to establish the crime of sexual assault. Rape legislation has traditionally operated on the assumption that all sexual intercourse is consensual unless proven otherwise.<sup>58</sup>

Most reviewed laws require an act of resistance from the woman in order to prove rape.<sup>59</sup> To stop this unfair practice, the burden of proof should be on the rapist. It is necessary that laws regarding rape specify when consent of the woman is considered to be absent, for instance, when the woman is mentally disabled, intoxicated, unconscious or asleep. It is preferable to have comprehensive laws regarding rape to be effective and to sufficiently protect women. In the Czech Republic, coercion under the law means that the offender used violence (which means physical force with the intent of overcoming or preventing serious resistance from the woman) and forced her into sexual acts against her will. The Czech rape law requires an obvious resistance from the woman in order to speak of forced sexual intercourse against her will.

### *Aggravating Circumstances*

In case a rape occurs under aggravating circumstances, the penalty can increase. The aggravating circumstances

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<sup>57</sup> see penal codes of Colombia, Mexico and Sweden; both sexes can be perpetrators and victims of rape.

<sup>58</sup> Rosemarie Tong, *Women, Sex and the Law*, page 96, 1984

<sup>59</sup> In most states in the United States, it is necessary that the woman acted to resist the rape.

establish a more grave situation in which the act of rape occurred, and therefore, require a stiffer penalty than "ordinary" rapes. The aggravating circumstances, found in different criminal codes, which require increased punishments are:

- the perpetrator is a relative of the victim;
- the victim is a mentally or physically disabled person;
- a relationship of trust, dependence or authority exists between the perpetrator and the victim;
- the rape is committed with the aid of one or more other persons;
- serious injuries result to the physical or mental health of the victim;
- the perpetrator is the carrier of a serious illness, transmissible by sexual contact;
- the victim is pregnant;
- the victim is imprisoned;
- the victim is a person over sixty years old;
- the victim and perpetrator are married;
- the victim is a minor.

### *Marital Rape*

Traditionally, rape was regarded as an illicit sexual act between a man and a woman who are not married.<sup>60</sup> Through pressure groups, some countries have reformed their rape laws and have included marital rape explicitly in their rape provision which provides that sexual intercourse within marriage without the

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<sup>60</sup> Adamo, Sonya, The injustice of the Marital Rape Exemption: A Survey of Common Law Countries, (American University Journal Of International Law and Policy.

consent of the wife is unlawful.<sup>61</sup> Other countries have enacted separate provisions to prohibit marital rape. However, when a country has no special law on domestic violence (including rape), the crimes committed against women by their husbands can often still be prosecuted under general provisions of criminal law.<sup>62</sup>

Unfortunately, there are still some countries that consider forced sexual intercourse within a marriage allowed and have marital exemptions in their criminal code, making it legally impossible for a man to rape his wife.<sup>63</sup> In the United States, some states still have marital exemptions to their rape laws. These exemptions shield husbands from being prosecuted for raping their wives. However, both the United Kingdom and Australia recently abolished the common law exemption against rape within marriage. As a result, a wife's consent to sexual relations within a marriage is no longer to be implied.<sup>64</sup>

Some civil codes consider sexual intercourse a marital obligation and refusal to have sex is legal grounds for divorce. When a husband forces his wife to have sexual intercourse this is seen as defending of conjugal rights. This practice is still apparent in Islamic countries under Shari'a laws. For example, after the Islamic Revolution in Iran in 1979, women's rights were restricted and married women have to be willing at all times to meet their husbands' sexual needs. If she refuses, she loses the right to shelter, food and clothing. Similar provisions regarding sexual intercourse within a marriage were enacted in the Hudood

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<sup>61</sup> In order to combat violence against women in Belgium, the Government recently adopted a new rape law, the new definition includes rape within the marriage and homosexual rape.

<sup>62</sup> Brazil, China, Greece, Japan, Mexico, Peru, Turkey and Poland.

<sup>63</sup> Rape within marriage is not recognized in the Czech Republic penal code; The penal code in Greece does also not recognize rape within a marriage, although recent jurisprudence in Greece on this issue seems to support the idea that a woman may bring an action against her husband in case of rape on the grounds of use of unlawful force.

<sup>64</sup> *Abolition of the Marital Rape Exemption at Common Law*, (6 Australian Journal of Family Law 1-3 1992); *R. v R. (Rape: Marital Exemption)* (1991) 4 ALL E.R. 481 (HL), United Kingdom.

Ordinance in Pakistan in 1979. With this new piece of legislation, the legal possibility of marital rape was eliminated. In Pakistan, rape within the marriage is not recognized in the legal system. A wife can in theory file a complaint against her husband for violence. She cannot, however, file a complaint of rape against him because the marriage contract is interpreted as having given the husband an absolute unqualified right over his wife's body as far as sexual intercourse is concerned.<sup>65</sup> Women in Pakistan are still seen as the property of men and therefore, marital rape is not considered a crime.

In some countries, forced sexual intercourse with a wife is not regarded as rape, except when the wife is still considered a minor. For example, Indian laws prohibit forced sexual intercourse of a man with his wife when the wife is under the age of 15. The statutory rape provision prohibits sexual intercourse with a woman under the age of 16, meanwhile child marriage is still considered more a social misdemeanor than the more serious crime of child rape that it is. Forced sexual intercourse with one's wife without her consent during marital separation is prohibited in some countries, whereas the law in other countries is silent about this possibility and judges are reluctant to interpret the law to make it an offense.<sup>66</sup>

Some criminal codes distinguish between stranger rape, acquaintance and spousal rape, whereas other criminal codes make no distinction between these forms. Through interpretation of the rape provision or other provisions in the criminal, code spousal rape can still be included. Some criminal codes give such a broad definition of rape it also includes prostitutes as they can also be obliged to have sexual intercourse against their will.<sup>67</sup> A broad definition of rape provides a much better protection for women against this form of violence.

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<sup>65</sup> Simorgh Collective and Hussein, S., *Rape in Pakistan*, 1990

<sup>66</sup> The Indian Penal Code criminalizes sexual intercourse with one's wife without her consent, during marital separation.

<sup>67</sup> see art.265 Mexican Penal Code



### *Rape of Minors*

Sexual abuse of children is also addressed in different ways in the legislation of the countries analyzed for this report. Some countries do not specifically recognize child sexual abuse, therefore, child rape is prosecuted under the adult rape definition.<sup>68</sup> Most criminal codes increase punishment or consider the rape of a minor an aggravating circumstance. The younger the age, the higher the punishment for the rape.<sup>69</sup> Other countries specifically prohibit sexual abuse of children as "statutory rape," even when the act was fully consented.<sup>70</sup> This can have awkward consequences, as statutory rape provisions ignore that young minor girls are often physically and psychologically mature enough to consent to sexual intercourse. States with a statutory rape provision can start the prosecution on statutory rape charges without a complaint from the girl and when the minor girl fully consented to have sexual intercourse.

### *Custodial Rape*

Because the focus of the report is on rape in the community (and excludes rape perpetrated or condoned by the state), custodial rape will be mentioned only briefly here.<sup>71</sup> Rape in custody is a form of torture because rape is an act by which severe physical and mental pain and suffering is inflicted on a woman by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. Most custodial rapes are committed by prison guards or police officers who are public officials as stipulated in Article 1 of the Torture Convention.

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<sup>68</sup> In Brazil forced sexual intercourse with a child is covered under the adult rape definition but carries higher penalties.

<sup>69</sup> see Sexual Offenses Act, 1992 Barbados; Norwegian Criminal Code, s.195, Colombian Criminal Code, art.316

<sup>70</sup> For example, Taiwan and some states in the U.S. consider sexual intercourse with a woman under a certain age as rape.

<sup>71</sup> For more information on custodial rape see Amnesty International Bulletin, *State Sanctioned Torture: Rape and Sexual Abuse by Government agents*, Vol. XIX No.2

However, forced sexual intercourse within the marriage is still being ignored and in some countries the refusal of sexual intercourse is still a ground for divorce. Fortunately, the pressure from women's groups forces governments to pay more attention to marital rape. Recently, governments have started to recognize marital rape as a crime and as a violation of women's human rights. In some countries, violence perpetrated in the family by a relative constitutes an aggravating circumstance. The law includes higher penalties in cases of wife abuse. In 1990, the Israeli Parliament increased the penalties on sexual offenses committed within the family. Besides the prohibition of rape in the penal code, the Israel Jewish religious law (halakha) also prohibits rape within the marriage.

### ***National Enforcement Mechanisms***

The attitude of law enforcement agents in rape cases differs greatly in each country. In the laws reviewed, the police is the first to receive the rape complaint. However, the police often fail to enforce effectively the laws for the following reasons:

- Police officers are generally not well trained to deal with rape victims. They lack expertise to interview victims of rape.<sup>72</sup>
- In addition, the police is often a male dominated environment and often have biased perceptions of women and their behavior. (They often doubt the story of rape victims, especially if there are no signs of injury.)<sup>73</sup>
- In cases of spousal rape, the police either sends the woman home or attempts to play the role of a mediator instead of considering the rape as a criminal offense.

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<sup>72</sup> Women's Rights Project, *Criminal Injustice: Violence Against Women in Brasil*, 1991

<sup>73</sup> Women's Rights Project, *Criminal Injustice: Violence Against Women in Brasil*, 1991

Under the Universal Declaration of Human Rights, the Covenants and the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment torture constitutes a human rights violation. The right not to be subjected to such abuse ranks as one of the most fundamental rights. However, women continue to be vulnerable to rape by state officials.

