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A Decade of the Development of Gender Crimes in International Courts and Tribunals: 1993 to 2003

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THE PAST TEN YEARS HAVE WITNESSED explosive developments in recognizing and prosecuting gender crimes in international law. Long ignored, trivialized, and misunderstood, rape and other forms of sexual violence committed in the context of war or mass atrocity have received unprecedented attention in recent years.

The primary impetus for the new developments in redressing sex crimes was the establishment of the International Criminal Tribunal for the Former Yugoslavia (ICTY or Yugoslav Tribunal) in The Hague in 1993. Set up by the United Nations Security Council after deeming the atrocities committed during the Balkan conflict a threat to international peace and security, the Yugoslav Tribunal explicitly authorized the prosecution of, among other crimes, rape as a crime against humanity.

Prior to establishing the ICTY, a number of reports highlighted the gender crimes committed during the conflict. When Roy Gutman of *Newsday* and Ed Vulliamy of *The Guardian* secured access to concentration type camps in Prijedor in 1992, they exposed a calculated system of mass starvation, rape, torture, murder, deportation, and other atrocities unseen in Europe since the Nazi holocaust of World War II. A horrified United Nations and international human rights community responded by investigating and documenting crimes committed during the conflict, including the systematic detention and rape of women and girls.

When the United Nations established the Yugoslav Tribunal, it gave it jurisdiction to prosecute war crimes, crimes against humanity, and genocide committed in the territory since 1991. While the Statute of the ICTY explicitly listed rape only under the crimes against humanity provision, nothing—except perhaps historical marginalization of sex crimes and lack of political will—prevented the prosecution from indicting rape and other forms of sexual violence as also constituting war crimes and genocide.

The ICTY was the first international war crimes tribunal established by the United Nations to prosecute individuals accused of serious crimes. Its primary predecessors—the Nuremberg and Tokyo Tribunals established by the Allied victors of World War II to prosecute German and Japanese leaders accused of waging aggressive war and overseeing systematic slaughter—had ended their trials over four decades earlier. While the World War II tribunals recorded a significant amount of evidence of sex crimes committed during the war, little treatment was given to gender crimes in the judgments. Moreover, the systematic rape and sexual slavery by the Japanese imperial army of as many as 200,000 former "comfort women" was wholly ignored in the Tokyo trial.

During the Second World War, evidence disclosed huge numbers of rapes (including by the Allied forces). In both Europe and Asia, sexualized torture, sexual mutilation, and forced abortion were widespread, as was rape as a prelude to murder. In Europe, the Nazis also conducted sterilization experiments. And as noted above, sexual slavery was particularly prevalent in Asia. Yet because waging aggressive war was considered the "supreme crime" by the Nuremberg and Tokyo Tribunals, most attention was focused on prosecuting crimes against peace, not war crimes or crimes against humanity, and certainly not crimes committed exclusively or disproportionately against women and girls.

By the time the Yugoslav Tribunal was established nearly 50 years after the Second World War, women's organizations and scholars had made major strides in deconstructing many of the stereotypes and misconceptions surrounding rape crimes, resulting in more prosecutions in domestic courts. Nonetheless, the ICTY had little real international precedent on prosecuting gender crimes to work with.

Disturbingly, less than a year after the Yugoslav Tribunal was established to end impunity and punish persons responsible for the most serious international crimes committed in the Balkan conflict, a genocide raged through the African nation of Rwanda. Between April 7 and mid-July, 1994, some 700,000 men, women, and children were systematically slaughtered and hundreds of thousands of others were tortured, raped, sexually enslaved, and otherwise abused. Reports indicated that Hutu leaders incited militia and the Hutu public to hunt down and quash their Tutsi neighbors and Tutsi sympathizers, resulting in the swiftest raping and killing spree in recorded history.

By the end of 1994, the UN Security Council had determined that an International Criminal Tribunal for Rwanda (ICTR or Rwanda Tribunal) was necessary to punish perpetrators of war crimes, crimes against humanity, and genocide committed in Rwanda during the conflict. Based in Arusha, Tanzania, the Statute of the ICTR explicitly authorized the prosecution of rape as a crime against humanity and a crime of war. Like the Yugoslav Tribunal, nothing precluded the ICTR from prosecuting rape and other forms of sexual violence under the genocide article or as other forms of crimes against humanity or war crimes.

