

GENDER CRIMES AND THE INTERNATIONAL CRIMINAL TRIBUNALS

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When I arrived at the International Criminal Court for Rwanda in Arusha, Tanzania in 1999, the Tribunal was on a mission to bring to light the sexual violence that had taken place during the genocide. I barely had time to walk through the building's metal detectors and already, unbeknownst to me, I had been drafted into the mission. My desk was piled with files filled with hundreds of pages of testimony by Rwandan women.

Before starting my work with Judge William Sekule at the Tribunal, I had spent a couple of months working with sexual violence survivors in Rwanda. I had visited mass graves, seen female bodies with legs spread apart and talked to countless rape survivors, many of whom were HIV positive and were living in U.N.-built camps in Rwanda. I had no trouble putting faces to the anonymous testimony at the Tribunal; testimony which was only labeled as Witness A, Witness E, Witness F.

So it has been over six years since my work at the Tribunal and it has been sixty years since Nuremberg. From Nuremberg to Rwanda, what has changed? Quite a bit.

The last decade has witnessed a profound transformation in the treatment of sexual violence in international law. Evidence of the widespread use of rape as a policy tool in the former Yugoslavia and in Rwanda has led to the legal reconceptualization of sexual violence and conflict. Both *ad hoc* tribunals, one for the former Yugoslavia, or ICTY, the other for Rwanda, or ICTR, broke new ground. They tackled the complexities of rape, enslavement, torture, and genocide. They struggled with determining a legal definition of rape. They wrestled with balancing the rights of the defendant and the rights of the witness. Although both the ICTY and the ICTR made a number of landmark decisions with regard to gender crimes, I will focus my remarks on the ICTR.

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First, in order to understand the progress that has been made since Nuremberg, I will briefly discuss the treatment of rape by the Nuremberg tribunal. Second, I will highlight several important accomplishments by the Rwanda tribunal. Third, I will point out a number of ways the tribunal has fallen short of expectations. Fourth and last, I will highlight several remaining challenges the Rwanda tribunal faces in prosecuting gender crimes.

At the time of the Nuremberg trials, sexual crimes, along with pillage, were viewed as inevitable aspects of war, and therefore unpunishable. In addition to equating rape with pillage, a further challenge existed; prosecutors shied away from the subject as too distasteful. In fact, the French prosecutor at the Nuremberg trials, when asked about the rape of French women, could only say “the tribunal will forgive me if I avoid citing the atrocious details.” Instead of confronting rape directly and treating it as other crimes, it is explained away as something too atrocious to prosecute and something so impossible to prevent that it is unworthy of prosecution.

The Statute of the Nuremberg tribunal makes no mention of rape or any sexual or gender-based crimes. It is enumerated neither as a crime against humanity, nor as a war crime. So it will be of no surprise to say that sexual crimes that took place during World War II were never prosecuted by the Nuremberg tribunal, despite the fact that World War II saw the widespread use of sexual violence.

In its first year of existence, the Rwanda Tribunal didn't fair much better with regard to gender crimes. There was little genuine or vigorous investigation of the crimes by the office of the prosecutor. Although the ICTR statute, unlike the Nuremberg statute, explicitly incorporates rape and other sexual violence under crimes against humanity and war crimes, none of the initial indictments by the court included sexual crimes.

When indictments were amended to include sexual crimes, the amendments did not occur until the middle of the trial, when witnesses happened to testify of the rapes. For example, in the *Akayesu* trial, when a witness - five months into the trial - testified of rapes, the trial was temporarily suspended so the prosecution could investigate and determine if evidence of rape crimes were available for which *Akayesu* could incur responsibility. The indictment was eventually amended, but only five months into trial.

Despite its slow start, the ICTR has to date made several important milestones with regard to prosecuting gender crimes. The ICTR is the first international tribunal to define rape under international law, to recognize rape as an instrument of genocide, to acknowledge that rape can cause mental as well as physical harm, to recognize rape as a crime against humanity, to accept forced pregnancy as a potential crime, to recognize the

role of the media in inciting sexual violence and the first to indict a woman for rape. Indeed, the court achieved quite a few milestones.

