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Rape: Human Right Violation - With special reference to International Perspective

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ABSTRACT

The most dehumanising act which affects not only the human body but also the dignity of women and reduces it to an animal existence is 'rape'. The law regarding rape has evolved to a great extent, but yet it is not sufficient to deal with the present scenario. The situation in the world is not much different as the famous Oprah Winfrey once mentioned that she was raped by her relative during her childhood. The offence of rape is made punishable under national legislation but failed to find a place under international law. This paper will make an analysis of various international instruments to examine their effectiveness in curbing the offence of rape.

Keywords: Human, Rights, International, Rape.

I. INTRODUCTION

The concept of human rights emerged to preserve the dignity and worth of an individual as a human. It helps to advance equity and equality in society and to protect against the evils of war, discrimination, hatred and other atrocities.

It is a contemporary concept. Initially, it was developed separately by different countries as the Magna Carta in England, the Bill of Rights in America, the declaration of rights of the man in France and so on. But till 1945, no consolidated action was taken.

After the end of World War II, a United Nations Organization (UNO) was established. It realised the need to draft laws to regulate the human rights of mankind and to put an end to dehumanising acts and unrestricted powers of the states.

When a person is raped, it does not affect her physically, but she has also undergone emotional, psychological and financial adversities and thus leading to her violation of fundamental human rights.²

II. INTERNATIONAL INSTRUMENTS

To protect and empower women to fight against these violations, the UN has taken various

¹ Author is an Advocate in India.

² Dr. H.O. Agarwal, *International Law and Human Rights*, (Central Law Publications, Allahabad, 18th ed., 2011)

progressive steps which not only aim to curb violence and discrimination against women but also help to strengthen their position in society. Some of the progressive steps are-

(A) UN Charter

The barbarity of the Second World War not only divulges the incompetency of the League of Nations to sustain world peace but also raises the demand to preserve and bequest human rights. Thus, the allied countries yearn to establish an international organisation to succeed the League of Nations and the one who will carry out the above-mentioned aspirations. In that event, United Nations Organisation was founded with the signing of its Charter by 51 states in San Francisco³. But UNO was born on 24th October 1945 after receiving ratification from 5 permanent members and 29 other states. It is a group of states who come together for a common purpose, through the ultimate beneficiary of it will be the people of all countries; as the preamble does not use the term “states” but the phrase “people of the united nations” has been adopted.

As per the preamble⁴ of the Charter, the core objective of it is to assert faith and belief in the human rights of an individual and to cater good lifestyle with all progress and growth both socially and economically. It also asserts to provide protection and security, and freedom from fear and war. Thus, it not only safeguards people from the atrocities and enormity of war but also equips people with their social, economic, cultural, civil and political rights, which enable them to grow entirely.

(B) Enactment of UDHR

After the end of the second world war, a need was felt to lay down the list of rights which are core or fundamental for the growth of an individual, the development of the country, and to establish worldwide peace and harmony. Thus, to supplement UN Charter, the general assembly decided to enact the declaration, which will become the foundation of municipal law of every country. The atrocities faced during world war lays the road for the declaration. The draft of the declaration was forwarded to the commission of Human Rights for laying down the

³ On 26th June, 1945

⁴ WE THE PEOPLES OF THE UNITED NATIONS DETERMINED to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and to promote social progress and better standards of life in larger freedom, AND FOR THESE ENDS to practice tolerance and live together in peace with one another as good neighbours, and to unite our strength to maintain international peace and security, and to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest, and to employ international machinery for the promotion of the economic and social advancement of all peoples, HAVE RESOLVED TO COMBINE OUR EFFORTS TO ACCOMPLISH THESE AIMS. Accordingly, our respective Governments, through representatives assembled in the city of San Francisco, who have exhibited their full powers found to be in good and due form, have agreed to the present Charter of the United Nations and do hereby establish an international organization to be known as the United Nations.

