

SYMPOSIUM ON
THE INTERNATIONAL LEGAL OBLIGATION TO CRIMINALIZE MARITAL RAPE
CONSIDERING THE ROLE OF THE STATE:
COMMENT ON “CRIMINALIZING SEXUAL VIOLENCE AGAINST WOMEN
IN INTIMATE RELATIONSHIPS”

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International human rights frameworks offer powerful support for a range of reforms to address marital rape. Melanie Randall and Vasanthi Venkatesh’s valuable commentary, *Criminalizing Sexual Violence against Women in Intimate Relationships*, correctly shines a spotlight on the extent to which marital rape is still accepted in too many countries around the world, and calls for its explicit criminalization under international human rights laws.¹ The commentary serves as an important reminder of the challenges and enduring stereotypes that prevent marital rape from being recognized globally as a human rights violation. But the commentary’s focus on criminalization as the fundamental response is unduly limited. While criminalization, whether explicit or implicit, is a core part of states’ obligations under international human rights law, centering criminal justice risks both shortchanging other approaches and obscuring the problems with criminal justice interventions. Although Randall and Venkatesh acknowledge that criminalization is but one element of a broader strategy, this essay urges a broader view. International human rights laws’ due diligence framework requires a range of responses that include the obligation to prevent, protect, and provide redress, along with the obligation to prosecute and punish. Explicitly framing states’ obligations in terms of that more comprehensive approach would reach broadly to address the cultural and social barriers that allow marital rape to continue without sanction.

Marital Rape and International Human Rights Law

As Randall and Venkatesh’s commentary recognizes, marital rape should fall within various prohibitions governed by international human rights law. These include, *inter alia*, the right to life, freedom from torture, right to equal protection, right to liberty and security of person, and right to health, which are variously protected by a number of international human rights instruments. Some human rights instruments explicitly recognize the harm of marital rape. For example, the Declaration on the Elimination of Violence Against Women defines “violence against women” as encompassing, *inter alia*, marital rape and other forms of violence within the family (art. 2a), and calls on states to pursue by “all appropriate means” policies to eliminate violence against women,

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¹ Melanie Randall & Vasanthi Venkatesh, *Criminalizing Sexual Violence against Women in Intimate Relationships: State Obligations under Human Rights Law*, 109 AJIL UNBOUND 189 (2015).

including criminal and other laws, public education campaigns, and social services for survivors and their families.²

Other international human rights instruments do not explicitly name marital rape as a human rights violation, but nevertheless encompass marital rape within their scope. For example, although the Convention on the Elimination of all Forms of Discrimination against Women, itself does not reference violence against women, General Recommendation 12 requires states to take actions to address violence against women, including sexual violence and abuses in the family.³ Those provisions should be interpreted to encompass marital rape, which of course is a form of sexual violence within the family. General Recommendation 19 explicitly defines violence against women as a form of discrimination and recognizes that traditional attitudes, in which women are regarded as subordinate to men or as having stereotyped roles, perpetuate practices such as family violence and abuse,⁴ and that family violence is one of the “most insidious” forms of violence against women.⁵ The General Recommendation calls on states to “take appropriate and effective measures to overcome all forms of gender-based violence, whether by public or private act,” and to “ensure that laws against family violence and abuse, rape, sexual assault and other gender-based violence give adequate protection to all women, and respect their integrity and dignity.”⁶ Similarly, the Convention against Torture has been interpreted to encompass a prohibition on rape, including rape by private parties when state actors fail to exercise due diligence to prevent, investigate, prosecute and punish those acts.⁷ Regional treaties, including the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (“Istanbul Convention”) and the Convention of Belém do Pará also define violence against women or domestic violence to include all acts of physical, sexual, psychological or economic violence that occur within the family.⁸

Regardless whether these international human rights instruments explicitly name marital rape, the prohibitions with respect to sexual violence, including sexual violence within the family, combined with the instruments’ recognition of the link between traditional stereotypes and attitudes sanctioning violence against women, discrimination against women, and practices involving violence, should lay to rest any question whether marital rape falls within these instruments’ ambit.⁹ Any purported justifications for excluding marital rape from

² UN Declaration on the Elimination of Violence against Women art. 4, GA Res. 48/104 (Dec. 20, 1993).

³ See, e.g., Convention on the Elimination of all Forms of Discrimination against Women, GA Res. 34/180 (Dec. 18, 1979); Committee on the Elimination of Discrimination Against Women, General Recommendation No. 12: Violence against Women, UN Doc. A/44/38 (1989).

⁴ Committee on the Elimination of Discrimination Against Women, General Recommendation 19, para. 11, UN Doc. A/47/38 (Jan. 29, 1992) [hereinafter CEDAW, General Recommendation 19].

⁵ *Id.* at para. 23.

⁶ *Id.* at para. 24.

