

RAPE IN A POST-DISASTER CONTEXT: EVOLVING JURISPRUDENCE OF THE INTER-AMERICAN COMMISSION

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I entered this field taking for granted that the proposition contained within the title of this panel, “Rape as a Form of Torture,” was simply stating a fact and not an aspiration. This important advancement in the recognition of women’s human rights is due in large part to the pioneering and visionary work of Rhonda Copelon and my fellow panelists, Felice Gaer, Patricia Viseur-Sellers, and Sir Nigel Rodley. Thank you to the *City University of New York Law Review* and Lisa Davis for the opportunity and the honor.

I was asked to speak about efforts to address rape of women and girls in post-earthquake Haiti and a related decision of the Inter-American Commission on Human Rights (“IACHR”) recognizing that Haiti, like all States, has a responsibility to prevent and punish sexual violence perpetrated by non-State actors. I will first provide a brief historical backdrop, focusing on efforts led by Rhonda Copelon to address state-sponsored rape on the international level following the 1991 *coup d’etat* in Haiti. Then, I will provide an overview of rape in Haiti since the January 12, 2010 earthquake and a request filed with the IACHR by women and girls living in displaced persons camps in Port-au-Prince, Haiti, arguing that the government was violating their right to be free from sexual violence. Finally, I will discuss the significance of the Commission’s decision granting this request with respect to the government’s obligation to exercise due diligence to prevent, investigate, prosecute, and punish private actors of rape.

I. HISTORICAL CONTEXT OF RAPE IN HAITI: HAITIAN WOMEN ESTABLISH PRECEDENT

Current efforts to combat gender-based violence in Haiti in the international arena build on the foundation established by Rhonda Copelon’s work around the widespread use of rape as a

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tool of political repression during the 1991 to 1994 *coup* period in Haiti.

In 1994, Rhonda assembled a team of attorneys and advocates in the United States and Haiti—including those from the City University of New York (“CUNY”) School of Law’s International Women’s Human Rights Clinic (“IWHR”), the Center for Constitutional Rights (“CCR”), MADRE, and the law firm Morrison & Foerster—and filed a Communication with the IACHR decrying the widespread use of rape following the 1991 *coup*.¹ The Communication called on the Commission to take the opportunity presented by the situation in Haiti to “take seriously” the crimes against women that society often does not; it labeled these acts crimes that “disappear from history though they remain seared into women’s bodies, consciousness and lives.”² The parties argued to the Commission that the numerous acts of violence documented in the Communication constitute violations of various Inter-American and other human rights instruments “whether the abuses were committed by officials of the illegal regime or by paramilitary groups acting in conjunction with the military,” and that, moreover, “[t]hey also constitute violations if they were committed by armed bands of private citizens acting as agents, at the instigation of, or with the consent, tolerance or acquiescence of the illegal regime.”³

In response to the brief, the IACHR issued a report recognizing that the evidence set forth in the Communication “clearly shows sexual violations and other types of violence against Haitian women as a form of reprisal, intimidation, terror, and degradation of women.”⁴ The Commission recognized that such abuses against Haitian women violate myriad provisions of Inter-American conventions, including those related to humane treatment and the protection of honor and dignity.⁵ In addition, the Commission Report stated: “the Commission considers that rape represents not only inhumane treatment that infringes upon physical and moral integrity . . . but also a form of torture.”⁶ This holding is particu-

¹ Communication Respecting Violations of the Human Rights of Haitian Women, Submitted to Inter-Am. Comm’n H.R. (Oct. 16, 1996)(on file with author).

² *Id.* at 1.

³ *Id.* at 32.

⁴ Org. of Am. States, Inter-Am. Comm’n on Human Rights, Report on the Situation of Human Rights in Haiti 1995, Doc. OEA/Ser.L/v/II.88 10 rev. ¶ 128 (Feb. 9, 1995), available at <http://www.cidh.org/countryrep/EnHa95/eh95p2.htm>.

⁵ *Id.* ¶ 129.