With regard to defining rape, the ICTR emphasized that while rape had traditionally been defined in domestic jurisdictions as non-consensual sexual intercourse, this definition was too narrow. Instead, it defined rape as a physical invasion of a sexual nature committed on a person under circumstances which are coercive. It went on to say sexual violence, including rape, is not limited to physical invasion of a human body and may also include acts that do not include penetration or even physical contact.

This definition of rape is important in several ways. First, it ousts consent as a defense to rape under international law, where coercive circumstances can be established. Coercive circumstances do not need to be evidenced by a show of physical force. Threats, intimidation, extortion and other forms of duress, which prey on fear or desperation, could be coercion. Second, the ICTR definition of rape includes rapes committed against children and men. Third, it expands the acts that constitute rape to include any physical invasion of any body orifice by any object introduced externally. This would include rapes with foreign objects, such as with a piece of wood. Fourth, it recognizes that sexual violence does not require penetration or even physical contact, which would include tactics such as forced nudity.

In addition to being the first international tribunal to define rape, the ICTR was the first tribunal in history - in its *Akayesu* case - to convict an accused, not only of genocide, but also of using rape as an instrument of genocide. The tribunal found that rape and other acts of sexual violence constitute infliction of serious bodily or mental harm on members of a protected group under the definition of genocide. The Tribunal heard how *Akayesu* stood by as rapes were committed; how he encouraged rape and told his subordinates they no longer needed to ask what a Tutsi woman tasted like; how *Akayesu* facilitated rape, forced nudity, sexual mutilation and other forms of sexual violence. He was not accused of raping women himself, but the charges demonstrated that he played a role in encouraging the rapes. The Tribunal also heard how *Akayesu* ordered young Tutsi girls to march or perform gymnastics naked. The sexual violence was ultimately designed to result in death or to destroy the woman psychologically, culturally and physically so as to render her incapable of normal existence, her capacity to reproduce and produce diminished, even eliminated.

So far, the journey has taken us from Nuremberg, where rape was too atrocious to mention, to Rwanda, where the Tribunal had no trouble addressing the sexual violence in detail. Recognizing that rape is an instrument of genocide is particularly important because genocide is one of the earliest and most widely recognized crimes and has been named the

“ultimate crime.” As the U.N. Special Rapporteur said in 1978, genocide is the “gravest and the greatest of crimes against humanity.”

Related to recognizing rape as an instrument of genocide, the Tribunal felt that serious mental harm, under the definition of genocide, could be interpreted as harm that causes serious injury to the mental state of the victim. It noted that measures intended to prevent births within the group may be physical but can also be mental. For instance, rape can be a measure intended to prevent births when a person raped refused subsequently to procreate in the same way that members of a group can be led through threats and trauma not to procreate. A showing of physical harm is not necessary; mental harm can be enough to constitute genocide.

The ICTR was also the first international tribunal to recognize rape as a crime against humanity. It found that the rapes in Rwanda were both systematic and carried out on a massive scale, as required by the definition of crimes against humanity. This finding is important because it recognizes that rape was not an isolated incident. It is estimated that, in a matter of three months, over 250,000 women were raped in the Rwandan genocide.

The ICTR, in its *Akayesu* decision, also recognized forced pregnancy as a potential crime. The Tribunal in dicta described the situation in which a rapist might deliberately impregnate his victim with the intent to force her to give birth to a child who would, because of social conventions, not belong to the mother’s group. The Tribunal noted that such an act might constitute genocide. This recognition of forced pregnancy as a potential crime is important because it paved the way towards explicitly including “forced pregnancy” into the International Criminal Court (ICC) statute. Forced pregnancy was not included under the ICTR statute, but was subsequently included into the ICC statute, under crimes against humanity and war crimes.