The women most vulnerable to rape by state officials are the women who are political activists, community organizers, trade unionist or human rights workers. Soldiers and policemen rape these women to humiliate and punish them for their political or social independence. In situations of armed conflict women are raped because they happen to be the wives, mothers, daughters or sisters of men who are sought by the authorities. Government agents torture or abuse them to punish and shame their male relatives or to coerce these men to surrender.

Through their failure to institute adequate investigations, prosecutions and procedural safeguards, governments around the world bear full responsibility for the persistence of widespread rape and sexual abuse of women in custody.

Nevertheless, governments around the world seem oblivious towards this form of violence against women. Cases of custodial rape are not investigated and the perpetrators go unpunished. In the rare cases where the perpetrators are punished, they only receive a reprimand and are not criminally prosecuted for their crimes. By condoning this form of violence against women, the state sends a message to the male population that sexual abuse of women goes largely unpunished and rape can become a tool of military strategy. In addition, this violence through state agents causes fear and insecurity among the female population.

#### *Rape in the Family*

Marital rape is not recognized as a crime in most countries. Since the Fourth World Conference on Women in Beijing, China, more governments recognize that wife beating is unacceptable.

- The police agents working on rape crimes are not given similar extra powers as police working on homicide or drug cases, which limits their ability to investigate rape crimes.

To counter these problems some countries in Latin America have started special all-female police stations as a response to the gender violence problems in their countries.<sup>74</sup> The female police officers are trained to respond to gender violence and to approach female victims in a more sensitive way. The women's police stations were established in Brazil, Colombia, Peru and Ecuador to assist victims of violence.<sup>75</sup> In Brazil, the first women's police stations (delegacias) were established in 1985 after pressure of women's groups and the State Council on Women of Sao Paulo. The stations are staffed entirely by fully trained women and dedicated to fighting crimes of violence against women. In 1990, there were 74 women's police stations throughout the country.<sup>76</sup>

In order to improve the role of the police in rape cases, it is very important that they receive proper training to enable them to deal with rape victims. Moreover, proper legislation should be installed by states to improve the ability of the police to investigate rape crimes. The state is responsible for the failure to protect women's right to equal protection.

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<sup>74</sup> Eluf, Luisa, A New Approach to Law Enforcement: The Special Women's Police Stations in Brazil in *Freedom From Violence: Women's Strategies from Around the World*, M. Schuler (Ed.), OEF International, 1992.

<sup>75</sup> Taiwan and Malaysia established similar women's police stations. Malaysia started women-only rape teams on the police force after lobbying of the Joint Action Group Against Violence Against Women (JAG)

<sup>76</sup> for more information on female police stations see: Dorothy Thomas, In Search of Solutions: Women's Police Stations in Brazil, *Women and Violence*, Miranda Davies, 1994 (this article is compiled from a larger report of the mission to Brazil to focus on the impact of women's police stations)

## **Rape in the Workplace or Educational Institutions**

Here we address rape as a form of sexual harassment. Countries that have signed and ratified the CEDAW have an international human rights obligation to enact sexual harassment provisions in their national laws to protect women against this form of gender based violence. Regional human rights instruments like the Inter-American Convention oblige States Parties to enact legislation regarding sexual harassment. Moreover, the state members of the European Community have to enact special legislation on sexual harassment in the workplace in conformity with the Code of Conduct of the European Commission on the protection of the Dignity of Women and Men at Work. Most member states have complied with the Code of Conduct and have enacted special legislation to prohibit sexual harassment in the workplace.

Legislation has been enacted to prohibit sexual harassment in the work place or educational institutions in many countries. Some countries treat sexual harassment as a sexual offense under the general provisions of their criminal code. Other countries have special provisions or laws on sexual harassment, or address sexual harassment in their labor codes. Some countries lack a provision on sexual harassment; for example, in Iran sexual harassment provisions are absent in the law and no court decisions concerning sexual harassment are available.

The definition of the offense often includes elements of power and/or authority. Sexual harassment by a co-worker or co-student falls under the responsibility of the employer who can be held accountable for failure to protect the female employees from sexual harassment. The employer should create a safe work environment for women. In order to provide female victims of sexual harassment effective recourse, employers should be held responsible for sexual harassment perpetrated by the

employees.<sup>77</sup> Moreover, the state is responsible for failure to investigate, prosecute and punish sexual harassment.

The sexual harassment provisions are sometimes gender neutral. For example, Belgium's Royal Order of 18 September 1992 provides protection to workers from sexual harassment in the workplace. The Order defines sexual harassment as:

any form of verbal, nonverbal, or physical behavior of a sexual nature such that the person engaging in this behavior knows or should know that it will affect the dignity of women and men in the workplace. To this end, employers must propose modifications to their work rules within three months of the publication of this order.

In order to speak of sexual harassment, there has to be a connection between the harasser and the victim's place of education or employment. Rape in the workplace is considered sexual harassment and is regarded as an aggravating circumstance in some countries, and therefore carries higher penalties for sexual crimes committed by persons with authority.<sup>78</sup>

However, sexual harassment complaints are often not taken seriously by the police and prosecutors. These criminal limitations force women to focus on civil remedies such as compensation.

Apart from adequate provisions regarding sexual harassment in the criminal codes, changes in the labor codes are necessary to recognize that sexual harassment is a problem connected to work conditions, hygiene and security, the abuse of power, and management of personnel, all of which are ultimately the employer's responsibility.

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<sup>77</sup> In the United States, Canada and Western European countries there is a noticeable trend of courts holding employers (corporations and universities) responsible for sexual harassment perpetrated by their employees at the work place or in the academy.

<sup>78</sup> Penal Code of France, art.222-22 to 222-31

## ***Migrant Women***

The problems of sexual harassment of migrant workers is increasingly addressed by the international community. Several organizations have published reports concerning this problem and also the U.S Department of State addressed the problem.<sup>79</sup> Economic reasons force thousands of women leave their countries to work in foreign countries. They often work as domestic workers while they try to save all their money to send back to their families in their home country. Most of these women come from Asian countries, such as the Philippines, Thailand, and Bangladesh, and end up in the Middle East, Hong Kong or Singapore. Often these women are sexually abused by their employers, or relatives and friends of their employers. Migrant women workers are vulnerable because they are alone in another country, often do not speak the language, and therefore are unable to read the laws. Raped migrant workers are afraid they will be detained, deported or further abused when they report the crime to the police.

International human rights instruments oblige states to provide migrant workers legal redress to psychological and physical abuse, such as rape, on the principles of state complicity and equality. Countries hosting many migrant workers should enact laws to provide women legal redress for rape. These laws need to be translated in the different languages of the migrant workers.

## **Rape in Situations of Armed Conflict**

Rape has always occurred during wartime and has often been used as a military strategy to destroy and demoralize culture and community, to create terror and displace the local population,

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<sup>79</sup> see more on migrant workers in: Middle East Watch, Women's Rights Project, *Punishing the Victim: Rape and Mistreatment of Asian Maids in Kuwait*, August 1992. In April 1992, Middle East Watch and the Women's Rights Project conducted a two-week fact finding mission in Kuwait to investigate reports of abuse of Asian women domestic servants; Nasra Shah, Sulayman S. Al-Qudsi & Mahkdoom A. Shah, "Asian Women Workers in Kuwait," 25 *International Migrant Review*, Fall 1991.

to boost the morale of the military, and to send a message of defeat.<sup>80</sup>

In most wars throughout history women have been raped by military, police, civilians and others. Mass rapes occurring as a weapon of war during World War I and II, the wars in Vietnam, Korea and within the last ten years in El Salvador, Guatemala, Liberia, Kuwait, Rwanda, and Yugoslavia are well documented. Still today in many parts of the world women are raped in situations of conflict. For example, both in Kashmir (India) and in Sudan, women are abused by both the government and armed opposition groups during the continuing civil wars.

At the Fourth World Conference on Women in Beijing in 1995, governments committed themselves to investigate and punish members of the police, security and armed forces and others who commit acts of violence against women, violations of international humanitarian law and violations of human rights of women in situations of armed conflict. Governments also confirmed that rape in armed conflict constitutes a war crime and is sometimes a crime against humanity and an act of genocide as defined in the Genocide Convention.

#### *Rape under International Humanitarian Law*

International Humanitarian Law is the law that is applicable in situations of war and armed conflict. Its sources are the Geneva Conventions, The Conventions of The Hague, the Nuremberg decisions, and customary law. The question arises how women are protected against rape in international humanitarian law (IHL). Although the crime of rape is recognized in IHL it has not been recognized as a violent crime against women.

Most IHL characterizes rape as a crime against a woman's honor and dignity. For instance, Article 27 of the Fourth Geneva Convention of 1949 provides women with special protection against rape but makes no reference to rape as a violation of the

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<sup>80</sup> Miranda Davies, *Women and Violence*, 1994; Lourdes Indai Sajor, *Rape as a War Crime*, 1995; Helsinki Watch, *War Crimes in Bosnia*, Volume I and II, 1993.



right of physical integrity. This is important because a violation against honor is perceived as less grave than a violation of physical integrity and therefore receives less attention from the international community. Article 27 states:

Women shall be especially protected against any attack on their honor, in particular against rape.

Not all women are protected under Article 27 of the Fourth Geneva Convention. Article 27 applies only to international conflicts. Fortunately, women in non-international conflicts are protected under Article 3 of the Fourth Geneva Convention (although it does not explicitly prohibit rape), and under the 1977 Protocol II, Article 4. Moreover, Article 76 of Protocol I covers any woman in the hands of a party to an international conflict.

