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PROSECUTING RAPE AS A WAR CRIME

The Honorable Richard J. Goldstone *

Ladies and Gentlemen, it is a great privilege to have been invited to deliver this first lecture in a series addressing topics that are of special importance.

I have said for a number of years now that one of the most important successes of the United Nations War Crimes Tribunals for the former Yugoslavia and Rwanda has been in the development of international humanitarian law. One area, unrelated to today's topic, pertains to narrowing the traditional difference between international armed conflict and internal armed conflict and the protection to which innocent civilians are entitled. Traditionally, civilians in civil wars have been entitled to far less protection than in transnational wars. This distinction is not a rational one. It has been narrowed in opinions of the tribunals almost to the point of extinction.

The second area relates to the treatment of gender-related crime and particularly systematic mass rape. In September 1998, a Trial Chamber of the Rwanda Tribunal, sitting in Arusha, delivered judgment in the case of the *Prosecutor v. Jean-Paul Akayesu*.¹ The three judges were drawn from three countries around the world. On behalf of the international community, the judges stated in clear terms that in their opinion, "Rape is a form of aggression. Rape is a violation of personal dignity," and "Rape and sexual violence constitute one of the worst ways of harming the victim as he or she suffers both bodily and mental harm."² It is significant that the judges referred to "he" as well as "she" because one of the horrible phenomena to come out of these wars is the rape of men by men.

For the first time in the history of humanitarian law, that Chamber of the Rwanda Tribunal handed down a conviction for rape as a crime against

* Lecture given on October 3, 2001 at Case Western Reserve University School of Law. Justice to the Constitutional Court of South Africa (1994-present); Chair of the Committee to draft the Declaration of Human Duties and Responsibilities, also known as the Valencia Declaration (1998); Chief prosecutor of the United Nations International Criminal Tribunals for the former Yugoslavia and Rwanda (1994-1996); Chairperson of the International Independent Inquiry on Kosovo (1999-present); Head of the Board of Human Rights Institute of South Africa. I would like to record my gratitude to my law clerk, Estelle Dehon, for her efficient research and assistance in the preparation of this lecture.

¹ *Prosecutor v. Akayesu*, Judgement, I.C.T.R., No. ICTR-96-4-T (1998), available at <http://www.ictor.org/default.htm>.

² *Id.* at ¶¶ 687 and 731.

humanity, and they held further that the rapes, which had been condoned and encouraged by *Akayesu*, also constituted the crime of genocide.

To date, the Rwanda Tribunal has indicted seventeen men and one woman for gender crimes, charging the suspects with genocide, crimes against humanity, and war crimes.³ The Yugoslavian Tribunal sitting in The Hague has convicted eight perpetrators of rape, has held sexual slavery to be a crime against humanity, and more than half of its public indictments, including that of Karadzic,⁴ the former head of the Republika Srbska, and Mladic,⁵ his army chief, incorporate gender crimes.⁶

In the past decade of tumultuous progress in international criminal law, the advances made in the recognition and prosecution of gender crimes committed during armed conflict are particularly noteworthy. This is all the more so because of the history of virtual effacement of these crimes from international humanitarian law. Among the many unique characteristics of the International Criminal Tribunals for both the former Yugoslavia and Rwanda from their very inception has been the concern shown to ensure that there would be prosecutions for gender crimes.

One of the early United Nations resolutions leading to the decision to establish the Yugoslavia Tribunal contained the first condemnation ever by the Security Council of rape in war.⁷ It declared that the Security Council was appalled by reports of the massive organized and systematic detention and rape of women, in particular Muslim women in Bosnia and Herzegovina. This reaction against sexual violence was a key element in the motivation for the establishment of the tribunal.

The Secretary-General's Report, which led to the drafting of the statute for the Yugoslavian Tribunal, refers to "[s]exual assaults". Article 5(g) of the proposed statute broke new ground by enumerating rape as a crime against humanity.⁸ It went on to suggest that given the fact that the Tribunal would have to deal with victims of rape and sexual assault, due consideration should be given to the appointment of qualified women in the Office of Prosecutor.⁹ So, even before the Tribunal began its work, the

³ For information concerning the number and nature of the indictments issued by the Rwanda Tribunal, *see generally* <http://www.ictt.org>.