international bill of human rights by the assembly. The drafting committee of has taken up the task. The committee was headed by a woman called Eleanor Roosevelt, who was the widow of Franklin D. Roosevelt⁵. The assembly adopted the final draft of Declaration on 10th December, 1948 in Paris. The cardinal virtue of the document is apparent from the fact that except eight member states who abstain from voting, all other member states voted in affirmative. No single vote was casted against the resolution.⁶

Some of the core rights provided in the declaration are -

- Right to dignity – Article 1⁷
- Right against discrimination – Article 2⁸
- Right to life - Article 3⁹
- Right to freedom from cruel and inhuman treatment – Article 5¹⁰
- Right to equality before law – Article 7¹¹
- Right to privacy – Article 12¹²
- Freedom from attack on honor and reputation – Article 12¹³
- Equal rights in marriage – Article 16 (1)¹⁴

Apart from these rights, there are other rights¹⁵ also which are integral for the maximum development of the individual. These rights can be restricted only when right of one person curtails the right of another or when it goes against the morality, public order or welfare of

⁵ An American President

⁶ S.K.Kapoor, “*International Law and Human Rights*”, (Central Law Publication, Allahabad, 22nd ed., 2021)

⁷ 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.

⁸ Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

⁹ Everyone has the right to life, liberty and the security of person.

¹⁰ No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

¹¹ All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

¹² No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

¹³ Ibid

¹⁴ Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.

¹⁵ Right to Education, Employment rights, right to effective remedy, cultural rights, right to freedom from against arbitrary arrest and detention, right to equal and fair hearing etc.

people. Provided these restrictions must be imposed by the law.¹⁶ The downside of the declaration is that it merely what should be done but does not furnish the modus operandi and the sanctions for the member states for not taking the required actions.

India has not only believed and articulated its principles in constitution and other laws of the country but also played significant role in shaping the document what it is today. Indian women delegate Hansal Mehta is the one on whose recommendation the term “All human beings” has been used in Article 1 at the place of “All men” which paves way for gender equality.

(C) Adoption of ICCPR & ICSECR

To overcome the drawback of UDHR, UN decided to enact a convention on human rights which will bind its member states to fulfil its obligations by incorporating required changes in the constitution or legislation. Resultantly, the draft of the convention was drafted which provides for two kind of rights- first generation rights which are civil and political rights and second-generation rights which are social, economic and cultural. They are called second generation because they are ancillary rights. This gave rise to criticism that both categories of rights are inculcated in one document. Consequently, two separate documents were drafted. One deals with civil and political rights and other with social, economic and cultural rights. The former is called ICCPR and later as ICESCR.

ICCPR contains 53 articles which are divided into six parts. First three parts deal with rights and the later provides for implementation procedure. Similarly, ICESCR has 31 Articles which are distributed into 5 parts. Article 1 of both the conventions provide right to self-determination which gives liberty to an individual to make free choice of his political and civil status.

Other essential **political and civil rights** provided in the convention are:

- Right to life (Article 6, Paragraph 1¹⁷)
- Right to freedom against inhuman treatment (Article 7¹⁸)
- Right to privacy (Article 17, Paragraph 1¹⁹)

¹⁶ Article 29(2) - In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

¹⁷ Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

¹⁸ No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

¹⁹ No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

- Equal spouses during marriage (Article 23, Paragraph 4²⁰)
- Equality before law (Article 26²¹)

Implementation procedure of ICCPR is enumerated under Part IV. Article 28²² provides for constitution of human rights committee which is composed of eighteen elected members who are people of high morals and competence. They will serve in their personal capacity and will not represent or protect the interest of their concerned state. The tenure of the members is 4 years though they are eligible for re-election.²³ They are considered on the basis of geographical distribution²⁴.