Although Article 76 of the 1977 Protocols to the Geneva Conventions recognizes rape as a violation of the personal dignity and not just a violation of honor, however, it still fails to regard rape as a violent crime. Indeed, the Protocols distinguish sexual assaults from crimes of violence.<sup>81</sup>

Article 76 states:

Women shall be the object of special respect and shall be protected in particular against rape.

The fact that both Article 37 and Article 147 of the Geneva Convention do not specify the crime of rape (whereas they do explicitly prohibit other violations of physical integrity and list grave breaches under the Geneva Convention) confirms that rape has not been regarded as a serious crime in IHL. Some people have argued that rape is not a crime or a grave breach under IHL, but since the atrocities in Bosnia and the Fourth World Conference on Women in Beijing, China there is a growing international

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<sup>81</sup> See Protocol I, Article 75 and 76; Protocol II, Article 4 (The Protocols have not been widely ratified).

consensus that rape is a crime and a grave breach under the Geneva Convention.<sup>82</sup>

### *Nuremberg and Tokyo Tribunals*

After World War II both the International Military Tribunal in Nuremberg (IMT) and the International Military Tribunal in the Far East (IMTFE) were established to expose, condemn and punish atrocities of the war. The IMT was set up by the Allies, which resulted in none of their atrocities being investigated or prosecuted. In the founding statute of both Tribunals no reference was made to rape. Although several rape victims testified at the Tribunal in Nuremberg, no rape charges were brought and nothing about the rape crimes was included in the final judgment of the IMT. Rape charges were brought against defendants tried before the IMTFE. Rape was discussed in the Judgment of the IMTFE in Tokyo but it was not treated as a crime for which the Japanese commanders would be separately charged and no reference was made to rape crimes committed by civilians. Among the crimes prosecuted before the IMT and the IMTFE were crimes against humanity which did not specify rape. The Charter of both Tribunals defined crimes against humanity as follows:

crimes against humanity: namely, murder extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during war, or persecution on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

The definition does not clarify whether the crime against humanity can be committed by civilians against other civilians. However, it is interpreted that civilians can commit crimes against other civilians in times of war or armed conflict.

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<sup>82</sup> The International Red Cross and the US State Department have recently declared that rape is a grave breach under Article 147.

In neither Tribunal was rape prosecuted as a crime against humanity, although the crime of rape could fall under "other inhumane acts" and be prosecuted as such. Based on the Nuremberg trials, several principles were developed to determine what constitutes a crime against humanity:

- the crime is committed against a civilian population
- proof of government participation is required
- a systematic pattern of the atrocity is required<sup>83</sup>
- the crimes can be committed by military personnel, local police, and all people occupying key positions (doctors, lawyers, judges, diplomats etc.)
- crimes are committed in war and peacetime

The last point, was however not confirmed in the Nuremberg trials, whose jurisdiction was limited to crimes against humanity "when committed in armed conflict." However, other human rights conventions confirm that certain conduct can be criminalized whether committed in times of war or peace. For instance, the Torture Convention (1984), Article 2 and the Convention on the Prevention and Punishment of the Crime of Genocide (1948)<sup>84</sup>, Article 1:

The Contracting Parties confirm that genocide whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and punish.

It is clear that systematic rape during war constitutes a crime against humanity when we consider the principles developed during the Nuremberg trials.<sup>85</sup> Moreover, the principles

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<sup>83</sup> If the crime is not committed on a wide scale but can be singled out it constitutes a war crime and not a crime against humanity.

<sup>84</sup> Convention on the Prevention and Punishment of the Crime of Genocide (hereinafter Genocide Convention), A/RES/260 A (III), 9 December 1948

<sup>85</sup> see Catherine N. Niarchos, *Women, War and Rape: Challenges Facing the International Tribunal for the Former Yugoslavia*, (Human Rights Quarterly 17.4, 1995)

of state complicity hold states responsible for crimes against humanity committed by civilians against other civilians when the crimes are condoned or supported by the government.

### *Tribunal in Yugoslavia*

More recently, the rape of women during the conflict in Yugoslavia has received enormous attention from the media. Although the use of rape as a military strategy during war is nothing new, it is only since the war in former Yugoslavia that the international community has paid attention to the rape of women. The increased focus of women's organizations, UN bodies and government on women's rights and violence against women helped to raise more attention to the atrocities committed against women in Yugoslavia. By contrast, the routine rape of women in the civil wars and during military dictatorships in Haiti, Peru, Liberia, and Burma has largely gone unreported.<sup>66</sup>

In May 1992, the United Nations Security Council created the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991. The Statute of the Yugoslavia Tribunal provides jurisdiction in the following cases:

- crimes constituting grave breaches of the Geneva Conventions (Article 2)
- crimes that violate the laws or customs of war (Article 3)
- crimes of genocide (Article 4)
- crimes against humanity (Article 5)

Rape could qualify as an "inhuman treatment," "torture" and "willfully causing suffering or serious injury to body or health," in order to fall under Article 147. Article 4 gives jurisdiction over

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<sup>66</sup> see more, Rhonda Copelon, *Gendered War Crimes: Reconceptualizing Rape in Time of War*, *Women's Rights Human Rights*, Julie Peters and Andrea Wolper, 1995.

crimes of genocide. Article 2 of the Genocide Convention (1948) describes crimes of genocide as follows:

Acts committed with the intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such:

- (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 to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.

The systematic rape of women in former Yugoslavia caused serious bodily and mental harm to members of the Muslim community and such constitutes as crime of genocide. It therefore falls within the jurisdiction of the Tribunal and can be prosecuted under the Genocide Convention.

Article 5 creates jurisdiction over crimes against humanity committed in armed conflict. The crimes are defined as "murder, extermination, enslavement, deportation, imprisonment, torture, rape, persecution on political, racial, and religious grounds, and other humane acts." Contrary to the Nuremberg and Tokyo Tribunals rape is here explicitly specified as a crime against humanity and hopefully will be prosecuted as such. A recent indictment of war criminals, the international prosecutor of the Tribunal explicitly recognized rape during war as a crime against humanity. This recognition of rape as a crime against humanity will set a precedent for women in future conflicts.

### *Tribunal in Rwanda*

In March 1995, the International Criminal Tribunal for Rwanda (ICTR) was established to investigate and prosecute the atrocities committed during the 1994 genocide in Rwanda. The Tribunal has jurisdiction over crimes that fall under Article 3 of the Geneva Convention and authorizes prosecution of rape crimes committed during the civil war. However, nobody has been charged with rape or other forms of sexual violence. Recently, a sexual assault committee has been set up by the ICTR to investigate gender based abuse during the conflict. It is very important that the ICTR starts to investigate and prosecute rape and other gender based violence at the same pace as other crimes in its jurisdiction. In August 1996, the Rwandan legislature passed a law which authorizes prosecution of crimes committed during the genocide, including rape. However, it is very unlikely that rape cases will get prosecuted as the local police in charge of collecting evidence continues to show extremely discriminatory attitudes towards gender based crimes.<sup>87</sup>

### *Refugee Women and Rape*

More than 80% of the refugees in the world are women and children. It needs no explanation that women and children are extremely vulnerable when they are fleeing. They often face physical and mental abuse. Refugee women are fleeing because they fear persecution for reasons such as race, religion, political opinion, or membership of a particular social group.

These refugee women are often sexually assaulted by members of the military, police or an opposition group during their flight. Even when women and girls end up in a refugee camp believed to be safe from violence and persecution, they are subjected to sexual abuse. Countries should provide recourse to refugee women against rape and other forms of sexual abuse committed during the flight or in the camps.

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<sup>87</sup> see Human Rights Watch and the Federation Internationale des Ligues des Droits de L'Homme (FIDH), *Shattered Lives: Sexual Violence During the Rwandan Genocide and its Aftermath*, 1996

A well-founded fear of persecution for reasons such as race, religion, political opinion, or membership of a particular social group is an internationally accepted standard for granting asylum. But when women flee their countries because they are subjected to female genital mutilation, sexual violence and rape, bride-burning, state sponsored violence against women who believe in women's rights, restrictions to women's freedom over their bodies and the rights to procreate, or fundamentalist religious codes, women have difficulty proving their claims to refugee status. Immigration officials may fail to recognize that gender based acts of violence constitutes a legitimate basis for asylum. The Beijing Declaration and the Platform for Action refer to "sexual violence or other gender-related persecution" as constituting a basis for establishing well-founded fear of persecution under the Convention relating to the Status of Refugees and its 1967 Protocol.

In some countries, women who have been raped or otherwise sexually abused may be seriously stigmatized and ostracized from their communities. They may also be subjected to additional violence, abuse or discrimination because they are viewed as having brought shame and dishonor on themselves, their families, and their communities. Asylum officers should bear this fact in mind when dealing with women claimants. *Fatin v. INS* was the first case in a Federal Court of Appeals in the United States, which recognized that feminism qualifies as a political opinion and where it was decided that women can constitute a particular social group for purposes of asylum eligibility.

