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Sexual Assault Issues Before the War Crimes Tribunal

By Diane Orentlicher*

This was originally presented as a speech in February 1996 at the U.S. Holocaust Memorial Museum, when "Calling the Ghosts" was presented (see related article on page 4).

At another program [at the US Holocaust Memorial Museum], Justice Ruth Bader Ginsberg spoke these words, written for the occasion by South African jurist Albie Sachs:

"There are some crimes so horrendous that they either hush us into silence or else hurl us into screams."

As we have watched this extraordinary film in hushed silence, the words of Justice Sachs seem appropriate once again.

Like all torturers, Željko Mejačić committed his crimes beyond any thought of shame or account, confident that no one would hear the screams from Omarska – confident that those screams would fall into silence.

Jadranka Cigelj and Nusreta Sivač were, of course, meant to be silenced. They have instead borne eloquent witness to an ordeal that few of us can even bear to imagine.

But if we merely admire their courage, we'll be missing their point. This film is, above all, a call for justice.

In this context, I've been asked to speak about the efforts of the War Crimes Tribunal in The Hague to bring some measure of justice to Ms. Cigelj, Ms. Sivač and others who endured rape and other sexual assaults during the recent conflict in Bosnia.

The first thing that has to be said is that the reports of mass rapes played an

important part in the very creation of the War Crimes Tribunal. Soon after these reports surfaced, the United Nations Security Council resolved to establish the first international war crimes court since the Nuremberg and Tokyo Tribunals half a century earlier. Although mass rapes were scarcely the only atrocities that led to this measure, reports of these crimes had a galvanizing effect on world opinion.

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From the beginning of the Tribunal's work, a guiding principle for the Tribunal and the Office of the Prosecutor has been, in the words of Judge Odio Benito, that there would be no justice unless women were part of that justice. As one measure of this commitment, somewhere between one-fifth to one-quarter of the 600 charges filed to date have involved allegations of sexual assault.

Virtually every aspect of the Tribunal's work presents daunting challenges; nowhere is this more true than in respect of its efforts to prosecute crimes of sexual assault. Let me start with the easiest challenge: the law.

The fact that crimes of sexual assault heretofore have been largely neglected in international law has meant that prosecutors in The Hague have had scant precedent to draw upon in shaping charges appropriate to crimes of sexual assault.

Contrary to general belief, evidence of rape and other forms of sexual assault was introduced at Nuremberg. But none of this evidence was mentioned by the Nuremberg Tribunal, largely depriving its judgment of precedential value for crimes of sexual assault.

The record at Tokyo was only slightly better. In contrast to Nuremberg, rapes did figure among the atrocities that were prosecuted in the Far East. Those committed during the infamous "Rape of Nanking" formed part of the basis for

convicting Japanese officials of war crimes.

This is noteworthy because, when the Hague Tribunal was established, many voiced doubt and concern about whether rape is a war crime. *There should be no doubt.* As long ago as 50 years, this was not doubted.

The problem, of course, has been a wholesale failure to enforce this law or to prosecute other war crimes relating to sexual assault. Incredibly, none of the charges prosecuted before the Tokyo Tribunal involved the Japanese military's enforced prostitution of Korean and other so-called "comfort women." (Again, however, there should be no doubt about the criminality of this practice, nor was there at the time they occurred. Dutch military courts operating in the Far East after the war prosecuted and convicted several defendants on war crimes charges relating to enforced prostitution.)

Generations upon generations have been raised to believe that rape is an inevitable byproduct of war. The Prosecutors in The Hague are determined to put this old canard to rest, once and for all. In contrast to the record at Nuremberg and Tokyo, prosecutors in The Hague have repeatedly charged rape as a war crime.

But the most significant *legal* advances in respect of sexual assault have involved charges of genocide and crimes against humanity. In a path-breaking indictment issued last June, the Prosecutor charged that certain practices at the "rape camps" in Foca

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described by Roy Gutman in the film . . . constitute the crime against humanity of "enslavement." It was a peculiarly appropriate charge, for the practices underlying these charges amounted to nothing less than sexual enslavement. Two of the women subjected to these practices

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were eventually sold to Montenegrin soldiers for 500 DM each.