⁷ See, e.g., Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 UNTS 85. Comm. Against Torture, General Comment No. 2: Implementation of Article 2 by States Parties, para. 18, UN Doc. CAT/C/GC/2 (Jan. 24, 2008) (recognizing that states’ due diligence obligation to address torture “or other ill-treatment” has been applied to gender-based violence such as rape, domestic violence, female genital mutilation, and trafficking); Rhonda Copelon, Gender Violence As Torture: The Contribution of CAT General Comment No. 2, 11 N.Y. CITY L. REV. 229, 238 (2008).

⁸ See Organization of American States, Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women art. 2, June 9 1994, 33 ILM 1534.; Council of Europe, Convention on Preventing and Combating Violence Against Women and Domestic Violence, art. 3, May 11, 2011, C.E.T.S. No. 210; see also African Commission on Human and Peoples’ Rights, Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa art. 4(2)(a) (July 11, 2003) (requiring all states to take “effective measures” to enact and enforce laws to prohibit all forms of violence against women including unwanted or forced sex whether the violence takes place in private or public).

⁹ See, e.g., CEDAW, General Recommendation 19, *supra* note 4, at para.6 (“Gender-based violence may breach specific provisions of the Convention, regardless of whether those provisions expressly mention violence.”).

prohibitions of other forms of rape and sexual violence, are grounded in the very traditional roles and stereotypes that the international human rights instruments mentioned above recognize perpetuate discrimination.¹⁰ Explicit prohibitions, both in the text of international human rights instruments themselves and in national and local laws, would offer useful clarity and signal strong condemnation. Moreover, absent express prohibitions, lesser-related offenses may allow unwanted sexual contact within marriage to escape review.¹¹

Decisions in cases brought under a number of international human rights instruments also reflect international human rights tribunals' recognition that rape and sexual assault, and states' failure adequately to respond to allegations of rape and sexual assault, violate international human rights prohibitions. Decisions holding states accountable for responding to sexual assault in a variety of contexts underscore that tribunals interpreting international human rights instruments define rape and sexual assault in broad terms, and recognize the links between traditional discriminatory attitudes and the persistence of sexual violence.¹² The reasoning in those decisions would apply as well to cases involving marital rape.

Due Diligence and State Obligations to Address Marital Rape

The due diligence obligation articulates states' human rights obligations and increasingly has been applied to gender violence.¹³ The obligation is widely understood as including an obligation on the state to prevent, protect against, prosecute, punish, and provide redress for acts of gender violence. As such, the obligation encompasses criminal justice responses in its obligations to prosecute and punish. But the transformative power of international human rights obligations lies in the scope of its command and reaches beyond its criminal justice focus. By framing states' obligations to include the obligation to prevent, protect against, and provide redress for acts of gender violence, the due diligence obligation requires a wide range of responses. The obligation directs states to criminalize, but also to provide comprehensive services for survivors, as well as to support programs that address the underlying social, cultural, and political biases that allow gender violence, including marital rape, to persist.

¹⁰ See, e.g., Michelle J. Anderson, *Marital Rape Laws Globally: Rationales and Snapshots around the World*, in MARITAL RAPE: CONSENT, MARRIAGE AND SOCIAL CHANGE IN GLOBAL CONTEXT 262-265 (Kersti Yllo & Gabriela Torres, eds., forthcoming 2016) (discussing justifications for deeming all sexual intercourse between husband and wife as lawful).

¹¹ See *id.* at 266-68 (describing additional criteria imposed in charges of marital sexual assault in the United States that pose barriers to successful prosecution).

¹² See, e.g., *M.C. v. Bulgaria*, 2003-XII Eur. Ct. H.R. 1 (recognizing states' obligation to punish all forms of rape and sexual assault in a case involving the sexual assault of a 14-year-old woman); Comm. on the Elimination of All Forms of Discrimination Against Women, *S.V.P. v. Bulgaria*, No. 31/2011, UN Doc. CEDAW/C/53/D/31/2011 (24 Nov., 2012) (recognizing gender violence as a form of discrimination against women in a case involving the sexual molestation of minor girl); Comm. on the Elimination of Discrimination Against Women, *Vertido v. Philippines*, No. 18/2008, UN Doc. CEDAW/C/46/D/18/2008 (Sept. 22, 2010) (recognizing the role of stereotypes and customs and practices that constitute discrimination against women in finding the acquittal of the president of a chamber of commerce for the sexual assault of an employee to be a violation of CEDAW); *C.K. v. Commissioner of Police*, Petition 8 of 2012, Kenya Law Reports, Republic of Kenya, High Court at Meru (2013) (recognizing that "defilement" of young women violates fundamental rights and freedoms); see also, e.g., *C.A.S. v. Romania*, App. No. 26692/05 (2012) (repeated sexual assault of seven year old boy violated international obligations); *González et al. (Cotton Field) v. Mexico*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 205 (Nov. 16, 2009) (sexual assaults and murder of young women constituted a form of discrimination).

¹³ For a fuller discussion of states' due diligence obligations with respect to gender violence, see, e.g., Julie Goldscheid & Debra J. Liebowitz, *Due Diligence and Gender Violence: Parsing its Power and its Perils*, 48 CORNELL INT'L L.J. 301 (2015).