In May 1995, the United States adopted guidelines for Women's Asylum Claims which provide substantive and procedural guidance for the adjudication of the gender-related claims of women.<sup>88</sup> The United States is the second country after

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<sup>88</sup> The Canada, United States and Australia formally recognize gender persecution and adopted guidelines for women's asylum claims. In the United States the guidelines were developed by 36 women's and refugee rights organizations. The Women Refugees Project (WRP), a joint project of the Harvard Law School Immigration and Refugee Program and Cambridge and Somerville Legal Services (CASLS). The Project was

Canada to adopt such guidelines. Recently also Australia has also adopted guidelines for female asylum claims. These new guidelines in these three countries formally recognize that rape, domestic abuse and other forms of violence against women can constitute grounds for asylum. It is important that other countries in the world adopt similar guidelines that recognize gender based persecution as a ground for asylum. Moreover, the Convention relating to the Status of Refugees and its 1967 Protocol should be interpreted to include gender persecution. Officers and immigration judges all around the world need training on how to respond to gender-based asylum claims.

## **Other Legal Issues Concerning Rape**

### ***Evidentiary Laws***

The provisions that cover evidence in a rape case often discriminatory for the victims. In many countries, the burden of proof in most rape cases is put on victims of rape which can have an enormous emotional impact. Fortunately, some countries have adopted laws regarding evidence in rape cases in order to protect victims and witnesses in rape prosecutions. These laws restrict prior sexual history as defense material and provide that a victim's testimony is enough to convict a rapist. In order for evidentiary standards to provide better protection in rape cases they should include the following:

- no corroboration of the victim's testimony shall be required;
- consent shall not be allowed as a defense if the victim;
  - (1) has been subjected to or threatened with or has had reason to fear violence, duress, detention or psychological oppression, or
  - (2) reasonably believed that if the victim did not submit, a third person might be so subjected, threatened or put in fear;

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specifically established to advocate for legal recognition of the gender-based claims of refugee women applying for political asylum.



- prior sexual conduct of the victim shall not be admitted in evidence;
- before evidence of the victim's prior sexual history is admitted, the accused shall testify in closed or in camera hearings to determine whether the evidence is relevant, crucial and credible for the accused's defense.

It is extremely important that victims of sexual assault be better protected by evidentiary laws. In too many cases women are afraid to file criminal charges against the rapist because they do not want to be exposed to cruel cross examination on their sexual history or have their counseling records released. Meanwhile, the measures to protect the victim and/or the witnesses are to be balanced against the rights guaranteed to the accused, particularly the rights to cross-examine the witnesses, to a fair trial, to a public hearing, and to adequate time to prepare the defense.

#### *Sexual History of the Victim*

Still today rape victims around the world are exposed to discriminatory practices which have an enormous emotional impact on victims. For instance, in many countries evidence of the sexual reputation of the victim is still admissible to challenge or support the credibility of a complainant.<sup>89</sup> Fortunately some countries have amended their laws and now consider physical maturity and sexual experience of the victim inadmissible.<sup>90</sup>

The Canadian laws governing the admissibility of sexual history evidence in rape cases have changed significantly over the last few decades. The Canadian Parliament recognized the need for greater protection to the complainant in a rape trial. The Canadian Criminal Code and passed a "new" rape shield statute

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<sup>89</sup> In Taiwan the sexual experience of a rape victim and her attire at the time of the rape crime are questioned in the police station.

<sup>90</sup> In Czechoslovakia the physical maturity and sexual experience are not taken into consideration during the legal process.

was passed on June 23, 1992. Section 176 provides that evidence that the complainant has engaged in sexual activity, whether with the accused or with any other person, is not admissible to support an allegation that the complainant is more likely to have consented to the sexual activity that forms the subject-matter of the charge. Moreover, her sexual history is not admissible as proof that the woman is less worthy to be believed. The defendant is only allowed to use the woman's sexual history when the judge determines that it could be relevant evidence for the defense.

The new Canadian legislation leaves discussions regarding the admissibility of sexual history as evidence of both the "sexual activity of the complainant with a person other than the accused and sexual activity between the accused and the complainant" to the trial judge. The trial judge determines the relevance of the evidence for the defense of the defendant which leaves an opportunity for unfair prejudice. In determining whether evidence is admissible, the judge shall take certain conditions into account in order to limit the unfair prejudice.<sup>91</sup>

In the United States, similar debates have taken place regarding the restriction of prior sexual history as evidence in rape cases. A general consensus exists that this evidence must be restricted but that this should not infringe on a defendant's Sixth Amendment right to present a defense and to confront and cross-examine his accusers.<sup>92</sup> The federal government and most states have enacted "rape shield laws" to restrict the use of evidence of a complainant's prior sexual conduct in prosecutions for sex offenses and related crimes.

Nevertheless, situations may occur in which evidence of the complainant's sexual history is relevant for the defendant's defense. In these cases, the court must determine whether the

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<sup>91</sup> M.A. Wagner, *Canadian Rape Shield Statutes*, (Hastings International & Comparative Law Review, Vol. 16, 1993).

<sup>92</sup> In *Michigan v. Lucas* (1991), the U.S. Supreme Court observed that the right to present relevant testimony is not without limitation. The right may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process.

relevance of the evidence outweighs the risk of unfair prejudice, embarrassment, and possible humiliation of the complainant. Most rape shield statutes authorize the trial judge to admit evidence of the complainant's prior sexual conduct if relevant to rebut physical evidence, such as evidence of the source of semen, injury, virginity (can be relevant in prosecution of sexual abuse), sexually transmitted diseases, and pregnancy, offered by the prosecution. Most rape shield statutes also authorize the trial judge to admit evidence of the complainant's past sexual behavior with the defendant if offered to support the claim that the complainant consented to the conduct in question.<sup>93</sup>

### *Corroboration*

In order to take a rape case to trial, corroboration rules in some countries still require a rape victim to provide evidence other than her own testimony. This is in contrast with other crimes where the accused can be convicted solely on the testimony of one individual. Stringent corroboration rules make it often difficult to convict a rapist. In some countries, the judge has to warn the jury of the possibility that the defendant has been unfairly accused of a rape crime, or the judge are required to advise the jury that it is unwise to convict the accused only on the testimony of the victim.

More than 20 Islamic countries have religious laws containing discriminatory rules regarding women.<sup>94</sup> The religious laws often give women an inferior status to men and restrict women's ability to provide evidence during trials. In some countries a rape victim has to produce four male Muslim witnesses to prove the act of penetration in order to get the rapist convicted.<sup>95</sup> As a result of these biased corroboration standards,

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<sup>93</sup> C.S Fishman, *Consent, Credibility, and the Constitution: Evidence Relating to a Sex Offense*, (Catholic University Law Review, Vol.44:709, 1995).

<sup>94</sup> Including Iran, Pakistan, Egypt, Saudi Arabia and the Gulf countries.

<sup>95</sup> The Hudood ordinance in Pakistan requires four male Muslim witnesses to prove the act of penetration in order to get the rapist convicted and excludes the testimony of

the benefit of the doubt is often given to men accused of rape. In some Islamic countries in the rules for adultery are applied to rape. Thus, a woman who has been raped and makes an accusation will be vulnerable to an accusation of adultery in case she fails to prove rape. A rape victim can therefore be punished for being raped after trial if she failed to prove rape. Rape and adultery are very different acts, since in adultery both people are consensual, whereas in the case of rape the woman is an unwilling victim. Proving rape is hard whereas proving adultery is easy. To apply the rules of adultery in the case of rape is therefore, absurd and totally unjust. These discriminatory evidentiary rules deteriorate a rape victims chances of proving the rape.<sup>96</sup> Moreover, in Islamic countries the testimony of two women equals one man. This is a very discriminatory rule which results in awful situations in rape cases, as failure to prove rape may set of a charge for adultery.

Some countries require a medical examination within 24 hours of the rape at a special medical institute responsible for classifying sexual and physical abuse crimes. The medical institute will examine the woman to classify the crime which is an important element of the investigation.<sup>97</sup> However, these institutes often have badly trained doctors, lack female doctors and are inaccessible to most women. Due to badly trained doctors the medical examination often fails to report evidence of physical abuse which is often key to proving rape.<sup>98</sup>

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the women. See more, Farida Shaheed, *The Experience in Pakistan*, Miranda Davies, *Women and Violence*, 1994.

<sup>96</sup> In Pakistan women who are unable to prove rape are charged with zina (adultery). The zina offense in the Hudood Ordinance presupposes a woman's guilt and deprives women of the right to testify on their own behalf when accused of adultery. In Karachi Central Court, about 15 per cent of the rape trials reportedly result in the woman who brought the case being charged and imprisoned. At any time hundreds of women are imprisoned under the Zina Ordinance due to discriminatory procedures and rules of evidence. Amnesty International considers these women prisoners of conscience who should be released immediately and unconditionally.

<sup>97</sup> In Brazil and Peru, rape laws require such medical examination.

<sup>98</sup> Pan-American Consultation of Legal and Health Experts, *Conclusions and Recommendations*, co-sponsored by the Women and International Law Program,

Feelings of shame and fear often keep women who are raped from taking immediate steps. Women will often wait a certain amount of time to build the courage to report the offense.<sup>99</sup> The requirements for a medical record are either laid down in the evidentiary law, customary law, or in regulations. Little research is done on the requirements for rape complaints and it would be very helpful to have access to comparative studies regarding requirements for rape complaints. Another very discriminatory evidentiary rule is the ability of criminal defendants to have access to their victims' counseling records. The defendants can use the records as evidence for their defense.<sup>100</sup> The access of defendants to the counseling records discourages rape victims to file a rape complaint. In order to protect victims, counseling records should only be available to the defendant when the defendant shows "a good faith, specific, and reasonable basis for believing that the records will contain exculpatory evidence," evidence which the defense believes will create a reasonable doubt of guilt that might not otherwise exist.<sup>101</sup>

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Washington College of Law, and Women' Health and Development Program Pan American Health Organization and the Health and Development Policy Project.

