

ADVANCES AND MISSED OPPORTUNITIES IN THE INTERNATIONAL
PROSECUTION OF GENDER-BASED CRIMES

*Susana SàCouto**

Good morning. As we just heard, in the past decade, and particularly since 1998, there's been an incredible transformation in the treatment of sexual and gender-based violence in international humanitarian and criminal law. Before this, as both Sita Balthazar and our moderator have alluded to, crimes committed exclusively or disproportionately against women and girls in times of conflict were largely either ignored or, at most, treated as secondary to other crimes. As Sita mentioned, the crime of rape was not expressly included in the charters of the Nuremberg Tribunal or the International Military Tribunal for the Far East.

And while rape was recognized as a violation of the law of war, as far back as the 15th century – when 27 judges of the Holy Roman Empire judged and condemned Peter van Hagenbach in a German court because he allowed his troops to rape and kill innocent civilians – international humanitarian law has traditionally linked sexual violence with crimes against honor or crimes against dignity rather than crimes of violence. An example of this is found in the 1949 Geneva Conventions; Article 27 of the fourth Geneva Convention protecting civilians states that women should be protected, especially against any attack on their honor and particularly against rape and forced prostitution or any form of indecent assault.

However, overwhelming evidence of the systematic raping of women in conflicts over the last decade has helped to create unprecedented levels of awareness of rape as a method of war and political repression. As a result, great strides have been made, as we just heard, in the condemnation and prosecution of sexual and gender-based violence. Rape and other forms of sexual violence have been successfully prosecuted as war crimes, as crimes against humanity and even as genocide by the *ad hoc* international criminal tribunals established to prosecute war crimes in the former Yugoslavia (ICTY) and Rwanda (ICTR). The Rome Statute that we heard about this

* Director, War Crimes Research Office, American University Washington College of Law; former Director of Legal Services, Women Empowered Against Violence, Inc. (WEAVE). The opinions expressed are those of the author alone.

morning that gave rise to the International Criminal Court certainly incorporates these advances and actually takes us a bit further, such as by explicitly including forced pregnancy in the crimes against humanity provision.

But for the most part, these tribunals have approached sexual violence as constituting the *actus reus*, or the material act, of the crime. What remains largely unexplored is a question that I think deserves some attention and on which I will focus my remarks today, and that question is whether the systematic and/or widespread use of rape and other forms of sexual violence tells us anything about a perpetrator's mental state. In other words, can the *mens rea*, or mental element of these crimes, particularly of genocide, be inferred at least in part from pattern evidence of sexual violence? It's an important question, not just a theoretical question, because it may in fact affect how crimes that are disproportionately directed against, or that disproportionately affect, women are charged and, therefore, whether they are adequately investigated and prosecuted.

The question becomes particularly relevant in light of the findings made last year by the U.N. Commission of Experts tasked with determining whether there was sufficient evidence to conclude that genocide had occurred in the Darfur region of Sudan. Despite finding that rapes had been used to terrorize, demoralize, and humiliate the targeted population, the Commission concluded that there wasn't enough evidence of genocidal intent. Had they considered the question of what pattern evidence of sexual violence tells us about a perpetrator's intent, among a number of other indicators of intent, they might have come to a different conclusion. My sense is that despite increased accountability for crimes against women, there remains a limited understanding of the various functions that mass sexual and gender-based violence play in times of conflict or mass violence.

Sexual violence can function, as we just heard, and as the ICTR case of *Akayesu* recognized, as the means by which to eventually destroy a particular group. Indeed, mass sexual violence can result, among countless other injuries, in permanent gynecological injury to large numbers of women of a particular group, thereby destroying their capacity to reproduce, and perhaps even destroying the capacity of a group to survive. An example of this is what happened to the "comfort women" subjected to sexual slavery by the Japanese military in World War II. According to some commentators, a majority of them suffered such extensive damage to their reproductive organs as a result of the abuses inflicted upon them that they lost their reproductive capacity altogether.

But the mass rape and other forms of sexual violence can arguably also function as a message to the group. When committed on a mass scale and in certain patterns, such as in front of family members or in public, sexual violence can communicate an intent to destroy the group, or the very

foundation of a particular group, and this is particularly true perhaps in social, cultural and religious communities where acts of sexual violence not only shame and humiliate the victim, but also tear at the fabric of her community.