⁶ *Id.* ¶ 133.

larly significant as it was the first time any treaty body at a regional or international level ever rendered a decision clearly treating rape as a form of torture.⁷

Notably, it was also the case of a Haitian woman who fled Haiti during the 1991 *coup* period that led to the first precedent decision in 1993 by the U.S. Board of Immigration Appeals establishing that rape constitutes persecution on account of a protected ground, specifically political opinion and religion, to qualify for asylum.⁸

CCR (an organization with which Rhonda was intimately affiliated)⁹ filed an action in federal court under the Alien Tort Statute against the notorious paramilitary leader, Emmanuel “Toto” Constant.¹⁰ The District Court in 2006 issued a default judgment finding him liable for, among other things, torture and the systematic use of rape, and awarded the plaintiffs \$19 million in damages.¹¹ To date, this suit remains the only successful action holding someone accountable for the state-sponsored campaign of rape that occurred following the Haitian *coup*. For all others, impunity prevailed.

During Haiti’s next period of political crisis—the second ouster of President Aristide from 2004–2006—rape was again used as a weapon to suppress dissent. A startling study published in *The Lancet* estimated that more than 35,000 women were raped in Port-au-Prince during the eight months following the second *coup*.¹² There were few, if any, prosecutions for the rapes. It is against this backdrop that the earthquake struck Haiti on January 12, 2010.

II. RAPE IN POST-EARTHQUAKE HAITI: HAITIAN WOMEN CONTINUE TO LEAD THE WAY IN THE FIGHT FOR JUSTICE

A. *Displaced Women and Girls Face Heightened Risk of Rape*

At the time of the earthquake, I was working as an attorney

⁷ Rhonda Copelon, *Gender Violence as Torture: The Contribution of CAT General Comment No. 2*, 11 N.Y. CITY L. REV. 229, 237 (2008).

⁸ Matter of D-V-, 21 I&N Dec. 77 (B.I.A. 1993).

⁹ Rhonda worked as an attorney with CCR for more than a decade and served on the CCR Board for more than three decades.

¹⁰ CTR. FOR CONSTITUTIONAL RIGHTS, *Doe v. Constant*, <http://ccrjustice.org/our-cases/current-cases/doe-v-constant>.

¹¹ *Doe v. Constant*, Default Judgment, 04 Civ. 10108 (SHS)(S.D.N.Y. Aug. 16, 2006), *aff’d* 354 Fed. Appx. 543 (2d. Cir. 2009).

¹² Athena R. Kolbe & Royce A. Hutson, *Human Rights Abuse and Other Criminal Violations in Port-au-Prince, Haiti: A Random Survey of Households*, 368 THE LANCET 864, 869–70 (2006).

with the Institute for Justice and Democracy in Haiti (“IJDH”), a U.S.-based non-profit, and its Haitian affiliate, the Bureau of International Lawyers (“BAI”), a public interest law firm in Port-au-Prince. Our office in Haiti served as a meeting point for grassroots organizations, including women’s groups. Within days after the earthquake, dozens of displaced women and girls who came to the BAI began reporting instances of rape, forced evictions, and other human rights violations.

The BAI derives its priorities and programming from the communities that it serves, so the needs of rape victims quickly rose to the fore. The BAI and IJDH launched the Rape Accountability and Prevention (“RAP”) Project that now provides legal services for victims of sexual violence both before Haitian courts and international bodies and helps build the capacity of grassroots women’s groups organizing in the camps.¹³ The first step we took with the RAP Project was to organize a fact-finding investigation. In May 2010, several attorneys and advocates, including representatives from many of the same organizations that had worked with Rhonda in 1994—including MADRE, CUNY School of Law, CCR, and Morrison & Foerster—conducted a series of interviews with victims, grassroots leaders, and government representatives in Haiti.

The situation we encountered was grim. We interviewed more than fifty women in one week who had either been raped or had a daughter or granddaughter who had been raped since the earthquake.¹⁴ The majority of the victims could not identify their assailants, which distinguished this period of sexual violence from past periods when rape was directly attributable to actors of the State.¹⁵ The vast majority of women interviewed lived in displacement camps in Port-au-Prince and hailed from impoverished communities (indeed, many of the same disfavored areas that were the sites of mass rapes following the 1991 and 2004 *coups*).