<sup>99</sup> For instance, in Bangladesh the law criminalizes marital rape but Article 342 of the penal code, requires that a woman undergo a medical examination immediately after rape.

<sup>100</sup> In an important victory for rape survivors, the Massachusetts Supreme Judicial Court in the United States has decisively narrowed the ability of criminal defendants to gain access to their victims' private counseling records. Since the *Commonwealth v. Stockhammer* decision in 1991, criminal defendants have routinely sought, and frequently gained, access to post-rape counseling records. Defense attorneys were free to use unrelated incidents from the victims' past to create a reasonable doubt of guilt for their client. This practice often result in the discontinuation of the treatment because patients fear that their records will be released upon request by the defendant. This unfair situation changed in *Commonwealth v. David Fuller*, issued July 17, 1996, the Court, acknowledged that survivors of rape should receive more protection and that there should be more stringent standards governing access for defendants to a victim's counseling records.

<sup>101</sup> In a rape case in the United States (*Fuller case*), the trial court had ordered the Rape Crisis Center of Central Massachusetts to turn over counseling records relating to the alleged victim's rape in 1995 and a previous rape in 1991. On appeal, the Supreme Court rejected the "likely to be relevant" standard as too broad, the Court held that a trial court may order disclosure of records only if the defendant shows "a good faith, specific, and reasonable basis for believing that the records will contain exculpatory evidence."

## ***Reporting of Rape Crimes***

Most countries in the world experience tremendous underreporting of rape crimes. There are several reasons why rape is underreported. As mentioned earlier, women are discouraged to report rape because of the gender bias, and lack of training of police officers and judges. Moreover, in many countries going to the police is dangerous for women. In particular, women from ethnic minority groups, poor women, or religious minority groups are often physically or psychologically abused by the police without impunity. In many countries the police believes women are partly guilty of rape, and therefore, it is justified for them to physically or psychologically abuse rape victims.

Rape and domestic violence are two of the most underreported crimes internationally.<sup>102</sup> See the following list of factors that cause underreporting:

- rape is a private action and prosecution depends on the victim.
- rape complaint needs to be made within 24 hours of the rape crime.
- distrust of court procedures.
- discriminatory evidentiary rules<sup>103</sup>

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The evidence which the defense believes they will create a reasonable doubt of guilt that might not otherwise exist. The Court decided that Fuller had failed to meet that standard. However, this standard is only as good as its enforcement and needs legislative changes to support this point of view.

<sup>102</sup> See United Nations, *Violence Against Women in the Family* (New York: United Nations, 1989), p.17.

<sup>103</sup> Religious laws in Islamic countries discourage women from reporting a rape crime to the police. The discriminatory rules make woman vulnerable to an accusation of adultery. In many Islamic countries women avoid going to the police to report the crime for fear of being condemned by society and bringing a bad name to the family. According to Fawad Usman Khan, coordinator of a small NGO in Pakistan, called War Against Rape, the actual rate of crimes against women at least eight to ten times more than reported to the police or in the press. Another reason why women refrains from reporting the crime of rape are mentally torturous cross-examinations conducted by the lawyer of the rapist. Moreover, the courts are biased against women. They often believe that women are to blame when raped. They often require extraordinary proof from rape victims that the alleged intercourse was forced. A disturbing practice in some Islamic countries is to keep victims of rape in "protective custody" after they have filed a formal complaint to await the outcome of the case. These women are never charged with any offense and are basically held there because she is probably complicit to the rape offense. Most women are held against their will in an environment that equals a prison.

- it takes years to get the rapist convicted<sup>104</sup>

International human rights law obliges States to prosecute and punish gender based crimes. Therefore, when a woman is raped she should have an equal opportunity to legal redress for gender based violations as for non-gender based violations. When discriminatory laws discourage women from reporting gender based violations, these laws should be abolished and replaced by non-discriminatory laws that guarantee equal right before the law. Therefore, rape should be viewed as a public crime and prosecution should be initiated by the state. Rape victims should be able to file rape complaints over a longer time period, rather than within 24 hours after the rape, and evidentiary rules should shift the burden to the defendant. Moreover, court procedures should change to make the total time between initial charges and final conviction shorter.

Other reasons that discourage women from reporting rape:

- even if the victim wins the trial and the offender is sent to jail, she may fear that after his release he will attempt to seek revenge;
- distrust of the authorities and of the police;
- attitude of society (family, friends);
- In some countries the police stations are not easy accessible for victims of rape;
- lack of rights awareness;
- harsh investigations of rape cases cause further psychological and sometimes even social injury to the victim.

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<sup>104</sup> The time between the initial complaint and the final conviction (in case there is a conviction at all), is often very long. This often discourages woman to seek legal redress. As described earlier, women in India may have to wait (sometimes for up to) 15 years before the court finally convicts their rapist. The long time between the actual crime and the final conviction has serious implications for the chances that the rapist will be convicted, due to the increasing chance that evidence gets lost during the long waiting time, or witnesses die increases.

The attitude of society often is a major factor for woman not to report rape and to keep it secret for the outside world. In many countries raped woman are not considered as good potential wives and therefore woman try to hide rape. Women who refrain from reporting are deprived from any form of legal redress and available remedies. The decision whether to report the crime or not should be only and entirely depend on the woman's own wishes and should not be forced upon her through factors as mentioned above.

### ***Prosecution of Rape***

There is a difference in approach regarding the prosecution of rape. Some countries consider rape, like all sexual crimes, as a crime against honor and classify rape as a private-action crime. In a private action crime the prosecution depends on the initiative of the victim, unless the rape includes serious physical abuse.<sup>105</sup> If the woman decides she wants to drop the charges and stop the prosecution, the case will be stopped.<sup>106</sup> In a private action case the police can also decide to drop the case and not proceed with the prosecution. In case the case is sent for further prosecution, the prosecutor can also decide to drop the case due to lack of evidence. However, in a private action case a woman can formally appeal the decision of the state to drop the case.

The majority of countries nevertheless consider rape a public crime and the state will pursue prosecution independent from the wishes of the victim. When a woman files a rape complaint in these countries this means that the case is in the hands of the state and prosecution of the rape depends on the police and state prosecutor. When the police decides after the investigation that there is no sufficient evidence to pursue the case, they can decide to drop the case. The rape victim has no legal option to fight the decision of the police. If the police decide

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<sup>105</sup> Under the Peruvian, Brazilian and Taiwanese Criminal Codes rape is classified as a private-action crime.

<sup>106</sup> In the Mexican Criminal Code sexual harassment is typified as a private-action crime which means that the crime will only be prosecuted on the initiative of the victim.



the evidence is sufficient to pursue the case, they hand it over to the prosecutor for further prosecution. If the prosecutor consequently decides that there is not enough evidence. No formal channel is available for the rape victim to appeal this decision and to force the state to continue the prosecution. The only available option is public pressure.

In some countries the rapist can avoid prosecution for the crime by marrying the rape victim. This practice derives from the "damage goods" argument that perceives women as "property" of the husband. Often the family of the victim will force the victim to marry the rapist to remove the shame inflicted. Fortunately, some countries have recently amended the rape laws so that the rapist cannot offer to marry the rape victim to avoid prosecution.<sup>107</sup>

National statistics all around the world show that the number of reported rape cases that are actually investigated and prosecuted is extremely low.

### ***Sentencing***

Sentencing of rape crimes differ in each country. As stated above, most countries consider rape a crime which carries penalties. The severity of the penalty depends on aggravating circumstances and on the role of the rape victim. An aggravating circumstances is an additional factor that makes the act of rape more grave and therefore requires a higher penalty. For example, in certain countries when a woman is raped while intoxicated or pregnant, the rapist will receive a higher penalty than in an "ordinary" rape.<sup>108</sup> The role of the victim during the trial determines the sentence. In a sentencing report a woman can demand that the rapist should receive a high penalty for the specific reasons of her case. The judge or jury may use the arguments of the rape victim to determine the sentence.

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<sup>107</sup> The Mexican law now excludes the possibility for the rapist to marry the victim.

<sup>108</sup> Norwegian Criminal Code, s. 193

In some countries the penalty for rape does not depend on the gravity of the offense but on the status of the victim, as the law distinguishes between married and unmarried women (the penalty is higher or lower in case the victim is married), virginity, or the penalties for rape depends on the "honesty or dishonesty" of a woman.<sup>109</sup> In some countries rape of an "honest" woman carries a higher sentence than rape of a "dishonest" woman.<sup>110</sup> In these countries prostitutes are considered "dishonest" women. Some countries increase penalties in cases where women are abused by their husbands or friends, whereas other countries have less severe penalties in domestic violence cases. In some countries the families of a rape victim and perpetrator agree on a money settlement after the rape crime which excludes the possibility to continue the criminal prosecution.

The penalties for rape vary from death penalty and prison sentence to amputation. These punishments can be combined with fines.<sup>111</sup>

### ***Remedies***

The available remedies in rape cases are either available through civil or criminal actions. There is a greater chance the victim will have access to remedies in a civil action because the rules of evidence are less stringent. The remedy available through civil actions is compensation for damages. It is a costly affair to start a civil action and the plaintiff needs a lot of money. The plaintiff can only get damages in a civil action when the defendant is found guilty. It is often difficult to claim material damages through a civil action, since the courts require the rape victim to collect evidence that damage was done to her, to prove that the damage was done by the offender, to discover the offender's

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<sup>109</sup> In Greece the penalty for marital rape is lower than for rape outside the marriage.