That broader reach is critical. Although Randall and Venkatesh acknowledge that criminalization must be supplemented by other approaches, such as public education and prevention programs, centering criminalization poses a risk that other approaches will be shortchanged or ignored.¹⁴ Moreover, criminal justice responses have proved problematic. Survivors may be reluctant to seek criminal justice interventions, even when they are available, for multiple reasons.¹⁵ Sexual violence committed by state actors, whether the military, paramilitary, or other law enforcement officers, may leave many survivors skeptical of the response they will receive if they call police.¹⁶ Police bias against women, as well as their biases based on race, sexuality, poverty, and migrant status, also leave many reluctant to seek criminal justice interventions.¹⁷ For LGBT survivors, particularly those in countries that criminalize private, consensual, same-sex behavior, criminal justice responses are effectively meaningless.¹⁸ Many survivors who live in communities subject to mass incarceration will not seek out additional criminal justice interventions.¹⁹ Survivors may resist police intervention because they fear their children will be taken away as a result; immigrant survivors may fear that they or their partners will be subject to deportation; survivors with criminal records, those who are sex workers, and those with histories of mental illness or drug addiction may fear that they will risk being arrested if they report abuse.²⁰ Even when marital rape is criminalized, survivors may not seek prosecution since the process is time consuming, often inefficient, and frequently subjects the “victim” to intrusive questioning they may experience as retraumatizing.²¹ Moreover, many survivors want the abuse to stop, but for reasons ranging from economics to love, may not want to see their partner arrested.²²

Finally, noncriminal justice related interventions are key to assisting survivors and ending abuse. Even if marital rape is criminalized, survivors need services ranging from counseling, to economic interventions such as employment, housing and other financial assistance. While criminalization may signify societal condemnation and may in some cases lead to punishment for the perpetrator, it affords an *ex post facto* remedy that does not offer practical assistance to survivors or directly address root causes. As Randall and Venkatesh rightly observe, even where marital rape is criminalized, implementation and enforcement problems remain. The human rights

¹⁴ See, e.g., Julie Goldscheid, *Domestic Violence as Sex Discrimination: Comparing American and International Approaches*, 28 T. JEFFERSON L. REV. 355, 389 (2006) (noting criminal justice-related reforms as the most common measures taken to meet international obligations under CEDAW, based on review of country reports submitted to Special Rapporteur on Violence Against Women).

¹⁵ See, e.g., National Domestic Violence Hotline, *Who Will Help Me? Domestic Violence Survivors Speak Out About Law Enforcement Responses* (2015) (finding, *inter alia*, strong reluctance to turn to law enforcement for help among survivors who had called the police, as well as those that had not called the police).

¹⁶ See, e.g., Goldscheid & Liebowitz, *supra* note 13, at 213; see also, e.g., AFRICAN AMERICAN POLICY FORUM, *SAY HER NAME: RESISTING POLICE BRUTALITY AGAINST BLACK WOMEN* (2015).

¹⁷ For a collection of research, and a recent study of service providers in the United States, see, ACLU ET AL., *RESPONSES FROM THE FIELD: SEXUAL ASSAULT, DOMESTIC VIOLENCE, AND POLICING* (2015) [hereinafter ACLU, *RESPONSES FROM THE FIELD*].

¹⁸ Goldscheid & Liebowitz, *supra* note 13, at 315. Of course, prohibitions of marital rape would not aid LGBT survivors in jurisdictions that criminalize private, same-sex behavior, where both parties would be subject to sanction regardless of any questions about consent, autonomy or choice. This inherent limitation in the reach of efforts to eliminate marital rape confirm the value of broad-based advocacy that reaches both beyond criminalization and beyond marriage.

¹⁹ See, e.g., MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2012); see generally, e.g., ACLU, *RESPONSES FROM THE FIELD*, *supra* note 17 (detailing reasons survivors in marginalized communities are reluctant to call police).

²⁰ ACLU, *RESPONSES FROM THE FIELD*, *supra* note 17, at 7-9 (reviewing research), 40-42 (reporting survey results).

²¹ *Id.* at 30-31.

²² See, e.g., *id.* at 2, 43; see also, e.g., Sally F. Goldfarb, *Reconciling Civil Protection Orders for Domestic Violence: Can Law Help End the Abuse Without Ending the Relationship?*, 29 CARDOZO L. REV. 1487 (2008).

framework supports a comprehensive response by highlighting prevention as a core state response and by underscoring the need to shift underlying biases and social norms. Particularly since questions remain about what mix of policy and legal responses are most effective, multiple strategies are needed.²³

Randall and Venkatesh's important arguments should inspire policy-makers in international and national fora to make clear that marital rape violates international human rights laws. While explicit criminalization should be a part of states' responses, laws, policies and programs that advance states' obligations to prevent, protect, and provide redress should be prioritized as well to promote the symbolic and practical interventions needed to support transformational and lasting change.

²³ See, e.g., Claire M. Renzetti et al., *Building the Knowledge Base: Research Funding through VAWA*, CUNY L. REV. FOOTNOTE FORUM (2014).