The members are mandated to send their progress reports to the Secretary-General of the UN who will later forward the same to the committee for the review. The reports are submitted initially after one year of enactment and later when so asked by the committee. The State parties not only mention about the step taken to implement the convention but also broach about the hurdles they face while enacting it. The committee make recommendations or comments to the member states upon the report submitted and may also pass the same to the economic and social council.²⁵ The committee though keep check upon the states to take action but convention does not provide any stringent means to implement the same. Thus, it fails to accomplish the desired

²⁰ States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.

²¹ 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 race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

²² 1. There shall be established a Human Rights Committee (hereafter referred to in the present Covenant as the Committee). It shall consist of eighteen members and shall carry out the functions hereinafter provided.

2. The Committee shall be composed of nationals of the States Parties to the present Covenant who shall be persons of high moral character and recognized competence in the field of human rights, consideration being given to the usefulness of the participation of some persons having legal experience.

3. The members of the Committee shall be elected and shall serve in their personal capacity.

²³ Article 32 Paragraph 1

²⁴ Article 31 Paragraph 2

²⁵ Article 40 - 1. The States Parties to the present Covenant undertake to submit reports on the measures they have adopted which give effect to the rights recognized herein and on the progress made in the enjoyment of those rights: (a) Within one year of the entry into force of the present Covenant for the States Parties concerned; (b) Thereafter whenever the Committee so requests.

2. All reports shall be submitted to the Secretary-General of the United Nations, who shall transmit them to the Committee for consideration. Reports shall indicate the factors and difficulties, if any, affecting the implementation of the present Covenant.

3. The Secretary-General of the United Nations may, after consultation with the Committee, transmit to the specialized agencies concerned copies of such parts of the reports as may fall within their field of competence.

4. The Committee shall study the reports submitted by the States Parties to the present Covenant. It shall transmit its reports, and such general comments as it may consider appropriate, to the States Parties. The Committee may also transmit to the Economic and Social Council these comments along with the copies of the reports it has received from States Parties to the present Covenant.

5. The States Parties to the present Covenant may submit to the Committee observations on any comments that may be made in accordance with paragraph 4 of this article.

goal.

The **Social, Economic and Cultural Rights** provided in the ICESCR are:

- Right to social security (Article 9)
- Protection from social and economic exploitation (Article 10, Paragraph 3)
- Right of enjoyment of physical and mental health (Article 12, Paragraph 1)

Alike under ICCPR, member's states are also obligated to submit reports under this convention. But there is no specific committee constituted under this convention. Thus, reports are forwarded by secretary general to social and economic council for consideration. Council may forward such reports to the commission of Human Rights for review. Similar to committee, council can also make comments on the report and transmit it to the concerned state. Thus, under this convention also, the process of enactment is not strengthened. Resultantly, the objectives behind enacting this convention remain unfulfilled even after so many years.

III. RAPE UNDER HUMANITARIAN LAW

The offence of rape is made punishable under national legislations but failed to find place under international law. Though its traces can be found way back in the year 1863 when in Lieber Instructions, it was classified as 'troop discipline' and in 1887 in Hague convention as 'crime against humanity'. But it developed enormously by the end of world war II when the great powers has started recognizing it as crime against humanity.²⁶ Its horizon has been expanded with the ICTR's judgment in the case of *Prosecutor v. Akeyesu*²⁷ where the tribunal has held it a crime against humanity, a war crime and crime of genocide.

The term 'rape' has been used in the statute of Control Council Law No. 10²⁸ for the prosecution and punishment of the Major War Criminals of the European Axis, 1945. But neither of it has defined the term 'rape'. For the first time, ICTR has tried to define it in the case of *Akeyesu* as "physical invasion of a sexual nature, committed on a person under circumstances which are coercive". In this, the tribunal has laid emphasis on both mens rea as well as actus rea but it failed to give it a precise meaning.

In the case of *Prosecutor v. Furundzija*²⁹, the ICTY has tried to fill in the gaps by expanding the constituents of mens rea and actus rea.