<sup>110</sup> The concept of "honest women" is still being used to determine the sentence in some Latin American countries and in parts of Africa.

<sup>111</sup> In Kuwait, Iran, and Egypt rape is punishable by death.

address and place of work, and to pay for the legal cost of the trial. Not in all countries women can start civil action for damages.<sup>112</sup>

The available remedies which are an element of punishment are restitution (monetary compensation) ordered by the court after conviction of the rapist by the court, and forced counseling of the convicted rapist.<sup>113</sup>

The available civil remedies for women who have been victims of rape within a marriage include civil actions, such as divorce, separation, protection order, injunctions, and a civil claim for damages.<sup>114</sup> Unfortunately, divorce is not in all countries an easy option for women to pursue.<sup>115</sup> In some countries the court authorizing a release on bail may as a condition of release issue an order prohibiting the defendant from having contact with the victim. For example, in the U.S, Mexico, Israel, Cambodia and many other countries a court can grant protective orders forbidding the husband to enter the house in which the wife lives or harass the wife.

In most sexual harassment cases civil suits are more frequently employed than criminal proceedings. Only in cases of severe physical injuries, such as rape, the harasser is prosecuted according criminal procedures.

### ***Services and Programs***

The services available for victims of rape range from crisis information centers to help the victims of rape, to shelters for abused women and victims of rape. Services for rape victims are either provided directly by the state, by state supported NGOs, or

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<sup>112</sup> In Peru a woman can only receive compensation through criminal trial.

<sup>113</sup> In the United States the court can order restitution when the defendant is convicted.

<sup>114</sup> The Indian and Mexican Civil Codes consider rape as a ground for divorce.

<sup>115</sup> In Israel, a husband can refuse to allow his wife to divorce him according the religious law (halakha) which overrides the decision of the court.

by NGO who receive no financial assistance from the state. Most countries have no state supported services for rape victims and the only available support is provided by local or international NGOs, although states are responsible for providing rape victims with the necessary services. States should make sure that women have easy access to these services and that they are affordable or free. This is part of a woman's right to dignity and life, as well as the right to the enjoyment of the highest attainable standard of physical and mental health, as guaranteed in ICESCR, Article 12.

It is unfortunate that the formal health sector in most countries rarely plays an active role in efforts to treat victims of rape. Women as care takers of the family are often already familiar with the health care system (especially midwives) and therefore, more likely to seek for help with this sector after being subjected to violence than to seek help from the police, lawyer, social worker, or psychologist. In order to respond effectively to rape victims, both public and private health care providers need training.

The available services for rape victims vary from general advice, abortions, medical services, psychological counseling, representation in court and legal counseling. Besides these direct services for victims of violence most industrialized countries have awareness raising and education programs for health workers, criminal justice professionals, and the general public to address violence against women. These programs include radio and television programs, newspaper advertisement, special brochures, and educational programs in schools.

The fact that some women become impregnated by their rapists, creates the need for an additional service. Apart from the fact that the victim had to undergo an emotionally devastating experience, she may also have to carry the baby of the rapist, which creates more psychological trauma for her. Data from countries around the world reveal an enormous number of rape victims under the age of 15. Moreover, the possibility of pregnancy

after rape is high.<sup>116</sup> The state responsibility for failure to protect women against violence obliges states to allow for a legal abortion in cases of rape. International human rights law includes the right to reproductive health and self-determination.<sup>117</sup> The abortion should be paid for by the state and performed either in a private or public clinic. Meanwhile, when states consider abortions illegal in cases of rape, they should at least support women with other services after the baby is born. For instance, a woman should be able to hand the baby over for adoption or she should receive financial support to raise the child.

Unfortunately, not all countries allow women to have their pregnancy terminated in cases of rape.<sup>118</sup> Some countries consider abortion illegal but make an exemption for women in certain circumstances such as rape, pregnancy of minors, medical reasons, etc.<sup>119</sup> In many countries termination of the pregnancy is only legally allowed until a specified week in the pregnancy. When abortion is illegal,<sup>120</sup> women still seek out abortions and

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<sup>116</sup> Lori Heise, "Freedom Close to Home: The Impact of Violence Against Women on Reproductive Rights," *Women's Rights Human Rights*, Julie Peters and Andrea Wolpers, 1995.

<sup>117</sup> In the International Conference on Population and Development held in Cairo, Egypt, in 1994, the international community reaffirmed the importance of the right to reproductive health and self-determination. See more: The Center for Reproductive Law and Policy, *Women of the World: Formal Laws and Policies Affecting Their Reproductive Lives*, 1995.

<sup>118</sup> Reed Boland, *The Current Status of Abortion Laws in Latin America: Prospects and Strategies for Change*, (21 *The Journal of Law, Medicine and Ethics* 69 Spring 1993); T. Papademetriou, *Abortion in Selected Countries* (Washington, D.C., Law Library of Congress, 1995); The Center for Reproductive Law and Policy, *Women of the World: Formal Laws and Policies Affecting Their Reproductive Lives*, 1995

<sup>119</sup> In the following countries women can have an abortion in case of rape: South Africa, Poland, Australia, Brazil, United States, New Zealand, India, Myanmar, Canada, Egypt, Israel, Japan, Mexico, Peru, China, Most European countries including Sweden, United Kingdom, The Netherlands, France, Hungary, Romania, Germany, Belgium, Greece.

<sup>120</sup> Abortion after rape is illegal in the following countries (note that this is not a complete list): Nigeria, Pakistan, Taiwan, Kenya, Nicaragua, Iran, Tunisia, and Ireland.

unfortunately, many women still die as a result of illegal abortions carried out under abominable conditions.<sup>121</sup>

Besides severe psychological problems, rape victims are also exposed to sexually transmitted diseases, including HIV and AIDS. The fact that women may attract sexual transmitted diseases during rape establishes a state's responsibility to provide women with the necessary medical services to test on sexual transmitted diseases after rape.

Unfortunately, sexual abuse and rape cannot be eliminated by building shelters, counseling, legal assistance, medical services or involvement of public health sectors. Efficient legislation, police enforcement and court support for these cases are of utmost importance in order to fight sexual violence against women. Moreover, public opinion regarding rape needs to change. In addition, unless women are fully aware of their rights, educated and economically independent, they cannot find the courage to stand up to their abusers.

## Conclusions

This report reviewed how rape is addressed in international and national legislation. Although all countries criminalize rape, the crime is not effectively investigated, prosecuted and punished. States parties to international human rights instruments often fail to adopt appropriate legislation and other measures to provide women adequate legal redress for rape and protect rights guaranteed in the treaties. The definition of rape often excludes categories of women, such as married women, girlfriends, prostitutes and other women in special situations. Moreover, the act of rape is often narrowly defined as penetration of the vagina by the penis. In spite of the internationally recognized right for

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<sup>121</sup> The Population Council, Prevention of Morbidity and Mortality from Unsafe Abortion in Nigeria estimated in 1991, that of the estimated annual 50,000 maternal deaths approximately 20,000 result from the complications of unsafe induced abortions. The International Program, The Center for Reproductive Law and Policy, *Women of the World: Formal Laws and Policies Affecting Their Reproductive Lives*, The International Program, 1995

women to be treated equally as men and the prohibition of discrimination based on sex, women are still subjected to discriminatory standards and behavior when it comes to rape. Discriminatory evidentiary laws allow a woman's sexual history to be used as evidence or require corroboration of the victim's testimony. In addition, countries have incompetent national courts, or poorly trained police and judiciary officials. In addition to inappropriate laws the attitude of the community towards rape victims increases their feeling of shame and often discourages women to report the rape crimes.

Recommendations for improvement are:

- Rape, should be addressed in international human rights instruments and should be recognized by the international community as a grave violation of a woman's integrity instead of a violation of a man's honor.
- All states should adopt effective rape laws which comply with international human rights treaties to protect women against gender-based violence in times of war and peace.
- Rape definitions should be broadened and included under a sexual assault definition to protect women against rape and other forms of sexual assault and should cover all categories of women without making a distinction between married, single, migrant, trafficked, dishonest or any other woman.
- Aggravating circumstances should depend on the harm inflicted on the woman which should be determined by the judge (the law may give examples of aggravating circumstances in a non-exhaustive list).
- Discriminatory evidentiary laws should be abolished and replaced by non-discriminatory laws.
- States should sensitize the police, judiciary and public through training and awareness raising programs.

- States need to improve the court procedures and establish effective remedies.
- Prosecution of a rape crime should depend on public initiation instead of private action.
- Punishment of the rapists should be equal to similar non-gender specific assaults.
- States should establish an environment in which women feel confident to report rape crimes and have access to effective enforcement mechanisms for legal redress.
- The International and national enforcement mechanisms are important tools to hold states responsible for failure to protect women's human rights and provide legal redress to rape. States should not be able to enter reservations when signing international human rights treaties because it reduces the effectiveness of international enforcement mechanisms.
- States should be encouraged to ratify the Optional Protocol of the International Covenant of Civil and Political Rights.



## **Guideline for Drafting Rape Legislation**

Rape is a pervasive problem in society. The actual rape or the fear of rape affects millions of woman around the world. The crime of rape must be reduced and prevented. When it occurs we must intervene effectively. In order to respond adequately to rape we need appropriate legislation.

This guideline for rape legislation was initiated in response to deficient rape laws and ineffective enforcement mechanisms. The guideline provides a drafting guide to legislatures and organizations committed working for the adoption of gender-specific, comprehensive rape legislation. The guideline will touch the areas that need improvement. The guide will help protect victims in a fair, prompt and comprehensive way. It will help prevent future rape violence in every society. However, law by itself will not be enough to prevent rape violations. The judiciary, law enforcement agency, medical and social workers and the public all have to be supportive in the effort to eliminate violations against women.