⁴ Prosecutor v. Karadzic, Indictment, I.C.T.Y., No. IT-95-5/18 (1995), *available at* <http://www.un.org/icty/indictment/english/kar-ii951116e.htm>.

⁵ *Id.*

⁶ For the number and nature of indictments issued by the Yugoslavia Tribunal, *see generally* <http://www.icty.org>.

⁷ *See* S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/RES/827 (1993).

⁸ *Report of the Secretary General Pursuant to Paragraph 2 of Security Council Resolution 808*, U.N. SCOR, 48th Sess., U.N. Doc. S/25704 (1993), *available at* <http://www.un.org/icty/basic/statut/S25704.htm> (last visited Sept. 17, 2003).

⁹ *See Id.*

Security Council and the Secretary-General were giving specific attention to gender-related matters. The suggestions were accepted, and the statutes of the two Tribunals set important precedents in enumerating rape as a crime against humanity and entrenching various procedural safeguards for the protection of victims and witnesses in sexual assaults. The statute for the Rwanda Tribunal went even further than its Yugoslavian counterpart, especially referring to “[r]ape, enforced prostitution and any form of indecent assault” as violations of Article 3 common to the 1949 Geneva Conventions.¹⁰

This statement stands in stark contrast to predecessors of the tribunals. The statutes of the International Military Tribunal at Nuremberg and the International Military Tribunal for the Far East at Tokyo contained no reference at all to rape. Although the French and Soviet prosecutors before the Nuremberg Tribunal introduced evidence of rape in the course of establishing war crimes and crimes against humanity, the judgment does not once mention rape.

The Tokyo Tribunal¹¹ expressly charged rape, but not one of the women victims was called to give evidence. The judgment records that approximately 20,000 cases of rape occurred in the city of Nanking during the first month of the occupation.¹² It devotes one paragraph in the opinion to the gender crimes that gave the name to the “Rape of Nanking”. Rape was subsumed under the general charges of command responsibility for the atrocities in Nanking. While crimes against humanity were based in part on evidence of rape committed by troops under the command of the defendant, the Tribunal completely ignored the equally notorious forcing of thousands of comfort women into prostitution in Japanese military brothels.

Men had written the laws of war in an age when rape was regarded as being no more than an inevitable consequence of war. The two UN Tribunals truly represent a distinct shift in mindset. They are characterized as having the specific intent to prosecute the perpetrators of sexual assaults. In fulfilling that intent, the Tribunals have advanced the substance of international humanitarian law through defining rape, sexual violence, and sexual slavery and broadening the categories of international crime under which judicial bodies can prosecute gender crimes.

¹⁰ Statute of the International Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the territory of Neighboring States, S.C. Res. 955, U.N. SCOR, 49th sess., 4353d mtg., Annex, at art. 4, U.N. Doc. S/RES/955 (1994), 33 I.L.M. 1598.

¹¹ Women's International War Crimes Tribunal on Japan's Military Sexual Slavery.

¹² See IRIS CHANG, *THE RAPE OF NANKING: THE FORGOTTEN HOLOCAUST OF WORLD WAR II* (1997) (relating the history of the “comfort women” program and the Tokyo Tribunal’s treatment of rape as a war crime).

In the time remaining, I propose to consider those advances, the definitions of rape and other gender offenses, and the procedural rules designed to protect the physical and mental wellness of victims and the witnesses to those crimes.

Much of the credit for these advances goes to human rights organizations. These organizations alerted me to the anger and frustration of the victims of those crimes and the concern of many thousands of women in dozens of countries. Soon after I arrived as the Chief Prosecutor in The Hague on August 15, 1994, I was inundated with letters and petitions from women and men in the United States, Canada, and many of the western European nations. The letters implored us to give adequate attention to gender-related crimes. It soon became clear that systematic mass rape could not have been peculiar to such different situations in the Former Yugoslavia and Rwanda. Why should that occurrence have suddenly become a feature of the last decade of the 20th Century? The answer is that for many centuries domestic and international legal systems had ignored gender-related crimes. What impressed me is that the letters had been individually written – they were not simply standard form letters or petitions. Many people, and particularly women, had taken the trouble to put in their own words, sometimes in broken English, their concern about rape either being ignored once again or not receiving adequate attention from the Tribunal.