²⁶ Mark Ellis, "Breaking the silence: Rape as an international crime", 38 Case W. Res. J. Int'L. 225 (2007)

²⁷ Case No. ICTR-96-4-T (2 September 1998)

²⁸ Punishment Of Persons Guilty Of War Crimes, Crimes Against Peace And Against Humanity

²⁹ IT-95-17/1-T (10 December 1998)

The tribunal has used the term ‘coercive’, ‘force’ or ‘threat to use force’ and observed that it is not essential that it is directly used against the victim only. If the same is applied against third party to put pressure on the victim indirectly even then it covers under it.

The ITCY further in the case of *Prosecutor v. Kunarc*³⁰, extended the ambit of mens rea. Now it includes intention to commit sexual act either non voluntarily or without consent of the victim. Thus mens rea includes elements such as coercion, force, threat to force, non-consensual or non-voluntary. It is not necessary that all elements be present. The presence of anyone of the element will be considered as the offence of rape if the same is accompanied by actus rea.

For the first time, the statute of ICC has formerly codified the definition of ‘rape’. The statute has defined it in general irrespective of the context that whether it is a war crime or crime against humanity or genocide.

(A) Rape: As Genocide

The term ‘genocide’ is derived from the Greek term “genos” means race and Latin term “cide” means killing. Thus genocide is an act of decimating a national, racial, ethnic or religious group either fully or partially. It is committed against individuals due to their belonging to a specific group. During World War II, Germany has committed the act UNDER Nationalist-Socialist regime. But at that time there was no law to prevent the same. Thus in the year 1951, the Genocide Convention was enacted and the statute of ICTR, 1994 also consists provision against genocide.

The term “genocide” is defined under Article 2³¹ of Genocide Convention as well as under Article 2(2)³² of ICTR statute. After careful understanding of the term, it can be said that the act of ‘rape’ falls within the parameter of the term “genocide” as the act can be committed to prevent births within the group either by-

- a) Forcefully impregnating a woman with the child of a man who belongs to another group.

³⁰ IT-96-23 & 23/1-A (12 June 2002)

³¹ In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, 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 calculated 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.

³² Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, 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 calculated 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.

As the child is known by the father, thus it results in extermination of the whole group indirectly or

- b) Due to its psychological impact on the women as instances show that women after traumatic experience of rape refused either to have sexual relation or for procreation even with their husbands.

Thus, the offence of rape can be called genocide if the above act is committed with the requisite intention. Similar observation is given by ITCR in the case of *Aykesu* where the tribunal called it an offence of genocide.

The blockade to punish an accused for genocide is the heavy burden of proof on the prosecution.

(B) Rape: A War Crime

A 'war crime' means commission of the prohibited acts during war. The list of prohibited acts is governed by various instruments enacted time and again. The law regarding war was enacted for the first time in Hague convention, 1907. But that was limited to combats and does not contain provisions to protect civilians during war. After World War II, the world committee felt the need to enact comprehensive law regulating armed conflicts. The four Geneva conventions were enacted dealing specifically with wounded and sick, maritime, prisoners of war & civilians respectively. Three additional protocols were also passed relating to victims of international and non-international armed conflicts and distinct emblems.

From history of wars, it is evident that the rape or sexual offences were considered as natural outcome of war and was accepted as 'right' of the conquered state. The provision to prohibit rape was not specifically inculcated in the Geneva Conventions or its additional protocols but attempts were made to expand the horizon of the rights of women under:-

- a) Respect for Honour - Article 27³³ of Geneva Convention IV³⁴

³³ Protected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity.

Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault.

Without prejudice to the provisions relating to their state of health, age and sex, all protected persons shall be treated with the same consideration by the Party to the conflict in whose power they are, without any adverse distinction based, in particular, on race, religion or political opinion.

However, the Parties to the conflict may take such measures of control and security in regard to protected persons as may be necessary as a result of the war.

³⁴ Relative To The Protection Of Civilian Persons In Time Of War Of 12 August 1949

- b) Protection of women - Article 76³⁵ of Protocol I³⁶
- c) Protection against outraging Personal Dignity - Article 4(2)³⁷ of Protocol II³⁸

Thus ‘rape’ was not declared as ‘war crime’ in specie till 1998.