The guidelines were set up in compliance with international human rights law honoring both the rights of the accused and the victim. International human rights law obliges States to adopt legislation and measures and provide services to eliminate gender-based violations and to protect women's human rights.

### ***Rules of Construction.***

This guide for model rape legislation shall be liberally construed and applied to promote its underlying purposes, which are to:

- (1) Recognize and uphold international human rights standards, in particular those articulated in the UN Declaration on the Elimination of Violence Against Women, which defines violence against women in Article 1 as "any act of gender-based violence that results in, or is likely to result in, physical,

sexual or psychological harm or suffering to woman, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life”;

- (2) Recognize that rape constitutes a violation of human rights;
- (3) Recognize that the state can be held responsible for the failure to protect human rights.
- (4) Recognize that the act of rape is perpetrated by men against men, women against women and women against men, however, the act is mainly perpetrated by men against women and therefore, this guideline primarily focuses on rape as a gender-based crime;
- (5) Recognize the act of rape as a serious crime against the individual which creates fear and physical and psychological traumas;
- (6) Recognize the vulnerability to rape violence of certain classes of women based on race, class, disability, age, and other women who are particularly vulnerable due to impairments in ability to seek or obtain protection;
- (7) Recognize that rape legislation should provide adequate legal redress to rape for women in custody, women belonging to an ethnic minority, trafficked women and migrant or undocumented women, and other women in special situations;
- (8) Recognize that the legal system has inefficiently dealt with rape violence in the past, allowing rapist to escape effective prosecution or financial liability; that although most countries criminalize the rape act, in practice there is still a widespread failure to appropriately protect and assist victims;
- (9) Enact a law that will work more effectively to reduce and eliminate rape violence against women and girls;
- (10) Enact non-discriminatory evidentiary standards that apply in rape cases;
- (11) Ensure that law enforcement and adjudication of rape cases will be pursued according to the factual merits of the case, and

not on the basis of myths, stereotypes and preconceived notions about how women in general or particular classes of women in particular behave and how they should behave; Recognize that rape violations require equal enforcement of the criminal laws by deterring and punishing perpetrators who commit rape crimes; support the efforts of rape victims to gain legal redress by clarifying the responsibilities of law enforcement officers to provide immediate, effective assistance and protection for victims of rape;

- (12) Train judges, prosecutors, juries, and police officials to respond effectively to rape cases;
- (13) Train medical staff and social workers to effectively respond to rape victims;
- (14) Expand the civil and criminal remedies for rape victims; Create a wider range of flexible, immediate and responsive remedies, including penal and civil remedies to punish and prevent rape while providing protections and compensation to the rape victims;
- (15) Establish departments, services, programs and duties including, but not limited to medical centers, abortion clinics, counseling, legal awareness programs to aid victims of rape;
- (16) Educate men about their legal responsibility to seek and obtain consent before initiating sexual activity and to respect the law's decree that no means no; Encourage women to articulate unwillingness to participate in unwanted sexual activities clearly; Develop a greater understanding at the community level of the incidence and causes of rape and encourage community participation in its eradication.

#### ***Criminal Proceedings***

- (1) The prosecution of rape crimes should offer both consistency with the principles of fundamental justice and fairness to complainants and accused;
- (2) Women and men should have equal rights as participants during the prosecution;

- (3) Both complainant and defender should have equal rights in providing evidence during the rape trial;
- (4) Prosecution of rape offenses must be initiated by the state in a public action and should not be dependent on the initiative of the rape victim;
- (5) The law provide written policies regarding arrest procedures for rape incidents.

***Definitions.***

States are urged to adopt broad definitions of acts of rape and relationships protected from rape, that reflect international standards.

Relationships to be regulated

- (1) Rape laws should protect all women and girls known or unknown to the perpetrator. Rape laws should not exclude the following relationships: wives, live-in partners, former wives or partners, and girlfriends, including girlfriends not living in the house, and other female relatives, prostitutes. (In the same extent it should protect against rape between men, rape between women, and the rape of men by women).
- (2) States should not permit religious or cultural practices to impede offering all women the full protection of this law.
- (3) There shall be no restrictions on women bringing suits against a spouse or any other interpersonal relationship. Evidence laws and civil procedure codes must be amended to overcome these obstacles.
- (4) States should offer the same protection of this law to migrant, illegal and other non-national women and hold non-national men accountable to the provisions of this law.

## Acts of Rape

The act of rape should fall under a broader heading of sexual assault that protects women against all forms of sexual abuse. The law should recognize that especially the act of rape is harmful to women and that rape is an act against the victim not against the family or society. The act of rape can be defined as "all acts that include penetration of an object or any part of the human body into the vagina or anus, or oral sex." In order for the abuse to constitute rape ejaculation is not required. Moreover, the attempt of rape causes fear and also restricts women's ability to enjoy their rights, therefore it needs to be criminalized along the same lines as an actual rape. In addition, intimate sexual contact needs to be criminalized. Intimate sexual contact is any non-consensual contact of the breast, genital area, genitals, inner tie with sexual or aggressive intent

## **Consent**

Consent is defined as "the present voluntary agreement of the complainant to engage in sexual activity".

- (1) Consent shall mean words or gestures which unequivocally express or manifest present voluntary agreement to the sexual activity or sexual activities between the accused and the complainant which form the subject matter of the charge. Equivocation, mixed signals, ambiguous messages, are not consent. In this respect, words such as "no", "stop", "don't", "I don't want to" or like expressions in any language constitutes such lack of voluntary agreement.
- (2) Actual or rumored sexual activity with the accused or with another individual on prior occasions does not constitute voluntary agreement to the sexual activity or activities with the accused which form the subject matter of the charge. Once the complainant has, by words or gestures, communicated unwillingness to continue sexual contact with the accused or to engage in

particular sexual activities with the accused, prior agreement, if any, is negated.

- (3) Consent on the part of the complainant is deemed absent where the complainant is incapable of consenting due to disability, intoxication, unconsciousness or other condition; where consent was expressed by a third person; where the complainant engages in the activity because of the accused's abuse of a position of trust or authority;
- (4) A woman has the right to say "no" to sexual activities with any man at any point. There should be no implied consent or perpetual accessibility based on race, profession, or other stereotypes about women's sexuality.
- (5) Words or overt gestures which unequivocally express voluntary agreement to sexual activity constitutes consent except where such apparent agreement is elicited by coercion:
  - (a) the application of force to the complainant or to a person other than the complainant;
  - (b) threats or fear of the application of force to the complainant or to a person other than the complainant;
  - (c) fraud or false representation or any significant lie which influenced the decision to agree to the sexual activity or activities which formed the subject matter of the charge;
  - (d) the exercise of authority or the abuse of trust or of social, economic or institutional power to secure sexual compliance on the basis of the accused's power to deny the complainant or a person other than the complainant significant benefits or necessities of life or to impose the complainant or a person other than the complainant significant harm;

- (e) conduct by the accused subsequent to obtaining the complainant's voluntary agreement to sexual activity which voids the condition under which her agreement was offered;
- (f) other circumstances which may legally vitiate consent.

### ***Evidence***

The standards of evidence should respect both the rights and dignity of the complainant and the accused.

- (1) The evidentiary laws shall not require physical harm in order to prove coercion or resistance;
- (2) No corroboration of the victim's testimony shall be required;
- (3) Cost free medical examination should be made available to victims of rape in order to establish a medical record for evidence;
- (4) Failure to prove rape should not constitute evidence for adultery;
- (5) Past sexual history of the complainant with the accused or with any other person cannot be used at trial to suggest that the complainant is more likely to have consented to the activity in question, or is less worthy to believe;
- (6) Counseling records of the victim of rape shall not be available for the defense;
  - (a) Rape legislation should provide for strict guidelines in determining admissibility of past sexual conduct in cases of fabrication.
- (3) The law should outline clearly the procedure that must be followed in admitting past sexual history evidence;

- (a) an application for a hearing to determine if the evidence is admissible must be made in writing by the accused or on the accused's behalf, to the judge, with a copy given to the prosecutor and to the clerk of the court;
- (b) the application must contain the details of the evidence that the accused wants to present and its relevance to the trial;
- (c) the judge considers the application without any jury or public present and if satisfied that the procedure has been complied with and the evidence has the potential to be admissible, he or she may grant the application and hold a hearing which will determine if the evidence is admissible;
- (d) the hearing will be conducted without any public or jury present;
- (e) the complainant is not required to be a witness at that hearing;
- (f) after the hearing the judge can determine if the evidence is admissible (or any part of it) at trial and must give reason for his or her decision;
- (g) the judge's reasons must be recorded or be in writing; the must indicate the factors that affected the judge's determination; the judge must also indicate why the evidence is or is not admitted, and the manner in which the evidence is expected to be relevant;
- (h) it is prohibited to publicize the contents of the application, as well as any evidence, information or representations at an application or at a hearing, and the decision and the reasons provided;



- (i) when past sexual history evidence is admitted at trial, the judge has the responsibility to instruct the jury as to the proper use of that evidence.

### ***Complaint Mechanisms***

The law must provide policies regarding complaint procedures which allow victims, witnesses to the rape offense, family members, close associates of the victim, state and private medical service providers, and rape assistance centers to register complaints of rape to the police or file action in court.

#### **(A) Duties of Police Officers**

In order to increase the ability to investigate and prevent rape crimes, the police in charge of rape complaints should be given similar powers as police working on other similar violent crimes.