Investigators and reporters documenting sexual violence in the Balkans and Rwanda were stunned by the magnitude, diversity, and intentionality of gender-related crimes. Never before had sex crimes been so intensely investigated and documented in war, including by female investigators and reporters. Countless corpses left evidence of sexual assault; a number of survivors admitted being sexually violated; and many others reported witnessing rape or other forms of sexual violence. The intensified scrutiny of wartime sexual violence was prompted primarily by greater global awareness of the harm caused by sex crimes, the presence for the first time of at least some female investigators, prosecutors, and judges, and pressure generated by women's organizations and human rights groups committed to ensuring that gender violence was prosecuted alongside other crimes of violence.

After nearly ten years of evidence submitted before the Yugoslav and Rwanda Tribunals, it is clear that sexual violence was strategically used in these conflicts as an instrument of war and a weapon of terror. Opportunistic rapes were extremely common, but systematic rape was even more prevalent. Evidence suggests that some rapes and other forms of sexual violence, particularly forced nudity and sexual torture, were ordered by superiors, whereas other sex crimes were simply encouraged or ignored. There is some evidence of forced pregnancy, forced abortion, sexual slavery, forced marriage, sexual mutilation, and sexual humiliation in testimony before the tribunals and, as discussed below, some of these crimes have been successfully prosecuted.

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ICTR—The *Akayesu* Case

Perhaps the most groundbreaking decision advancing gender jurisprudence worldwide is the *Akayesu* judgment delivered by the Trial Chamber of the Rwanda Tribunal on September 2, 1998. In this trial, for the first time in history, rape was explicitly recognized as an instrument of genocide and a crime against humanity.

The original indictment brought against Jean-Paul Akayesu, the former *bourgmestre* (mayor) of the Taba commune in Rwanda, contained no charges of sexual violence, despite documentation from human rights and women's rights organizations demonstrating that rape crimes were widespread throughout Taba. The initial indictment charged Akayesu with twelve counts of war crimes, crimes against humanity, and genocide for extermination, murder, torture, and cruel treatment committed in his commune.

In the midst of trial, a witness on the stand spontaneously testified about the gang rape of her 6-year-old daughter. A subsequent witness testified that she herself was raped and she witnessed or knew of other rapes. Fortunately, the sole female judge at the ICTR at that time, Judge Navanethem Pillay, was one of the three judges sitting on the case. Having extensive expertise in gender violence and international law, Judge Pillay questioned the witnesses about these crimes. Suspecting that these were not isolated instances of rape, the judges invited the prosecution to consider investigating gender crimes in Taba and, if found to have been committed and if attributable to Akayesu, to consider amending the indictment to include charges for the rape crimes.

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The trial was temporarily adjourned while the prosecution investigated the reports of rape in Taba. It found significant evidence of rape and forced nudity, often in the presence of Akayesu and with his encouragement or acquiescence. Indeed, many of the gender related crimes had been committed on the grounds of his office, where women and girls throughout the area had sought refuge. Consequently, an amended indictment was filed, charging Akayesu with three counts of rape and other inhumane acts as crimes against humanity. The genocide court in the amended indictment also referred to the alleged sexual violence.

When the trial recommenced, several witnesses testified about pervasive rape and forced nudity committed under Akayesu's watchful gaze or with his encouragement. The Trial Chamber concluded that sexual violence was widespread and systematic in Taba, and committed by Hutus with an intent to humiliate, harm, and ultimately destroy, physically or mentally, the Tutsi group. Akayesu was ultimately convicted of, among other crimes, rape as an instrument of genocide and as a crime against humanity. He was sentenced to life imprisonment.

The Trial Chamber also noted that there was no definition of rape in international law, and it thus specified that rape could be defined as "a physical invasion of a sexual nature, committed on a person under circumstances which are coercive."

The Appeals Chamber upheld most of the verdict, including the sex crime convictions.

ICTY—The *Čelebići* Case

Two and a half months after the *Akayesu* Judgment was delivered by the Rwanda Tribunal, the Yugoslav Tribunal handed down a landmark decision redressing gender crimes committed in the Balkans. On November 16, 1998, the ICTY delivered the *Čelebići* Judgment, convicting the accused of a number of crimes, including sex crimes, committed in the Čelebići prison camp in Bosnia. As the leading superior responsibility case decided by the ICTY, it sets the standards for holding a civilian or military leader responsible for crimes committed by subordinates under their authority or control, which they failed to prevent, halt, or punish.

