2002

The Legal Frontiers of Gender-Based Violence, Persecution, and Discrimination

Linda A. Malone
William & Mary Law School, lamalo@wm.edu

Repository Citation
http://scholarship.law.wm.edu/popular_media/301

Copyright c 2002 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository. http://scholarship.law.wm.edu/popular_media
THE LEGAL FRONTIERS OF GENDER-BASED VIOLENCE, PERSECUTION, AND DISCRIMINATION

Linda A. Malone

If I lived in Afghanistan, I would be a beggar or worse. In the United States, I am a chaired professor of law with two happy, healthy young daughters. In Afghanistan, I would not be permitted to teach. My daughters would not be permitted to go to school. I have no close male relatives, so I could not leave the house (if I had one), even if I were covered from head to toe with the restrictive burkha. The windows of every woman’s house must be painted so no woman can be seen. I could be stoned in the street if my wrist or ankle showed; or if my shoes made any noise. Women and female children in Afghanistan must be invisible. Most of them are also starving from four years of Taliban rule and drought. The global community has almost universally condemned the Taliban for its treatment of women, but has struggled ineffectively with how to remedy or punish a ruling coalition that does not observe even the most fundamental rules of law which govern states and recognized governments. There are no precedents for addressing apartheid on the basis of gender.

My involvement in women’s rights under international law began in 1991 with the beginning of the war in Bosnia. I had been working for some time on human rights issues, particularly in the Mideast. I received a call from a former law professor of mine, who was helping to put together the legal team which would file a complaint on behalf of Bosnia-Herzegovina before the World Court against the former republic of Yugoslavia. The essential charge of the complaint was that Milosevic, the head of Yugoslavia and Macedonia, had aided and abetted the genocidal practices of the Bosnian Serb paramilitary against Bosnia and the Bosnian Muslims.

At that time I began hearing the horrendous stories of systematic rape, forced prostitution, forced pregnancies, and other gender-based atrocities which would eventually become general knowledge in the news accounts of the war. As a human rights lawyer, I was astonished at how inadequate human rights law was in addressing persecution on the basis of gender. The most common sense proposition—such as custodial rape being equivalent to torture—had yet to be established as a matter of international law. As co-counsel for Bosnia, I was primarily responsible for addressing the sexual violence of the war as violations of international humanitarian law. We succeeded in obtaining a preliminary injunction that the offenses as outlined in our petition must cease, but the World Court has yet to issue a final determination on the merits that Milosevic, and thus Yugoslavia, was responsible for the genocide committed by the Bosnian Serb paramilitary.

The attention to these issues brought about by the war in Bosnia led to long-needed improvement in the formulation of human rights law to address gender-based violence and persecution. In the UN Security Council Resolution establishing the international criminal tribunal for Yugoslavia, there was no specific mention of sexual violence. It was initially the dedication of the first prosecutor, Richard Goldstone, and of women’s rights advocates, to addressing these issues which brought about inclusion of sexual offenses in the tribunal’s indictments. Ironically, the first indictment alleging sexual violence was on behalf of a male victim.

When the UN committee was first investigating the atrocities which had occurred in Bosnia, one of the first witnesses the investigators heard was a Bosnian Serb. He was a local soccer star, married to a Bosnian Muslim, who had a popular café visited by Serbs and Muslims before the war. After the war began, a Bosnian Serb paramilitary group came to his home. They shattered both of his legs, telling him he would no longer play soccer. They raped his wife and two young daughters, and then cut their throats. Before leaving, they told him they would not kill him so he would never forget. He didn’t forget. He told his story to the investigators, and told them that now it was their responsibility to remember. Shortly after his testimony he took his own life.

The testimony of courageous victims made sexual violence the focus of legal reform and reformulation of the legal standards. In contrast to the UN statute establishing the Yugoslavian tribunal, the statute establishing the Rwandan tribunal was explicit and extremely detailed in delineating sexual enslavement, systematic rape, and other forms of sexual violence as international crimes. Similarly, the treaty establishing the International Criminal Court builds upon these developments to incorporate gender-based violence into its jurisdiction.
Recently, the United Nations has made abolition of sexual slavery and sex trafficking of women and children a priority. Once again, the dimensions of the problem and the current inadequacy of the law is astonishing, as the following statistics illustrate.