As a consequence of those letters, I appointed an outstanding American lawyer, Patricia Sellers, to the inner cabinet that I set up at the Tribunal. I appointed her as the legal advisor to the Office of the Prosecutor for Gender Crimes. We agreed that it was important that her brief should not only relate to the manner in which we deal with rape in indictments and investigations, but that she should also be concerned with gender issues within the Office of the Prosecutor.

I was amazed at the gender bias that emerged in our international office. One of the precipitating factors was the high number of investigators amongst the staff of the office. For the most part, they were police and army officers. They came from many countries on five different continents. In all but one or two, there were no senior female investigators. Their culture was not such as to make them concerned about gender-related crime. It soon became apparent to me that it was essential to make them all aware that any form of gender discrimination or inappropriate language in the office would simply not be tolerated. I became convinced that if we did have an appropriate gender policy in the Office of the Prosecutor, we would have little chance of getting it right outside of the office. Patricia Sellers applied herself with great diligence to a difficult task. Many of the developments to which I will refer are the result of her initiatives and her imaginative approach.

The initial indictments were issued under tremendous pressure to obtain crucial funding from the United Nations. Indeed, soon after I arrived in the middle of August 1994, I was told that there was no budget for our Tribunal, and that I would have to appear before the budget committee of the United Nations at the beginning of November of that year – less than three months later. I was advised in a friendly fashion – and correctly as it turned out – that if we did not have an indictment out by that time, we would not get any money for the following year. The result was that we had to devote all of our meager resources to that endeavor (and there were then only twenty-three members of staff in the office, and very few of them were investigators). We had the important report from the Commission of Experts (the Bassiouni Committee) and we used it to find people against whom there might be sufficient evidence to justify indictments.

Just before the end of October 1994, we decided there was only one defendant against whom there was sufficient evidence available to justify an indictment. His name was Dragan Nikolic. We indicted him for a number of murders and the torture of innocent civilians.¹³ Now, Nikolic was not an appropriate first person for an indictment by the first international war crimes tribunal, but we had no option. In order for the work to continue, we had to get out an indictment quickly. That is the explanation for the Nikolic indictment.

In the view of the lawyers who worked on the Nikolic indictment, there was insufficient evidence to justify charging him with gender crimes. That, however, did not deter one of the two women judges on the Tribunal, Odio Bennito, from raising the gender issue very forcefully early in the proceedings.¹⁴ In one of the early procedural applications, she publicly exhorted the Office of the Prosecutor to include gender crimes in the indictment. She relied on some of the testimony associated with the indictment and took the other two male members of her trial chamber with her. In their interlocutory judgment, they called for gender crimes to be added to the indictment. They made the following statement:

It appears that women and girls were subjected to rape and other forms of sexual assault during their detention . . . Dragan Nikolic and other persons connected with the camp are related to have been directly involved in some of those rapes and sexual assaults. These allegations do not seem to relate solely to isolated incidents. The Trial Chamber feels that the prosecutor may be well advised to review these statements carefully with a view to ascertaining whether to charge Dragan Nikolic with rapes and other

¹³ Prosecutor v. Dragan Nikolic, Indictment, I.C.T.Y., No. IT-94-2-PT (1994), available at <http://www.un.org/icty/indictment/english/nik-ii941104e.htm>.

¹⁴ Judge Odio Benito became the Deputy President of Costa Rica and is now a deputy president of the International Criminal Court.

forms of sexual assault, either as a crime against humanity or as grave breach or war crimes.¹⁵

Now that was a most unusual, far reaching and surprising invitation. It came as a very welcome surprise because, as I mentioned earlier, in the statute of the Tribunal, rape was referred to only as a crime against humanity. Rape was not traditionally regarded as a war crime on its own, and it certainly was never included amongst the crimes listed in the 1949 Geneva Conventions as a "grave breach". So, this was a huge step forward and an invitation that we accepted with alacrity.

The consequences were relevant also for domestic courts. This followed from the provisions of the Geneva Conventions that oblige all nations that have ratified the Conventions to prosecute any person suspected of having committed a grave breach.¹⁶ It does not matter where the crime was committed – universal jurisdiction in respect of such crimes was established. Now, 189 countries have thus far ratified the Geneva Convention, and each one of them has obliged itself to prosecute in reliance upon that universal jurisdiction. Here was a suggestion for the first time ever that such a violation constituted a gender-related crime.