Three of the four accused were charged with individual or superior responsibility for sex crimes, along with other crimes. More specifically, superiors in Čelebići Camp (Delalić, Mucić, and Delić) were charged with superior responsibility for the war crimes of "wilfully causing great suffering" and "inhuman treatment" as grave breaches, or for "cruel treatment" as a violation of the laws or customs of war, when subordinates committed sexual abuses on male detainees. The indictment alleged that their subordinates forced two brothers to perform fellatio on each other and tied a burning fuse cord around the genitals of another detainee in the camp. One defendant (Delić) was also charged with individual responsibility for rape crimes after being accused of personally raping several women in the camp.

The Trial Chamber acquitted Delalić for lack of sufficient evidence against him. It convicted Mucić of superior responsibility for the sexual violence committed against the male detainees, finding him guilty of cruel treatment, inhuman treatment, and wilfully causing great suffering. The chamber emphasized that if the forced oral sex had been charged as rape, it would have convicted him of rape as a war crime. The chamber concluded that Mucić, as *de facto* commander of the camp, was in a superior-subordinate relationship; he knew or had reason to know that the crimes were about to be or had been committed; and he failed to take necessary and reasonable measures to prevent the crime or punish the perpetrator.

The Trial Chamber also convicted Delić of torture for the *actus reus* of forcible sexual penetration for the rapes he committed, which included participating in the raping of two women (vaginally and anally) on multiple occasions. The chamber found that the women were raped for purposes of obtaining information, as punishment for reporting previous abuse, as coercion and intimidation, as a form of sex discrimination, and as a means to humiliate the women and to create an atmosphere of fear and powerlessness in the camp. Judge Elisabeth Odio-Benito, one of the three female judges appointed to the Yugoslav Tribunal, was sitting on this case, and her extensive expertise in gender crimes likely had a significant impact on adjudicating female sexual torture and male sexual violence.

The Appeals Chamber upheld all of the sexual violence aspects of the Čelebići Trial Chamber Judgment, and further strengthened the law concerning command/superior responsibility.

ICTY—The *Furundžija* Case

Less than a month after the Čelebići Judgment and just over three months after the *Akayesu* decision, another important gen-

der justice verdict was delivered, combining with the other jurisprudence to shatter the delusion that sex crimes are not as serious as other crimes of violence. The *Furundžija* Judgment was handed down by the ICTY on December 10, 1998 (IT-95-17/1-T). The entire trial, lasting some eleven days, centered on the multiple rapes committed against one woman during the Yugoslav conflict. The rape crimes were indicted as war crimes of torture and outrages upon personal dignity, both charged as violations of the laws or customs of war.

Furundžija, a paramilitary leader, verbally interrogated a nude civilian woman while his colleague repeatedly raped her vaginally, orally, and anally, initially in front of a group of laughing soldiers. Furundžija was not a superior to the physical perpetrator and had not himself touched the woman. However, the Trial Chamber found that the role he played in facilitating the rapes allowed them to occur and continue, and he was therefore just as responsible as if he had raped her himself. He was convicted of torture (as a co-perpetrator) and outrages upon personal dignity (as an aider and abettor) as war crimes.

Sitting on the trial was Judge Florence Mumba, one of the three female judges on the court. On appeal, the defense alleged essentially that, because Judge Mumba had previously served as a member of the UN's Commission on the Status of Women and condemned rape as a war crime and urged its prosecution, she was predisposed to promote a common feminist agenda, and should have been disqualified for having at least an appearance of bias.

In its judgment of July 21, 2000, the Appeals Chamber upheld the *Furundžija* Trial Chamber judgment. It further dismissed the allegations of appearance of bias, noting that Judge Mumba's expertise in women's issues and gender crimes made her exceptionally qualified to sit as a judge on cases adjudicating sexual violence.

ICTY—The *Kunarac* Case

The historic *Kunarac* Trial Chamber Judgment was handed down on February 22, 2001, solidifying and strengthening previous case law and further developing jurisprudence on gender-related crimes. This was the first case on rape as a crime against humanity to come before the Yugoslav Tribunal, and the first international trial in history to adjudicate rape and enslavement for crimes essentially constituting sexual slavery.

The original indictment was brought against eight accused and, significantly, focused entirely on a series of gender-related crimes committed in the town of Foča during the war. When the ICTY gained custody of three of the indictees (Kunarac, Kovać, and Vuković), it went to trial against them on charges of rape, enslavement, torture, and outrages upon personal dignity. (Note that although the ICC Statute specifically enumerates sexual slavery as a crime, the ICTY Statute only lists rape and enslavement; hence, these offenses were combined to prosecute the accused for the sexual enslavement of women and girls.)