- 80,000 women and children from Myanmar, Cambodia, Laos and China have been sold into Thailand's sex industry since 1990.
- 5,000-7,000 Nepali girls, some as young as nine, are trafficked into the red light districts of India each year. 200,000 Nepali girls, mostly under 14, have been trafficked into India in the last decade. 6
- Afghani women are sold into prostitution in Pakistan for 600 rupees per kilogram.
- Albanian women are regularly trafficked into Italy, more than 10,000 in the last 5 years.
- 45,000-50,000 women and children from Asia, Latin America and Eastern Europe are trafficked for sexual exploitation into the United States. The going rate for a woman or child sold to the U.S. sex trade is between $12,000 and $18,000.
- 10,000 children between 6 and 14 are enslaved in brothels in Sri Lanka. 10
- 5,000 children from 10 to 16 are sold into sexual slavery in Cambodia every year. 11
- 300,000 women have been trafficked into the Western European sex trade in the last 10 years. 12
- 20,000 women are in brothels in the Czech Republic, most are from the former USSR. 13
- 10,000 Albanian women have been trafficked into Italy in the last 5 years and forced into prostitution. 14
- 250 women from Romania, Moldavia and the Ukraine were discovered in Bosnia in the last 2 years having been trafficked and forced into prostitution. 15
- 5 women from Moldova were discovered in a Phnom Penh, Cambodia brothel in 2000. 16
- Lithuania, Latvia and Estonia have become sex centers for Western Europeans. The women trafficked there are from the former Soviet Union. 17
- 1,000 women trafficked from the former USSR into Israel became prostitutes in exchange for legal documentation. 18
- 3,000 Nigerian women have been forced into prostitution in Italy. 19
- Two million women and children are held in sexual servitude. Eighty percent of them are under the age of 24 and roughly 50% of them were internationally trafficked from one country to another. 20
- 15% of the sexually exploited population, or 30,000 women and children, die every year-equivalent over a 10-year span to the number killed by atomic bombs in Hiroshima and Nagasaki.

The United Nations in December of 2000 adopted an international convention against organized crime with a protocol on international trafficking by organized crime elements. 21 In part, the adoption of the Protocol was a response to the inadequacy, and disgracefully inadequate ratification, of the 1949 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others. Only 25% of the world's states had ratified the 1949 Convention. In addition, there are no regional treaties addressing the problem of sexual trafficking.

Formulation of a universal treaty on sexual trafficking was complicated by a normative debate over whether and when a woman could "consent" to prostitution and trafficking. Although there are certainly some situations in which the outcome of that debate is significant, these situations are hardly representative of, or relevant to, the vast majority of the victims of sexual trafficking, and totally irrelevant to the plight of the millions of children who have been sexually exploited. At the very least the harsh reality of prostitution and sexual trafficking mandates a presumption that prostitution generally, and sexual trafficking in particular, are not truly consensual practices on the part of the women involved. This presumption is manifest in the new Protocol.

There is much that needs to be done, and much of that work is closer to home. The Report of the Gender Bias Task Force demonstrates how pervasive and yet obscured gender discrimination can be in seemingly neutral rules and processes. 22 The effects of such discrimination, however, are more visible than its causes, and it is often children who suffer the most from the discrimination their mothers encounter. Nowhere is this effect more apparent than in the examples from family law cited in the Report. Nationwide statistics demonstrate that the standard of living and income for non-custodial fathers increases after divorce while income and the standard of living for custodial mothers, and their children, declines significantly.