That same indictment also included charges framed under the rubric of rape and torture as additional crimes against humanity. Needless to say, no charges of this sort were brought at Nuremberg.

Allegations of sexual assault have also figured prominently in the few charges of genocide brought by the Prosecutor in The Hague. Only five of the 75 men indicted by the Tribunal have been charged with genocide. . . . *Željko Mejakić is one of them.* [Two years ago,] he became the first suspect to be charged with genocide by the Tribunal.

The Tribunal's rules of procedure also authorize the Trial Chambers to accord witnesses a range of measures designed both to alleviate the trauma of testifying in the presence of their tormenters, and to protect them against retaliation.

Charges relating to patterns of sexual assault also figure prominently in the indictments against Radovan Karadžić and Ratko Mladić, the two highest-level officials indicted by the Tribunal. In a decision reconfirming *their* indictments, a Trial Chamber of the Tribunal affirmed last July that the systematic rapes in Bosnia constituted crimes against humanity and genocide, and also suggested that forced impregnation of non-Serb women by Serb perpetrators helped establish genocidal intent.

These are truly important—and long overdue—acknowledgments that crimes of sexual assault are, under some circumstances, international crimes. But these advances in the law will amount to very little indeed unless the Tribunal completes the course on which it has set itself.

In this, it faces two major challenges: getting the evidence, and getting the suspects. Both challenges are daunting.

First, the evidence: Rape investigations present special challenges in all

legal systems, including our own. But these challenges are compounded beyond measure in respect of the Bosnian conflict. When a rape is committed in the United States, typically the police have one major crime to investigate. But rape survivors from the former Yugoslavia have rarely endured this torment alone. Many of them have also lost their spouses, children, parents and homes to "ethnic cleansing." Traumatized, homeless, and facing an uncertain future, many rape survivors are quite simply terrified at the prospect of testifying against suspects who still present a very real threat to their security.

The Tribunal has developed a number of specialized procedures to address these concerns. In the field, for example, the Prosecution attempts to deploy "gender-flexible" teams so that witnesses will have the option of speaking to an investigator with whom they are most likely to feel comfortable.

The Tribunal's rules of procedure also authorize the Trial Chambers to accord witnesses a range of measures designed both to alleviate the trauma of testifying in the presence of their tormenters, and to protect them against retaliation. These include, where appropriate, the use of pseudonyms to protect a witness's identity; redaction of court transcripts to expunge references to witnesses' identities; use of *in camera* proceedings; allowing witnesses to testify by closed-circuit television, and scrambling witnesses' voices and images.

But even with these measures, in the extraordinary context surrounding the Tribunal's work, many rape survivors (as well as other witnesses) remain too frightened to testify. The one charge brought directly under the rubric of rape against the first defendant tried by the Tribunal, Dusko Tadić, had to be withdrawn on the eve of trial when the witness decided she was unwilling to testify.

These challenges matter enormously. At Nuremberg, the prosecution was overwhelmingly based on documentary evidence. The Nazis left a meticulous inventory of their crimes. In contrast, the trials in The Hague are overwhelmingly driven by witness testimony.

In this respect, prosecutions of sexual assault charges will call on yet another extraordinary act of courage by women like Jadranka Cigelj and Nusreta Sivač. If the charges that I have

mentioned ultimately result in convictions, the world will owe a very great debt indeed to these witnesses.

Against this background we bear a special responsibility to perform the most important duty that falls to us:

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playing *our* part to secure the arrest of those whom the Tribunal has indicted.

The Tribunal does not have its own police force, and must rely on states to arrest those whom it has indicted.

Although the U.S.-led NATO force in Bosnia is authorized to arrest indicted war criminals, it has repeatedly declined to do so. It is thus scarcely surprising that of 74 people whom the Tribunal has indicted, only seven are now in its custody.

This is unacceptable, and it is shameful. It necessarily casts a long shadow of doubt upon the commitment of the United States government—which in many respects has provided crucial support to the Tribunal.