Sexual violence caused deep physical and psychological effects to the women and girls. Haiti’s complete ban on abortion, even in cases of rape or where the mother’s health is in danger, further deepened the physical and emotional hardship for the women we interviewed who became pregnant as a result of sexual violence.

¹³ See Blaine Bookey, *Enforcing the Right to be Free from Sexual Violence and the Role of Lawyers in Post-Earthquake Haiti*, 14 N.Y. CITY L. REV. 101 (2011).

¹⁴ MADRE ET AL., OUR BODIES ARE STILL TREMBLING: HAITIAN WOMEN FIGHT AGAINST RAPE 4 (2010) available at <http://ijdh.org/wordpress/wp-content/uploads/2010/07/Haiti-GBV-Report-Final-Compressed.pdf> [hereinafter MADRE].

¹⁵ *Id.* at 11.

We heard repeated thoughts of suicide; at least one woman had taken steps to that end, thankfully without success.¹⁶

All of the camps we visited lacked adequate lighting and the police were markedly absent in the interior of the camps. To fill this gap, grassroots organizations began to organize their own security with women and men in their communities.¹⁷

Seeking assistance from the authorities was an exercise in futility, or worse yet, subjected women and girls to re-victimization. The police turned women away, blaming the woman for the rape or blaming the lack of a vehicle for their inability to respond. Deep-rooted sex discrimination pervaded even the highest levels of government. One official told us she believed that that the women were inviting the rape by going to the bathroom outside (albeit in the camps where women have no other option). Those in the government who recognized the crisis were completely hamstrung by the lack of resources.¹⁸

B. Lawyers Organize with Displaced Haitian Women and Girls to Hold the Government Accountable for Failure to Protect

Faced with these dire circumstances, in October 2010, our legal team filed a request under Article 25 of the Commission's Rules of Procedure, which provide that the Commission can grant precautionary measures in "serious and urgent situations" to prevent "irreparable harm."¹⁹ The request was filed in collaboration with grassroots organizations, including KOFVIV²⁰ and FAVILEK,²¹ on behalf of women and girls living in twenty-two displacement camps in the capital, Port-au-Prince, identified by the organizations as places where women and girls were most at risk.²²

The request alleged that the government of Haiti was in violation of several provisions of the American Convention on Human Rights and other regional conventions, including the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women, also known as the Convention of Be-

¹⁶ *Id.* at 12.

¹⁷ *Id.* at 21 and app. A at 32.

¹⁸ *Id.* at 16.

¹⁹ Request by Int'l Women's H.R. Clinic at CUNY School of Law et al. for Precautionary Measures Under Article 25 of the Commission's Rules of Procedure (Inter-Am. Comm'n H.R. Oct. 19, 2010) (on file with author) [hereinafter Request for Precautionary Measures]. See also MADRE, *supra* note 14, at 1.

²⁰ *Komisyon Fanm Viktim Pou Viktim* [Commission of Women Victims for Victims].

²¹ *Fanm Viktim, Leve Kanpe* [Women Victims Get Up Stand Up].

²² Request for Precautionary Measures, *supra* note 19, at 5.

lém do Pará.²³ In particular, the request argued that Haiti was violating the American Convention's prohibition against torture and other cruel, inhuman, or degrading punishment or treatment.²⁴ Our precautionary measures request made the case that, among other things, the government knew (or should have known) about the crisis of sexual violence, but was not acting with due diligence to prevent, investigate, and punish rape perpetrated by non-State actors, thereby condoning the practices.

C. *The IACHR Recognizes State Responsibility for Rape Perpetrated by Private Actors*

In December of that year, the Commission granted our request in a letter to the Haitian Government.²⁵ The letter included recommendations related to the provision of adequate medical and psychological care for victims (including emergency contraception), increased security measures in the camps, improved accountability mechanisms, and inclusion of grassroots women's groups in planning and leadership.²⁶

Although, like all precautionary measures decisions, the Com-

²³ Inter-Am. Convention on the Prevention, Punishment, and Eradication of Violence Against Women, June 9, 1994, 33 I.L.M. 1534 [hereinafter Convention of Belém do Pará].