As one commentator who has written about sex-based violence in the Holocaust has noted, and here she was referring to public nudity and the removal of bodily hair for selection into concentration camps, in these types of contexts, there is absolutely “no confusion between victim and perpetrator over the content of the message.” She says, “[t]aking away a woman’s clothing and exposing her to the gaze of [unfamiliar] men was a crude and effective act of sexual violation. Nudity in a public context was an abnormal and grotesque experience for these women and the perpetrators understood it would be experienced [by the women] as such.” She further notes that because most were religious women, these acts were all the more shameful and humiliating and therefore, in her terms, “organically linked to the enterprise of cultural eradication in which destruction of the carriers of the community was a central plank of policy.” It appears that when committed on a mass scale and in certain patterns, sexual and gender-based violence may have communicative value and as such may have something to say about the intent of the perpetrator.

Now stepping back, the prosecution of genocide involves two basic elements: the *actus reus*, or the material element, the physical acts by which genocide is committed, and the intent, genocidal intent, or the *mens rea* of the perpetrator. It’s this last element, the specific intent to destroy a particular national, ethnic, racial or religious group that has been proven to be extraordinarily difficult to prove. It was in fact the problems of proof surrounding the *mens rea* element of genocide that precluded the U.N. Commission of Experts from finding that there had been a state policy of genocide in Darfur. Proving genocidal intent demands a showing that perpetrators not only killed or caused serious injury to members of a particular group, but also that they did so specifically seeking to destroy the group, in whole or in part. It’s this specific intent that is said to distinguish it from other crimes, such as crimes against humanity.

Now, international jurisprudence, particularly that of the ICTY and ICTR, has recognized the difficulty of proving genocidal intent. Very infrequently is there a smoking gun evidence of intent; so in the absence of a confession, genocidal intent can be inferred from other acts. For example, tribunals have looked to statements or propaganda condemning the group as a whole, acts of violence directed at cultural symbols associated with a group, policies of discrimination against members of the group, sheer numbers of victims or scale of atrocities, and also patterns of systematicity of the violence against a particular group or the brutality or gratuity of the violence employed. Significantly, one decision points to the perpetration of

acts which violate, or which perpetrators themselves consider to violate, the very foundation of the group as evidence from which genocidal intent can be inferred.

So the character and the acts in question, as well as the manner in which they are carried out, can constitute strong evidence of intent, the Tribunals say. However, few cases have recognized the existence of systematic sexual violence as evidence of this intent. One notable exception is a decision in the case of *Karadzic* and *Mladic* – who, by the way, have not been prosecuted by the ICTY yet, as they remain at large. This was a decision reviewing their indictment. In it, the Tribunal found that the specific nature of the means used to achieve the objective of what they termed “ethnic cleansing” during the Bosnian conflict, including the systematic rape of women, tended to show that the acts were designed to reach “the very foundations of the group.” Noting that the systematic rape of women was in some cases committed to transmit a new ethnic identity to the child and in others to dismember the group through terror and humiliation, the Tribunal found that genocidal intent could be derived at least in part from systematic rape of the kind perpetrated during the Bosnian conflict.

It seems logical that the Tribunal would have come to this conclusion, I would argue. After all, the sexual violence perpetrated against Bosnian Muslim and Bosnian Croat women during the Bosnian conflict was intimately tied to the process of destruction of their ethnic group; the mass scale, the extremely public and humiliating nature of the rapes and the systematic nature in which they were committed clearly constitute facts which arguably violate the very foundation of the group.

Similarly, in the Rwandan conflict, Tutsi women were raped in public, gang raped, and raped using recurring methods, such as with foreign objects or in especially humiliating ways. And as the trial chamber in *Akayesu* described, acts of rape and sexual violence were committed solely against Tutsi women, many of whom were subjected to the worst public humiliation, mutilated and raped several times often in public and often by more than one assailant.

The patterns show that this was not the kind of rape that some would argue accompanies the lawlessness that exists in times of conflict. The accounts from many of the victims from the conflicts in the former Yugoslavia and Rwanda suggest that these rapes were conducted in a systematic manner under a plan conceived to wipe out the victims’ group. As the Tribunal in *Akayesu* concluded, the “rapes resulted in the physical and psychological destruction of the Tutsi women, their families and the communities.” Recognizing the devastating impact of sexual violence, the Tribunal emphasized that “sexual violence was a step in the process of

destruction of the Tutsi group—destruction of the spirit, of the will to live and of life itself.”