U.S. officials have repeatedly urged that principal responsibility for arresting indicted suspects lies with local authorities in Bosnia. For the majority of at-large suspects, this means local Bosnian Serb police. The problem, however, is that a number of the suspects indicted by the Tribunal *are* local police.

Last October, the Boston *Globe* reported that Željko Mejakić, already indicted for genocide, was serving as deputy police chief of Prijedor—the district where his crimes occurred. Three other men indicted by the Tribunal were also found serving in the Prijedor police force. Surely nobody expects these men to arrest themselves.

A fifth suspect found working as a police officer in Republika Srpska, Radovan Stanković, was one of only two suspects charged with sexually enslaving Muslim women at Foca. In November,

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governments will have to rethink the ethical implications of genetic technology and rewrite existing laws accordingly. Regulation requires language, language requires definitions, and definitions change with technological capability. Genetic technology magnifies human rights violations conceptually: it shifts power from few hands to many, raises stakes from an individual to a collective level and affects the health of families for centuries to come. Whether governments employ human rights principles to restrict or widen access to genetic technology, they need a human rights language that accommodates the spacial and temporal dimensions of technological advancement. That is, governments need a language that is as state-of-the-art as the technology itself.

Genetic technology allows human rights organizations to play an active role in preventing human rights violations. Because scientists can often predict the development of techniques years in advance, human rights organizations have time to reassess and upgrade their language, organize them-

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selves and promote their agenda before human rights violations occur. Rather than responding to violations, they can use the lag-time to help states formulate policies that prevent violations from occurring. The scientific community's ability to foresee potential misuses of genetic technology may therefore bring

about the 'rebirth' of human rights organizations by transforming them into effective players in the policy-making process. Through science, human rights organizations can learn some preventive medicine of their own.

Scholars often compare geneticists to the Apollo astronauts who bravely explored the unknown frontiers of outer space. Ironically, the genetics race is more dangerous because it is local. Future development and application of genetic technology will ultimately affect how humans value themselves and treat one another. Behind all attempts to decode or alter the human genome is a global search for human identity. By spearheading this search, the scientific community can redefine life as humans know it. By providing a dynamic language, human rights organizations can redefine life as humans want to know it. ☹

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Mr. Stanković lodged a complaint with UN police in Bosnia alleging that *he* was being harassed by the Bosnian government. He apparently had no anxiety about being arrested when he filed his complaint, despite the fact that he had

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been indicted by the War Crimes Tribunal in The Hague.

In the wake of these and other reports, the United States, France and Britain have recently endorsed the idea of creating a special unit to apprehend war criminals. Let us hope that the Administration and its Allies intend to talk less and do more.

In a recent column in the *New York Times*, Abe Rosenthal wrote:

"There is no lesson to be learned in the Holocaust except this: Evil beyond evil was done and can be done again, unless the living remember."

Of course, we must never forget. But when genocide occurs in our time, we must do more than remember.

My father taught me that the chief lesson of the Holocaust is that evil does not restrain itself. We must stop it. And we *can* stop it.

I hope that we do not find ourselves pondering half a century from now how it came to pass that we allowed a handful of genocidal bullies to cow *us* into silence. And, make no mistake about it, they are counting on us to be silent. If Jadranka Cigelj and Nusreta Sivač found the courage to stand up to Željko Mejačić, surely we can as well. ☹

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Conclusion

The National Commission on Human Rights is a small step toward the recognition of international human rights norms in Indonesia. While the Commission itself was not created in the best political atmosphere and is lacking in many respects, its existence provides hope for change in Indonesia. In fact, the Commission's establishment is timely because it provides Indonesia's emerging middle class with reason to expect and demand respect for civil liberties. As Indonesia's economy grows, the middle class will become a greater political force for change and its voice, combined with the National Commission's findings, could eventually cause the Government to respond to its demands. The general elections for parliament which are proposed to be held on May 29, 1997, may be the harbinger of that change and the Commission could be the beginning of a path toward a freer, more vibrant Indonesia. ☹

More information may be found at the Commission's web site: <http://engine2.dnet.net.id/specialsites/komnasham/>