²⁴ Request for Precautionary Measures, *supra* note 19, at 5.

²⁵ See Letter from Santiago A. Canton, Exec. Sec'y, Inter-Am. Comm'n H.R., to Lisa Davis, Esq., Int'l Women's Human Rights Clinic, City University of New York School of Law, Human Rights Advocacy Dir., MADRE, et al. (Dec. 22, 2010) (on file with author).

²⁶ Precautionary Measures, Inter-Am. Comm'n H.R., Report No. MC-340-10 ("Women and girls residing in 22 Camps for internally displaced persons in Port-au-Prince, Haiti") (on file with author) [hereinafter Precautionary Measures]. The Commission's recommendations include:

1. Ensure medical and psychological care is provided in locations available to victims of sexual abuse of the twenty-two camps for those internally displaced. In particular, ensure that there be:
 - a. privacy during examinations;
 - b. availability of female medical staff members, with a cultural sensitivity and experience with victims of sexual violence;
 - c. issuance of medical certificates;
 - d. HIV prophylaxis; and
 - e. emergency contraception.
2. Implement effective security measures in the twenty-two camps; in particular, provide street lighting, an adequate patrolling in and around the camps, and a greater number of female security forces in police patrols in the camps and in police stations in proximity to the camps;
3. Ensure that public officials responsible for responding to incidents of sexual violence receive training enabling them to respond adequately to complaints of sexual violence and to adopt safety measures;
4. Establish special units within the police and the Public Ministry to

mission's decision in this case is short and provides little legal analysis, its precedential value is consequential in at least three respects.

First, it recognizes that sexual violence is one of the gravest forms of human rights violations requiring immediate action by the State. In fact, hundreds of requests are filed each year, but few are granted, and only a few of those granted involve petitioners at risk of rape.²⁷

Second, the measures apply to an unnamed group of women and girls in contrast to past decisions involving rape that have provided protection only to individual women.²⁸

Third, the decision is the first precautionary measures decision to recognize that a state has a responsibility to prevent sexual violence by non-State actors.²⁹ The decision thus codifies the recognition by General Comment No. 2 to the Convention Against Torture ("CAT") that the failure to exercise due diligence to prevent, investigate, prosecute, and punish sexual violence perpetrated by non-State actors is tantamount to a state's consent or acquiescence in such impermissible acts.³⁰

III. IMPLEMENTATION OF IACHR JURISPRUDENCE

Under domestic and international law, Haiti is obligated to take seriously the measures called for by the Commission.³¹ Failure

investigate cases of rape and other forms of violence against women and girls; and

5. Ensure that grassroots women's groups have full participation and leadership in planning and implementing policies and practices to combat and prevent sexual violence and other forms of violence in the camps.

²⁷ For example, in 2009, the Commission granted only thirty-four requests out of 324 received. Annual Report 2009, ch. III(B) (2) tbls. (a)-(b), OEA/Ser.L/V/II (Dec. 30, 2009).

²⁸ Lisa Davis, *Still Trembling: State Obligation Under International Law to End Post-Earthquake Rape in Haiti*, 65 U. MIAMI L. REV. 867, 890 (2011).

²⁹ *Id.* at 889. The Commission and the Inter-American Court of Human Rights have recognized a State's duty to act with due diligence to prevent violence against women, such as domestic violence, but this has been in the context of individual petitions and the decisions have not recognized torture violations. *See, e.g.*, *Maria da Penha v. Brazil*, Case 12.051, Inter-Am. Comm'n H.R., Report No. 54/01, OEA/Ser.L/V/II.111, doc. 20 rev. ¶ 704 (2000); *González v. Mexico (Cotton Field)*, Preliminary Exceptions, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 205 (Nov. 16, 2009); *Jessica Lenahan (Gonzales) et al. v. United States*, Case 12.626, Inter-Am. Comm'n H.R., Report No. 80/11 (July 21, 2011).

³⁰ Felice Gaer, *Opening Remarks: General Comment No. 2*, 11 N.Y. CITY L. REV. 187, 193-94 (2008).