For the first time, in the case of *Prosecutor v. Ayekshu*³⁹, the tribunal has declared ‘rape’ as war crime under Article 3⁴⁰ of the ITCY’s statute. The tribunal while interpreting the definition of ‘war crime’ has observed that the rape amounts to outraging the personal dignity of the person and also causes physical and mental pain and thus a defendant can be convicted for the war crime. By similar reasoning, the tribunal has convicted the defendant for war crime in the case of *Prosecutor v. Kunarc*⁴¹.

In the year 1998, ICC statute was amended to include the term ‘rape’ in the definition of “war crime”. Thus it helps to reduce the burden of the prosecution to prove rape as “war crime” as now the prosecutor merely needs to prove that rape has been committed unlike before where the prosecutor besides proving rape has to argue how the act of rape is a war crime and not just a crime against individual. The ICC has also inculcated the provisions for the benefit of rape victim such as reparations, special security, protection, psychological counseling and other. Though we acclaim the significant development or progress of law made so far but the result is

³⁵ 1. Women shall be the object of special respect and shall be protected in particular against rape, forced prostitution and any other form of indecent assault.

2. Pregnant women and mothers having dependent infants who are arrested, detained or interned for reasons related to the armed conflict, shall have their cases considered with the utmost priority.

3. To the maximum extent feasible, the Parties to the conflict shall endeavour to avoid the pronouncement of the death penalty on pregnant women or mothers having dependent infants, for an offence related to the armed conflict. The death penalty for such offences shall not be executed on such women.

³⁶ Relating To The Protection Of Victims Of International Armed Conflicts Of 8 June 1977

³⁷ Without prejudice to the generality of the foregoing, the following acts against the persons referred to in paragraph I are and shall remain prohibited at any time and in any place whatsoever:

- (a) Violence to the life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;
- (b) Collective punishments;
- (c) Taking of hostages;
- (d) Acts of terrorism;
- (e) Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;
- (f) Slavery and the slave trade in all their forms;
- (g) Pillage;
- (h) Threats to commit any of the foregoing acts.

³⁸ Relating To The Protection Of Victims Of Non-International Armed Conflicts Of 8 June 1977

³⁹ 1998, ICTR-96-4-A

⁴⁰ The International Tribunal shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, but not be limited to: (a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering; (b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity; (c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings; (d) seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science; (e) plunder of public or private property.

⁴¹ 2001, IT-96-23 &23/1

not appeasing. The commission of offence is unceasing thus a long road lies ahead.

IV. CONCLUSION AND SUGGESTIONS

After a long struggle of feminist movements, the efforts have fructified as a woman has come out of the four walls of the house and entered into all spheres of life and achieving new heights every day. Worldwide also, women are leaving their prints all over, such as philanthropists Mackenzie Scott, Malala, and Kamla Harris are few. But the repercussions of such empowerment are very harsh as the rate of violence keeps on increasing year after year. The safety of the women is greatly hampered. She does not feel safe even in her own house. The cases of domestic violence, harassment by husbands, dowry deaths, suicides etc., are surging.

Various international conventions and declarations have been enacted to protect the fundamental and human rights of the people, especially the vulnerable section of society – children and women. Some specific documents have been enacted that aim to promote the welfare of these sections and to protect and prevent the occurrence of violence or abuse against them. These documents have been adopted by the majority of nations, and they amend or reform their municipal laws to make them in consonance with these declarations and conventions. Despite such efforts, the picture of violence against these vulnerable sections in other countries has not yet changed.

Preventing the commission of an offence is better than punishing the accused post the commission of the act. It is imperative for the government to take steps in this direction. Governments all over the world shall ensure the apposite implementation of international instruments to achieve the goal of a “safe world for women”. Secondly, it is imperative that there is uniformity of law in all states.