Some months later, the judges of the Rwanda Tribunal were similarly progressive in their approach to the prosecution of gender crimes. The initial indictment against Akayesu did not charge him with gender crimes. When the trial commenced, however, witnesses began to make repeated reference in their testimony to widespread rape and sexual violence in the Taba Commune in Rwanda. They also referred to Akayesu's tacit support for the commission of those gender crimes. The only woman judge in the Rwanda Tribunal, Navantham Pillay, (who I am proud to say is a South African), was astute in eliciting from witnesses evidence of sexual violence, taking initiative from the bench to do so. Her actions, combined with the amicus brief of the Coalition for Women's Human Rights in Conflict Situations urging the Tribunal to request an amendment of the indictments to include sexual violence, resulted in a postponement of the trial during which the indictment was amended to include charges of sexual violence against displaced women who sought refuge at the Taba Commune.

This judicial diligence in facilitating testimony on gender crimes and in urging the inclusion of such crimes in indictments, together with the diligence of Patricia Sellers and others in the Office of the Prosecutor, contributed to the significant progress that the Tribunals have made in their recognition and prosecution of gender crimes.

¹⁵ Prosecutor v. Nikolic, Judgement, I.C.T.Y., No. IT-94-2-R61 (1995), *available at* <http://www.icty.org>.

¹⁶ See Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, art. 49, 6 U.S.T. 3114, 75 U.N.T.S. 31. .

More regularly, indictments began to include gender-related crimes. In 1996, I issued the first indictment focusing exclusively on sexual assault, the so-called Foca indictment.¹⁷ Foca was the place where the sexual crimes were committed. Therefore, there has been activism from the judges and there has been activism from the Office of the Prosecutor in this area.

Substantively, one of the problems we faced in charging rape as a war crime was the absence of any definition of that crime. International law had never defined the crime of rape. That, in itself, is significant. A crime that had been occurring for centuries during wars had never received sufficient attention to justify definition. In *Akayesu*, the Trial Chamber of the Rwanda Tribunal took a major step toward filling this gap in the law. It held, "The central elements of the crime of rape should not be captured in a mechanical description of objects and body parts."¹⁸ The judges defined rape as "a physical invasion of a sexual nature committed on a person under circumstances which are coercive."¹⁹ They added, "Sexual violence, which includes rape, is considered to be any act of sexual nature, which is committed on a person under circumstances which are coercive."²⁰

Now, that was a huge step forward and in advance of the approach to rape in most domestic jurisdictions around the world. If anything, it goes too far to the extent that it does not require any act of penetration of or by a sexual organ to constitute rape. It was a crucial step forward, however, to the extent that it concentrated upon the all-important aspect of the violation of the victim. The progressiveness of the definition is re-enforced when taken in conjunction with the procedural aspects of the Tribunals' fight against gender crimes.

The Rules of Procedure and Evidence of both of the Tribunals contain a specific provision dealing with the admissibility of evidence in cases of sexual assault. Rule 96 represents, again, several significant departures from the domestic practice in many countries. First, the tribunal, according to the rule, need not require the corroboration of the testimony of a victim of sexual violence, thereby dispensing with the evidentiary distrust of female complainants.²¹ Many countries, and particularly in the Anglo-

¹⁷ Prosecutor v. Gagovic, Indictment, I.C.T.Y., No. IT-96-23-PT (1996), available at <http://www.un.org/icty/indictment/english/foc-ii960626e.htm>.

¹⁸ *Akayesu Judgement*, No. ICTR-96-4-T.

¹⁹ *Id.* In the judgment, The Chamber defined rape as "a physical invasion of a sexual nature, committed on a person under circumstances which are coercive. Sexual violence, which includes rape, is considered to be any act of a sexual nature which is committed on a person under circumstances which are coercive. This act must be committed (a) as part of a wide spread or systematic attack; (b) on a civilian population; (c) on certain catalogued discriminatory grounds, namely: national, ethnic, political, racial, or religious grounds."