Although the *Akayesu* Trial Chamber did not use evidence of sexual violence in its analysis of genocidal intent, the context and manner in which the rapes were committed suggest that the rapes themselves had what the commentator I spoke of earlier has termed “communicative value.” Not only did the rapes often result in severe physical injuries, sometimes causing permanent gynecological injury and destroying women’s capacity to reproduce, but some rapes also resulted in what both victim and perpetrator considered to be children of a new ethnicity. In patriarchal societies such as in the Balkans, where the family name passes through the male, the perpetrators of rape no doubt knew that the victim and her community would experience forced pregnancy as a way to transmit a new ethnic identity to the child. Perpetrated on a systematic scale, this pattern provides persuasive evidence of an intent to violate the very foundation of the group.

Second, having lived among many of their victims in societies which place a high value on the chastity and purity of women, the perpetrators no doubt knew and understood that women raped or impregnated as a result of rape would likely be viewed within their own community as tainted and/or unworthy of marriage. There were reports, for instance, coming out of the former Yugoslavia in the mid ‘90’s that some husbands abandoned their wives after learning that they had been raped.

The public and systematic nature of these rapes, resulting in what perpetrators no doubt assumed would be the rejection and ostracizing of the victims by their families and communities, arguably communicated a clear message that the perpetrator intended to destroy not only the individual victims’ bodily integrity, but also the group’s internal cohesion and capacity to exist as such. Although *Akayesu* found this pattern to be evidence that the rapes constituted genocide in the same way as any other *act*, rather than as evidence of *intent*, the analysis demonstrates the communicative value of group destruction that accompanies the perpetration of sexual violence.

So why does this matter? Why should we worry really about the use of systematic rape and sexual violence as evidence of intent? Well as we know and as Sita Balthazar mentioned, the way in which criminal conduct is charged and prosecuted matters. It matters not only because of the symbolic value and message that it sends—that crimes perpetrated exclusively or disproportionately against women and girls are just as serious as other international crimes—but also because sanctions of those convicted of genocide may be stiffer than for those convicted of other types of international crimes.

Without a full understanding of the various functions that sexual and gender-based violence can play in the context of mass violence, these crimes are unlikely to be adequately charged or investigated and, again, this

can affect eventually how these crimes are prosecuted. As I mentioned, the report of the Commission of Experts on Darfur is a good example of this. The Commission found evidence of genocidal intent lacking. It could have examined whether the nature, scale and context in which the sexual violence occurred in Darfur was intended to communicate a message of destruction, but it didn't. Indeed, the Commission's Report failed to recognize the multiple functions that rape can play in a genocidal scheme. As in Rwanda, rules of descent in Sudan trace identity through patrilineal lines. As a result, mass rape can be used as a way to communicate an intention to transmit a new identity to offspring and alter the ethnic composition of a community. There have been reports for instance that the government of Sudan permitted widespread gang rape to "make what they say will be lighter skinned babies and ensure that non-Arab tribes will be too degraded to return to their homes." As in Rwanda and the former Yugoslavia, the rapes committed in Darfur have been described as often flagrant, occurring in the full view of many people. Moreover, a recent Physician for Human Rights report suggests that, as in other conflicts, a profound social stigma is attached to rape in Darfurian society, suggesting that the tactic was used intentionally to publicly humiliate the husbands and shame the women, thus weakening familial and societal bonds. Although this pattern of sexual violence may well suggest an intent to destroy the targeted group of non-Arab tribes, this issue was not addressed by the Commission. Instead, the Commission focused its analysis of intent on the fact that the perpetrators of atrocity in Sudan targeted primarily young men feared to be rebels or potential rebels and concluded, therefore, that the primary purpose of these attacks as well as the forcible expulsion of large sections of the population from their villages amounted to "counter-insurgency warfare."

In arriving at its conclusion that genocidal intent was lacking, the Commission pointed out that not everyone who was targeted was killed, but as ICTY jurisprudence has held, the failure to kill everyone in the group with whom the perpetrator comes into contact does not negate other evidence of genocidal intent. In this case, the Commission could have explored whether the sexual violence committed against women and girls in these villages, in combination with other abuses, indicated an intent to destroy the group. But it chose not to. Indeed, it did not examine whether the systematic rape it characterized in an earlier part of the report as a means to terrorize, demoralize and humiliate the population would inevitably weaken or destroy the lives of women in the group, including their reproductive capacity, and thereby indicate an intent on the part of the perpetrators to eventually destroy the group. Had it done so, the Commission might have reached a different conclusion.