The accused were members of the military, and the victims were civilian women and girls held in detention facilities in Foča after a takeover of the town. The judges found that Kunarac and Kovać took women and girls from detention centers (typically after they had already been repeatedly raped and gang raped) and held them for their own personal sexual gratification. The victims were required to provide sexual services at the whim of the accused, who also loaned, traded, or sold the women for others to rape. (Note that "victim" is used here instead of the more empowering term "survivor" simply because some victims did not survive.) The women were typically held for weeks or months, during which time they were raped during the night and forced to cook and clean during the day. The judgment articulated indicia for enslavement which included, among other things, exploitation, sex, prostitution, trafficking in persons, assertion of exclusivity, control of sexuality, and restriction on an individual's autonomy. Finding that the women and girls had been raped, enslaved, and treated as the personal property of Kunarac and Kovać, the accused were convicted of rape and enslavement as crimes against humanity.

Kovać was also convicted of "outrages upon personal dignity" for forcing women and girls to dance nude on a table, which naturally caused humiliation to the victims. The Trial Chamber found the harm was caused regardless of whether it was for his own personal gratification, for the entertainment of soldiers, or was actually intended to humiliate and degrade the victims.

"Finding that the women and girls had been raped, enslaved, and treated as the personal property of Kunarac and Kovać, the accused were convicted of rape and enslavement as crimes against humanity."

Kunarac and Vuković were found guilty of torture as a war crime and crime against humanity for the sexualized torture inflicted on women and girls. Kunarac was convicted not only for raping them personally, but also for aiding and abetting in women being tortured by means of rape when he took them to places knowing others would rape them. The Trial Chamber found that the victims were singled out for rape by the Serb soldiers because they were Muslim and female, and this constituted discrimination, an explicitly prohibited purpose of torture. It emphasized that discrimination (or any prohibited purpose) need not be the sole purpose in singling out women for the sexualized torture. The chamber also noted that women and girls were raped during interrogation in order to gain information or a confession, and these also constitute prohibited purposes of torture. It emphasized that rape is one of the worst acts a person can inflict upon another and inherently causes severe pain and suffering to the victim-survivor. The chamber also concluded that under international humanitarian law (as opposed to international human rights law), state action is not a required element of torture.

The Trial Chamber expounded upon the elements of rape in previous judgments, and concluded that violations of sexual autonomy determine when sexual activity becomes rape. The elements of rape essentially were held to consist of (i) the sexual penetration, however slight (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator or (b) of the mouth of the victim by the penis of the perpetrator; (ii) by coercion or force or threat of force against the victim or a third person, including where

such sexual penetration occurs without the consent of the victim.

Judge Florence Mumba was one of the three judges sitting on the Trial Chamber in this case. The judgment was upheld and further strengthened by the Appeals Chamber Judgment rendered on June 12, 2002.

ICTY—The *Kvočka* Case

It took nearly ten years after being exposed by Gutman and Vulliamy in 1992, but in 2001, justice was finally rendered for some of the victims of Prijedor camps, particularly the Omarska and to some extent Keraterm Camps. The *Kvočka* Trial Chamber Judgment convicted all five indictees for sex crimes committed through persecution as a crime against humanity. The trial focused on atrocities committed in Omarska Camp in Prijedor, where the accused (Kvočka, Kos, Prcać, Radić and Žigić) worked or regularly visited. When the decision was delivered on November 2, 2001, the Trial Chamber concluded that Omarksa Camp operated as a joint criminal enterprise used to persecute non-Serbs detained in the camp. The defendants were found guilty of knowingly and substantially participating in that enterprise.

During its approximate three months of operation, Omarska Camp was used to imprison, torture, kill, rape, humiliate, and otherwise abuse persons suspected of resisting Serbian authority in the Prijedor area. The indictment had charged only one defendant with physically committing rape crimes (Radić), though each was charged with rape committed in the context of persecution.

There was little evidence submitted at trial that demonstrated that any of the accused other than Radić knew that women held in Omarska Camp were being raped or otherwise sexually assaulted. However, the Trial Chamber concluded that because the camp operated as a criminal enterprise designed to persecute, terrorize, and otherwise mistreat detainees, it was wholly foreseeable that women held in the camp would be raped. It thus held that they were liable for all crimes committed as an intended or even foreseeable consequence of the joint criminal endeavor. Therefore, all were convicted of crimes, including sexual violence in the persecution context.