²⁰ *Id.*

²¹ RULES OF EVIDENCE AND PROCEDURE OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA, Rule 96, available at <http://www.ictcr.org/ENGLISH/rules/index.htm>.

American world, require corroboration of a woman's evidence on the issue of sexual violence. This is an aberrational requirement that does not apply in other areas of the law. Second, Rule 96 specifically excludes the admissibility of prior sexual conduct of the victim, dispensing with the implication that a woman with a sexual history is an unreliable witness.²² This exclusion judicially impedes the possibility that women who were assaulted and raped by men would have to face those pre-war relationships being used as a justification for rape. It also begins to address misconceptions about women and their credibility.

Finally, Rule 96 outlines the parameters within which consent may be raised as a defense to a charge of rape or sexual assault.²³ This starts from the premise that consent cannot be a defense if the victim had experienced or had reason to fear violence, duress, detention, or psychological aggression. The procedure by which evidence of consent may be admitted requires the defendant overcome the burden of proving to the Trial Chamber, on camera that the evidence is relevant and credible. Consequently, the opportunity is there, but the burden of proof is placed very clearly on the defendant to establish why, in that war situation, consent is at all relevant to the defense.

The broad gender sensitive definition, combined with the specific exclusion of sex and prior sexual history and the curtailment of the defense of consent are significant achievements. They represent a notable change in the way in which international criminal law approaches gender crimes.

The Yugoslavia Tribunal relied on this progressive definition adopted in *Akayesu* in a number of other cases. It has not, however, all gone one way. On the one hand, the Yugoslavia Tribunal made a further progressive finding. It held that forcible oral sex is “[a] most humiliating and degrading act upon human dignity and could rightly be included in the definition of rape.”²⁴ You will agree that this was an important step extending the definition of rape to include forcible oral sex. This also diverges from the practice and the law in many domestic jurisdictions. On the other hand, however, the Trial Chamber recast the definition to require penetration as an element of the offence of rape.

Overall, I would suggest the jurisprudence of the Tribunals in this important area is positive. They have also not avoided telling the detail of the stories of the witnesses and victims. This is a welcome departure from the Nuremberg precedent where the prosecutors refused to detail gender crimes while not flinching from gory descriptions of other heinous crimes. This kind of criticism of the Nuremberg proceedings should take into account that the times were very different. It is always unfair to judge what

²² *Id.*

²³ *Id.*

²⁴ Prosecutor v. Furundzija, Judgement, I.C.T.Y., No. IT-95-17/1-T (1998), available at <http://www.un.org/icty/furundzija/trialc2/judgement/fur-tj981210e.pdf>.

happened 50 or 60 years ago by today's standards. However, it remains noteworthy that some of the prosecutors who were involved in gender-related crimes at Nuremberg refused to read the details from affidavits they had because they felt it was too shocking to speak in public about these crimes.

The statute for the International Criminal Court (the "ICC")²⁵ has forwardly advanced the work of the U.N. Tribunals. Gender crimes are no longer subsumed under outrages on personal dignity. Rape, sexual slavery, forced pregnancy, forced sterilization and other forms of sexual violence are now expressly enumerated as crimes against humanity in Article 7 and as war crimes relating to both international armed conflict and non-international armed conflict. This is significant in that the Rome Statute for the ICC represents the normative benchmark of international criminal law, and gender crimes are now given the recognition they were denied for so many years. One question, of course, is how these advances will actually affect attitudes and lead to some form of deterrence. Another question relates to the extent to which they will influence the prosecution of gender crimes before domestic courts.

I really think there is a challenge here and an opening for lawyers in the United States and other democracies to use these advances in international law and to place them before domestic judges and so influence attitudes toward these horrible crimes. The work of the International Tribunals and the promise of the ICC provide a strong basis for the international community to start addressing in a more appropriate manner the phenomenon of rape, forced pregnancy, sexual slavery, and other gender crimes committed during armed conflict. It is my hope that the history of impunity for gender crimes under international criminal law will resolutely be replaced in the future by accountability and deterrence and prevention.

²⁵ The Rome Statute of the International Criminal Court, July 17, 1998, U.N. Doc. A/CONF. 183/9 (1998), 37 I.L.M. 999, *available at* <http://www.un.org/law/icc/statute/romefra.htm>.