³¹ The Commission's decision is based on international human rights principles codified in treaties that have been duly signed and ratified by the Haitian govern-

to do so, as CAT General Comment No. 2 states, would provide a form of “encouragement” or “de facto permission” on the part of the State.³² However, it goes without saying, enforcement of the decisions of international bodies is often difficult.

Thus, we are continuing to think of creative ways to implement the framework set forth by the Commission, focusing, as lawyers, on the measures related to accountability and inclusion of grassroots organizations (as required by international law). In March 2011, three months after the Commission issued its decision, we requested and were granted a hearing with the Commission on the status of the precautionary measures decision.³³ The Haitian government did not respond to the precautionary measures request at the time of filing before the Commission ruled, so the hearing provided an opportunity for the government to participate and explain and defend its actions. The hearing also, to some extent, gave the grassroots leaders from KOFIV who testified at the hearing their “day in court.” The significance of grassroots leaders sitting across the table from Haitian government officials should not be overlooked.

Since the hearing, through the ongoing work of the BAI and

ment. *See* CONSTITUTION DE LA RÉPUBLIQUE D’HAÏTI, Mar. 10, 1987, art. 276–2 (“Once international treaties or agreements are approved and ratified in the manner stipulated by the Constitution, they become part of the legislation of the country and abrogate any laws in conflict with them.”).

³² *See* Comm. Against Torture, General Comment 2, Implementation of Article 2 by States Parties, ¶ 18, U.N. Doc. CAT/C/GC/2 (Jan. 24, 2008). General Comment No. 2 reads in relevant part:

The Committee has made clear that where State authorities or others acting in official capacity or under colour of law, know or have reasonable grounds to believe that acts of torture or ill-treatment are being committed by non-State officials or private actors and they fail to exercise due diligence to prevent, investigate, prosecute and punish such non-State officials or private actors consistently with the Convention, the State bears responsibility and its officials should be considered as authors, complicit or otherwise responsible under the Convention for consenting to or acquiescing in such impermissible acts. Since the failure of the State to exercise due diligence to intervene to stop, sanction and provide remedies to victims of torture facilitates and enables non-State actors to commit acts impermissible under the Convention with impunity, the State’s indifference or inaction provides a form of encouragement and/or de facto permission. The Committee has applied this principle to States parties’ failure to prevent and protect victims from gender-based violence, such as rape, domestic violence, female genital mutilation, and trafficking.

³³ Inter-Am. Comm’n H.R., Precautionary Measures 340–10—Women and Girls in camps for Forcibly Displaced Persons in Haiti, 141 Period of Sessions (Mar. 25, 2011) *available at* <http://www.oas.org/es/cidh/audiencias/Hearings.aspx?Lang=En&Session=122>.

KOFAVIV, we have identified barriers to pursuing complaints in Haitian courts and are working to overcome them. For example, the procurement of a medical certificate to corroborate a victim's rape claim is one of the most problematic obstacles preventing full implementation of the Commission's decision.³⁴ Although a medical certificate is not required under Haitian law, the prosecutor's office will often refuse to pursue a rape case if a woman fails to present a medical certificate "verifying" that the rape took place, or if the certificate does not provide sufficient detail.³⁵

Requiring a medical certificate to corroborate a claim of rape perpetuates the inherent distrust of women's testimony. Moreover, medical certificates are difficult to obtain and often do not provide probative evidence (rape is defined based on lack of consent, not use of violence or force).³⁶ Although public hospitals are meant to provide the certificates for free,³⁷ women often cannot make it to the hospital within seventy-two hours after a rape when forensic evidence can still be captured (even assuming that such evidence can be analyzed and used in a Haitian court). The lack of uniformity of the medical certificates across public and private institutions presents another complication.³⁸

To address this issue, we worked with grassroots groups and various Haitian ministries to organize an interactive conference and workshop on the harmonization and improved provision of medical certificates in February this year. Government officials, judges, attorneys, and members of civil society were present and a small committee is now being formed to follow up on the solutions identified. Slowly, we are making progress.