Significantly, the Trial Chamber also noted that other forms of gender related crimes, including forced marriage, forced abortion, forced impregnation, forced nudity, molestation, sexual slavery, sexual mutilation, forced prostitution, and forced sterilization, are international crimes of sexual violence and punishable as such.

Judge Patricia Wald sat as the sole female judge on the case. The case is currently on appeal.

The International Criminal Court Statute and Hybrid Tribunals

The Statute of the International Criminal Court (ICC) is a treaty that was signed in Rome on July 17, 1998, and entered into force on July 1, 2002, after its 60th ratification by a state. Based in The Hague, the Netherlands, the ICC is a permanent court with jurisdiction over war crimes, crimes against humanity, genocide, and, eventually, aggression.

For the first time in history, a statute for an international criminal court has explicitly authorized the prosecution, as war crimes and crimes against humanity, of rape, sexual slavery, forced prostitution, forced sterilization, forced pregnancy, "and any other form of sexual violence of comparable gravity." The rich jurisprudence of the ICTY and ICTR, and the fact that seven of the eighteen judges are women (most with expertise in gender crimes), will help ensure that gender crimes will be prosecuted in the court and are not committed with impunity.

Hybrid courts, that is courts having a mixed composition of international and domestic prosecutors, judges, and defense attorneys, and adjudicating international crimes, are increasingly being established to prosecute war crimes, crimes against humanity, and genocide. Hybrid courts are already functioning in East Timor, Sierra Leone, and Kosovo, and one is forthcoming in Cambodia. Gender crimes are justiciable in these courts and the jurisprudence of the ICTY and ICTR serves as a useful precedent (non-binding but highly authoritative) in prosecuting rape, sexual slavery, and other forms of gender violence.

Conclusion: The Trend Toward Ending Impunity for Gender Related Crimes

The above cases are not the only cases in the ICTY and ICTR that adjudicated gender-related crimes, but they are the ones which have established the primary precedent upon which subsequent decisions have been based. Rape has now been explicitly recognized as an instrument of genocide, a crime against humanity, and a war crime (as grave breaches, violations of the laws or customs of war, violations of Common Article 3 to the Geneva Conventions, violations of the Fourth Geneva Convention, violations of the 1977 Additional Protocol I to the Geneva Conventions, and violations of the 1977 Additional Protocol II to the Geneva Conventions). Sex crimes are justiciable as war crimes regardless of whether they are committed in an international or internal armed conflict.

In the Yugoslav and Rwanda tribunals, rape and other forms of sexual violence have been successfully prosecuted as rape, torture, enslavement, persecution, cruel treatment, inhuman treatment, inhumane acts, willfully causing great suffering, and outrages upon personal dignity. The cases have confirmed that males and females can be raped; that a person convicted of rape does not have to be the physical perpetrator; that forcible vaginal, anal, or oral sex constitutes rape; and that rape can be committed by foreign objects, such as guns, sticks, and broken bottles. They prove that the rape of a single victim is worthy of prosecution as a war crime and that persons can be held criminally responsible for sex crimes as individuals and superiors. And they establish that rape committed in the context of a joint criminal enterprise is justiciable if the rape is either a part of or a foreseeable consequence of the criminal endeavor.

Convictions for gender crimes have been rendered against high-, mid-, and low-level perpetrators, military officials and civilians, businessmen, soldiers, government officials, and common thugs. One woman is on trial for rape in the Rwanda Tribunal for encouraging and inciting rape crimes, and one woman was convicted of rape crimes in the Yugoslav Tribunal after pleading guilty to persecution as a crime against humanity for incurring responsibility for a series of crimes, including sexual violence.

The cases demonstrate that female judges, investigators, prosecutors, and translators, particularly those with expertise in gender crimes, are extremely useful in the prosecution of gender crimes. They further demonstrate that there must be political will to prosecute sex crimes, and that pressure exerted from NGOs is often indispensable to ensuring that gender crimes are investigated and indicted. Sex crimes inflict acute physical and mental violence on survivors, and they also cause extensive harm to the families, communities, and associated groups of the victims. The evidence indisputably demonstrates that rape crimes are amongst the most serious crimes committable and constitute a threat to international peace and security. *HRB*