- (1) Police officers must assign the highest priority to calls and cases involving alleged incidents of rape;
- (2) The police must respond to every request for assistance and protection in cases alleging rape. The police must respond promptly even when the request comes from someone other than the victims of the violence;
- (3) victims of rape must be able to file a complaint with the police until at least a few months after the crime occurred;
- (4) In responding to the request the police must:
  - (a) interview the parties and witnesses in separate rooms. The interview is preferable done by a police officer trained in sexual assault investigation;
  - (b) shall make a detailed written report;

- (c) provide the victim of the victim's rights as outlined in section C;
- (d) fill out and file a rape report as provided by law in section D;
- (e) provide or arrange transport of the victim to the nearest hospital or medical facility for treatment and the collection of evidence if it is required or requested;
- (f) initiate a thorough and efficient investigation.

(B) Alternative Complaint Procedure

- (1) A victim, witness or reporter may file a complaint alleging a rape act in the judicial division where:
  - (a) the victim resides
  - (b) the offender resides (if known)
  - (c) where the violence took place
  - (d) where the victim is temporarily residing
- (2) A victim may file a complaint alleging a rape act(s) to a state or private health facility which shall be directed to the police in the judicial division where the facility is located.
- (3) At the victim's request a relative, friend or organization may file a complaint alleging an act of rape to the police which must be investigated accordingly.
- (4) Neither a complaint nor criminal/civil proceedings shall be contingent upon the victims' receipt of a medical exam.

(C) Statement of Victims Rights

The purpose of the statement of victim's rights is to acquaint the victim of the legal remedies available to her during

the initial stage of her complaint. It also outlines the duties of the police and judiciary in relation to the victim.

- (1) The police officer must communicate to the victim in a language understood by the victim indicating his/her name and badge number for identification.
- (2) The law requires that police inform the victim that rape is a crime and that it is the responsibility of the police to start a thorough and effective investigation to provide the victim legal redress to rape;
- (3) The law should provide the victim of rape an option to appeal the decision of the police or judiciary to drop her case;
- (4) It is a police responsibility to arrest the perpetrator without a warrant if there is probable cause to believe (more likely than not) that the suspect committed the rape crime;
- (5) Advise the rape victim about seeking medical attention and preserving evidence;
- (6) Provide the victim with transportation to the nearest medical facility for treatment of her injuries and collect evidence of the crime;
- (7) Shall offer the rape victim adequate information in a language appropriate for the victim of the procedures and relief available to rape victims;
- (8) Provide the victim with at least one referral to an accessible service agency;
- (9) The police and judiciary should refrain from disclosing the identity of the complainant.

#### (D) Rape Report

Every law enforcement officer investigating a rape case shall make a written report.

- (1) It shall be the duty of every police officer responding to a rape complaint to complete a rape report which must be part of the record. A copy of the report shall be submitted to the appropriate justice department and the applicable court.
- (2) The rape report shall be in a form prescribed by the Police Commissioner. It must include but not be limited to incorporating:
  - (a) name of the victim;
  - (b) relationship of the parties;
  - (c) sex of the parties;
  - (d) description of the perpetrator;
  - (e) special characteristics/marks for identification;
  - (f) the time and date the complaint was received;
  - (g) the time the officer began the investigation;
  - (h) the time, place and date of the rape crime;
  - (i) the type and extent of the sexual abuse;
  - (j) the type of instruments used;
  - (k) names of possible witnesses;
  - (l) the amount of time taken in handling the case and the actions taken by the officer;
  - (m) any other data necessary in order to effectively prosecute the rape offense.
- (3) It is the duty of the Police Commissioner to compile and report annually to the Department of Justice/ Department of Women's Affairs Parliament on all the data collected from the rape reports.
- (4) The annual report must include but not be limited to:
  - (a) the total number of reports received;

- (b) the total number of reports made by the victims of each sex;
- (c) the number of reports investigated;
- (d) the average time lapse in responding to each report;
- (e) the type of police action taken in disposing cases including the number of arrests;
- (f) how the incidents were resolved.

### ***Health Care Professionals***

Any person who is licensed, certified or otherwise authorized by the law to administer health care shall offer to a person suspected to be a victim of rape immediate and adequate information regarding services available to victims of rape and provide medical services in their best capacity. The state should provide training to health workers to enable them to handle rape victims in an appropriate manner.

### ***Duties of Judicial Officers***

In order to improve the prosecution and prevention of rape cases all persons shall be equal before the courts and tribunals. Everyone shall be entitled to a fair and public hearing by a competent , independent and non-biased tribunal established by law.

- (1) If the investigation of the police produces probable cause to believe that the suspect committed the rape crime the judicial officers shall prosecute the rape complaint;
- (2) Once the complaint is filed the judicial officer shall impose a no contact order for the defender with regard to the victim;
- (3) The judicial officers shall inform the victim of rape in the language she understands of the nature and procedures of the prosecution;

- (4) The rape shall be tried without undue delay;
- (5) At the victim's request the courtroom should be closed;
- (6) The judicial officers shall refrain from disclosing the identity of the victim of rape to the public or the media.

### ***Defenses***

- (1) The law should specifically codify that intoxication provides no defense to rape.
- (2) The law should specifically that post rape marriage provides no defense to rape.
- (3) The accused's belief that the woman wanted it is not a defense to rape.

### ***Available Remedies***

Depending on the nature of the offense there should be a sentence, conviction, punishment, restitution, mandatory counseling, and safeguards, such as no contact orders

- (1) The imprisonment will depend on the circumstances in which the rape occurred; Aggravating circumstances require a higher penalty for the act of rape. Whether aggravating circumstances, which require a higher penalty, were present during the act of rape depends on the harm inflicted on the victim. (Examples of aggravating circumstances are, when assault occurred in zone of privacy, children were present during the sexual assault, in case the woman is vulnerable due to pregnancy, physical disability, intoxication etc.)
- (2) Upon conviction the court can order restitution (monetary compensation) as an element of punishment;
- (3) Upon conviction the court can order counseling which requires the defendant to undergo counseling for a specified duration with a social worker, psychologist, clinical psychologist, psychiatrist, family service agency,

mental health center guidance counselor, program designed for rapist or any other guidance service the court deems appropriate;

- (4) Regardless of the outcome of the prosecution, women should be able to initiate a civil action for damages to order for payment of losses suffered as a direct result of the rape.

### ***Provision of Services***

#### **(A) Emergency Services**

- (1) International human rights law obliges states to provide emergency services to woman which must include:
  - (a) twenty-four hour access to rape crisis centers;
  - (b) easy access to medical centers for examination;
  - (c) immediate access to medical attention from trained medical staff;
  - (d) transportation from crisis center of police station to medical center;
  - (e) emergency legal counseling and referrals;
  - (f) emergency mental counseling;
  - (g) confidential handling of rape victims.

#### **(B) Non-Emergency Services**

- (1) International human rights law obliges states to provide non-emergency services to women which must include:
  - (a) delivery of free services to assist in the long-term rehabilitation of victims of rape through mental counseling;
  - (b) continuous access to free STD and HIV/AIDS testing;

- (c) access to free legal abortions in cases of rape or child care facilities and financial support for the child depending on the wish of the victim;
- (d) rape awareness and educational programs for the public;
- (e) delivery of services in cooperation and coordination with public and private, state and local services and programs;

(C) Training of Police Officers

- (1) The Police Department must establish a mandatory gender sensitivity training and maintain an education and training program for police officers to acquaint them with:
  - (a) the nature, extent, causes and consequences of rape;
  - (b) the legal rights and remedies available to victims of rape;
  - (c) the services and facilities available to victims of rape and rapists;
  - (d) the legal duties of police officers to make arrests and to offer assistance to the victim of rape;
  - (e) techniques for handling rape incidents and to approach the victim of rape in an appropriate way.
- (2) Every police cadet should be trained to respond to rape cases.
- (3) Special units should also be established with more intensive and specialized training to handle more complex cases.
- (4) Police officers trained in sexual assault investigation should be present in each police station to handle rape cases.



- (5) Educators, psychologist and victims should participate in seminar programs to sensitive police.

(D) Training of Judicial Officers

- (1) Provisions must be made to conduct on-going training programs for judicial officers on the handling of rape cases. Training must include guidelines on:
  - (a) the nature, extent, causes and consequences of rape;
  - (b) guidance to be given to victims on available legal remedies;
  - (c) sentencing guidelines;
  - (d) training on appropriate remedies for the rapist;
- (2) Training must include an initial course involving a prescribed number of hours and an annual review involving a prescribed number of hours;
- (3) Special training must be provided for the judges that are assigned to handle rape cases in court;

(E) Training of Counselors

- (1) The State must provide trained counselors to support police, judges, victims of rape and perpetrators of a rape crime.
- (2) The law must mandate counseling programs for perpetrators as a supplement to and not as an alternative to the criminal justice system.
- (3) Counseling programs must be designed to:
  - (a) help the perpetrator take the responsibility for his violence and make a commitment not to inflict further violence
  - (b) educate the perpetrator on the illegality of rape violence.

- (4) Funding for counseling and perpetrator programs should not be taken for sources assigned to victims of violence.
- (5) The law should provide but not mandate counseling for victims of rape. Counseling for rape victims must be:
  - (a) provided as a free service;
  - (b) easy accessible for the victim;
  - (c) available to the victim for as long as deemed necessary by qualified and knowledgeable doctor;
  - (d) empowering to the victim and helpful to overcome the traumatic experience.

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