At the same time, we have made suggested changes to Haiti's Draft Law on the Prevention, Punishment, and Eradication of Violence Against Women in Haiti, which is now in its final stages.³⁹ In particular, we recommended that the law explicitly state that a wo-

³⁴ Meena Jagannath, *Barriers to Women's Access to Justice in Haiti*, 15.1 CUNY L. REV. 41, 42 (2012).

³⁵ *Id.* at 41-42.

³⁶ CODE PÉNAL [C. PÉN] [HAITIAN CRIMINAL CODE], art. 278 (Haiti), reprinted in MENAN PIERRE-LOUIS & PATRICK PIERRE LOUISE, CODE PÉNAL app. at 15 (2007).

³⁷ Haitian Presidential Protocol, *Protocole d'Accord sur l'Octroi et la Gratuité du Certificat Médical Relativement aux Agressions Sexuelles et/ou Conjugales* [Memorandum of Agreement on Granting Free Medical Certificates in respect to Sexual and/or Marital Assault] (on file with CUNY Law Review).

³⁸ Jagannath, *supra* note 34, at 42.

³⁹ MADRE ET AL., ACHIEVING JUSTICE FOR VICTIMS OF RAPE AND ADVANCING WOMEN'S RIGHTS: A COMPARATIVE STUDY OF LEGAL REFORM 4 (2012), available at <http://www.trust.org/documents/connect/Madrev16-1final.pdf>.

man's credible testimony alone should be sufficient to yield a conviction in a case of rape in line with international best practices to avoid the medical certificate as an obstacle altogether in some cases.⁴⁰ We are also working with Haitian women's organizations to identify pressure points in Parliament to target once the law is introduced to ensure its passage. Political gridlock, however, has stalled advancements in many areas, including legal reform (but that is a topic for another paper).

Despite barriers and setbacks, the work of BAI attorneys in collaboration with KOFAVIV and others has led to the arrest and prosecution of several accused rapists, and official figures show that reported rapes were down in 2011 from 2010, so one can find hope that the situation is improving. However, we are still aware of dozens of new cases every month and there are yet countless women and girls awaiting justice. Indeed, two recent studies confirm the alarmingly high rates of sexual assault since the earthquake, particularly among women and girls living in displacement camps or otherwise impoverished neighborhoods in the capital.⁴¹ So, there is, of course, much more to be done. The Commission's decision provides a roadmap for priorities moving forward and, as they say in Haiti, *piti piti zwazo fe nich*, or, little by little the bird makes its nest.

⁴⁰ *Id.*

⁴¹ The Center for Human Rights and Global Justice at New York University School of Law conducted a comprehensive empirical study of the prevalence of sexual violence in internally displaced persons ("IDP") camps, finding that fourteen percent of IDP households reported at least one member had been a victim of sexual violence since the earthquake, with sexual violence defined as rape, unwanted touching, or both. CTR. FOR HUMAN RIGHTS AND GLOBAL JUSTICE, YON JE LOUVRI: REDUCING VULNERABILITY TO SEXUAL VIOLENCE IN HAITI'S IDP CAMPS 35, fig.4 (2012). Nine percent of respondents surveyed indicated that one or more of their household members had been raped, defined as "forced into having sex when they did not want to." *Id.* at 36, fig.5. Additionally, seventy percent of survey respondents indicated that their worry about sexual violence against themselves or a member of their household had increased since the earthquake. *Id.* at 37, 39, figs.7-8. The results from a subsequent survey of random Haitian households conducted from August 2011 to February 2012 similarly indicate a dramatic escalation in criminal violence, particularly in densely populated urban centers. Residents of low-income urban areas were twenty-seven times more likely to be sexually assaulted than residents of wealthier, less densely populated areas. ATHENA R. KOLBE & ROBERT MUGGAH, HAITI'S URBAN CRIME WAVE? RESULTS FROM MONTHLY HOUSEHOLD SURVEYS AUGUST 2011-FEBRUARY 2012 1 (2012) available at [http://www.athenakolbe.com/downloads/Strategic_Brief_1_\(Haiti\)_March_2012.pdf](http://www.athenakolbe.com/downloads/Strategic_Brief_1_(Haiti)_March_2012.pdf).