Unfortunately, the Darfur example is not the only example. The *Kunarac* case, decided by the ICTY, focused almost exclusively on crimes

of sexual violence that occurred in the town of *Foca*. The allegations included gang rapes, rapes in detention, rapes in public, rapes leading to permanent gynecological harm and rapes accompanied by statements such as “you will now give birth to good Serbian children.” Based on *Akayesu* and the decision in the case of *Karadzic* and *Mladic*, the character and the nature of the acts in question, as well as the manner and context in which they were carried out, seemed sufficient to permit an inference of genocidal intent, but genocide was not charged in that case. Charges in that case were rape as a crime against humanity and rape as a violation of the laws of war.

Two small caveats I think should be addressed in this argument. One is that some would argue that highlighting the harm to the community done by crimes committed against women risks diminishing the harm to the individual victims. I would submit that recognizing the many functions sexual violence perpetrated on a mass scale can play does quite the opposite. Acknowledging the dual functionality of rape and sexual violence as being relevant to proving both the act of genocide and the mental state of the perpetrator helps to more accurately describe the harms that women and their communities experience and, as the examples in the case of Darfur and *Foca* show, to ensure that the harms are sanctioned in an appropriate way.

I think a more powerful contention, and one I think deserves some attention, is that not all women in these conflicts who suffered sexual violence were shamed, ostracized or rejected by their communities. In fact a recent article on wartime rape in Bosnia and Herzegovina noted that when one survivor was asked whether she felt shame or guilt by what happened to her, she noted “the shame is theirs, not mine.” Nonetheless, very rarely do we have smoking gun evidence of intent, and when the facts support an inference of intent with respect to a particular case, we should not ignore those facts. While we need to be careful not to exaggerate our claims or to allow the trauma victims experience to define them or their communities in an overstated way, we owe it to survivors of rape and sexual violence to recognize and remedy as fully as possible the injuries they and their communities have suffered. I would submit, therefore, that sexual and gender based violence committed in times of conflict or mass violence have, under certain circumstances, the potential of communicative value and as such may have something to say about a perpetrator’s mental state. In light of the incredible progress made in the last decade regarding the recognition of sexual violence as an international crime, we may want to seize the momentum to begin hearing more clearly what women say, understanding the harms they and their community experience and recognizing the many functions sexual violence can play in times of conflict, including the communicative value of those acts.

On a final note, I just want to end with what this means to me on a practical level. Minimizing missed opportunities requires more than a

creative interpretation of the law. It requires the will to interpret and implement the law in a way that effectively responds to the crimes committed. Although there has been overwhelming evidence of the systematic raping of women in nearly every conflict that has occurred since the beginning of time, those tasked with investigating, prosecuting, and adjudicating culpability for such crimes have rarely been women. Though the record is improving, we need look no further than the tribunal set up in Iraq to try Saddam Hussein and other members of his regime. Not a single judge, prosecutor or defense attorney to my knowledge is a woman.

Although certainly no guarantee, recent experience has shown that including women in war crimes tribunals makes a difference. As Sita mentioned, sexual violence charges did not appear in many of the original indictments brought before the ICTY and ICTR. It was Elizabeth Odio Benito in the case of the ICTY and Judge Navanethem Pillay in the case of the ICTR who highlighted the absence of such charges to the parties litigating before them. As Judge Pillay has noted, “who interprets the law is at least as important as who makes the law, if not more so.” “I cannot stress how critical,” she says, “I consider it to be that women are represented and a gender perspective integrated at all levels of investigation, prosecution, defense, witness protection and the judiciary.”

Taking into account some of the lessons learned in the ICTR and ICTY, the statute of the International Criminal Court requires that in the selection of judges, prosecutors and other staff, the need for legal expertise on gender-related crimes be taken into account. This, I would argue, should apply not only to the ICC, but also to all other international or internationalized efforts to hold perpetrators responsible for atrocities committed in times of armed conflict or mass violence. Until then I think we risk missing critical opportunities to bring justice to victims of gender-based crimes and their communities.

Thank you.