Despite the provision in the Virginia child support statute that maintenance of the children's standard of living is a factor, 23 as a factor outside the guidelines the reality is that it is an uphill litigation battle to get child support to ensure that the children of divorce are not punished financially. Making matters worse is the very ill
advised allowance for reduced child support based on "shared custody." If the non-custodial parent can accumulate 90 days of visitation over the course of a year, child support can be reduced. The fundamental flaw in the provision is that every day is not financially equivalent in supporting a child. The non-custodial parent, whose visitation is in most cases weekends, summer, and holidays, has to provide little financial support other than food during those periods, while the custodial parent still bears the costs of school, activities, lessons, sports, medical and dental bills, clothing and all the other necessary expenses of raising a child during the rest of the year. While lawmakers criticize "welfare mothers" who continue to have children, they pass laws implementing the "Colorado rule" which allows a parent to reduce child support to his prior children for each child he has and supports subsequent to the divorce.

In the 25-year landmark study of the effects of divorce on children, The Unexpected Legacy of Divorce, authors J. Wallerstein, J. Lewis and S. Blakeslee find that these children, punished financially and shuttled back and forth on rigid visitation schedules, believe their interests were never considered by the courts or lawyers, and as adults resent and distrust the legal system as a result. Are decisions being made "in the best interests of the child?" The adult children of divorce apparently do not think so. The "best interests of the child" has become a meaningless mantra of family law, which serves best to insulate bad court decisions from being overturned on appeal as shrouded in discretion.

As women lawyers, we should certainly be proud of what we have accomplished, but not complacent. What needs to be done in reform of the law on any of these issues will inevitably depend on our voices and dedication. As I finalized my remarks from last October, the United States was bombing Taliban bases in Afghanistan. I could not help but wonder how different the situation would be, and how many lives could have been saved, if the world had united as forcefully against the Taliban four years ago for its persecution of women.

Linda A. Malone is the Marshall-Wythe Foundation Professor of Law at The College of William and Mary School of Law. She has been a visiting professor at the University of Virginia Law School, Washington and Lee Law School, Duke University, the University of Arizona, and University of Denver law schools and has taught at the University of Arkansas Law School in Fayetteville. She is the author of numerous publications, including several books on international law, human rights, and environmental law. She was also the Associate Editor of the Yearbook of International Environmental Law and has served on the Advisory Council to the National Enforcement Training Institute of the U. S. Environmental Protection Agency, the Board of Visitors of Duke Law School, and the Board of Directors of the American Agricultural Law Association. She was a delegate to the United Nations Conference on the Environment and Development in Rio in 1992, co-counsel to Bosnia-Hercegovina in its genocide case against Serbia and Montenegro before the World Court, and co-counsel to Paraguay in Paraguay v. Virginia. In 1998 she received the Fulbright/OSCE Regional Research Award to conduct research on women's and children's rights in Eastern Europe. Professor Malone received her B.A. from Vassar, her J.D. from Duke, where she was Research and Managing Editor of the Duke Law Journal, and her L.L.M. from the University of Illinois. Prior to joining the William and Mary faculty in 1988, she served as a law clerk for the Honorable Wilbur F. Pell, United States Court of Appeals for the Seventh Circuit, and practiced law in Chicago and Atlanta. She is presently serving on the ABA's Special Subcommittee on the Rights of the Child, which is working on passage of the Convention on the Elimination of Discrimination Against Women and the Convention on the Rights of the Child, and on a committee of the National Academy of Sciences on scientific methodologies for measuring cleanup of contaminated sites. In 2000 she received the first Millennium Award from the Virginia Women's Bar Association, given to a professor, a judge, and a practitioner for their contribution to the role of women and women's rights in the law.
Endnotes

1. Author’s Note: As this article was going to press, the prospects for women being brought back into Afghanistan’s civil society had improved. In March of 2002, girls were allowed to return to school, for many of them the first time in seven years. Women returned as teachers as well. In a major step, a U.N. sponsored commission pledged on March 31 to include at least 160 women in an emergency council of elders that will convene on June 10 to choose Afghanistan’s post-Taliban leaders. Anyone linked to terrorist groups, narcotics trafficking, human rights abuses, or war crimes has been barred from the council. DAILY PRESS, Mon., April 1, 2002, at A3, col.1.


6. Id.

7. Id.

8. Id.

9. Id.

10. Id.

11. Id.

12. Id.

13. Id.

14. Id.

15. Id.

16. Id.

17. Id.

18. Id.

19. Id.

20. Id.

21. Id.