The ICTR was the first tribunal in history to hold the media responsible for inciting sexual crimes committed as a means of persecution of the Tutsi. The defendants in the media case were two founders of the Rwandan radio station, Mille Collines, and an editor of a Rwandan newspaper. The Tribunal noted that the radio station and the newspaper had relentlessly demonized Tutsi women, presenting them as seductive enemy agents. By defining the Tutsi women as enemies in this way, the media articulated a framework that made the sexual attacks on Tutsi women a foreseeable consequence. This decision by the ICTR to hold the media responsible will most probably play an important role in future decisions by the ICC.

The ICTR established an incredible precedent by being the first tribunal to charge a woman with genocide and rape. Pauline Nyiramasuhuko, former minister for women’s development and family welfare, was charged with two charges of rape: one as a crime against humanity and the other as a violation of the Geneva Conventions on war

crimes. The indictment alleges that Nyiramasuhuko set up roadblocks in order to identify, kidnap, rape and kill members of the Tutsi population. It alleges that she used her influence to incite those under her authority to commit acts of rape during the Rwandan genocide. Charging Nyiramasuhuko with rape committed by those under her command reinforces the principle that sexual violence of any kind committed by any person, male or female, should not and will not be tolerated. Her trial is currently in progress at the Tribunal.

Despite its historical significance in furthering progress in the prosecution of gender-related crimes committed in the context of war or mass violence, the ICTR has fallen short of expectations in several respects. Considering the widespread use of sexual violence in the Rwandan genocide, gender crime prosecutions at the ICTR have been inadequate. The Tribunal put on trial 27 suspects and handed down 20 judgments. Twelve years after the genocide, only 10 persons have been convicted of rape, either in Rwanda or at the ICTR.

After the momentous ruling in the *Akayesu* case, the hope was that future indictments against accused persons at the tribunal would automatically include charges of rape and sexual violence where evidence existed. Certainly after the groundbreaking interpretation of rape as a form of genocide and as a crime against humanity, it was widely suspected that the prosecutor would be charging sexual violence in the broadest possible manner underneath the statute. Unfortunately, this proved to be a false expectation. In the case of the *Cyangugu* defendants, for example, two witnesses, one a victim and another a perpetrator, gave evidence of crimes committed. Yet there were no charges of rape or sexual violence at all in the indictments.

From a statistical point of view, there has been a drastic fall in the proportions of indictments that include sexual violence. Although more than half of the indictments at the ICTR have contained charges of sexual crimes, the proportion of indictments pertaining to sexual violence fell from 100% in 1999-2000 to 35% in 2001 and 2002.

The Tribunal has also fallen short of expectations when it comes to compensating victims of sexual violence. Many victims of rape in Rwanda - seventy percent - contracted HIV as a result of the rapes. For a long time, the accused in custody of the ICTR were receiving drugs while the rape victims and witnesses with HIV/AIDS were denied those same drugs. Although the Tribunal is currently beginning to address this, it is not empowered to compensate the victims of rape. The ICTR statute was set up without any mechanism of compensation. It lacks the jurisdiction to handle and assess those cases. Article 105 and 106 of the ICTR Rules of Procedure and Evidence assign the issue of compensation to national courts. The ICC statute changes this by allowing victims to claim reparations. This

development has a lot to do with Rwandese victims of rape speaking up and stating that justice is no justice without compensation. Even in its shortcomings, the ICTR has paved the way to further positive developments in international law.

The Tribunal faces a number of remaining challenges. It is currently hearing nine cases involving a total of 28 accused. It still has 15 detainees to bring to trial and 14 high-level accused that remain at large. All trials are supposed to end by 2008, and the closing date for the court is set for 2010. The fear is that in the interest of speed, rape charges will be overlooked and perhaps put aside. For example, in the case of *Omar Serushago*, the indictment originally contained specific charges of rape, but these charges were withdrawn at a plea bargain that enabled the defendant to plead guilty. More recently, in December 2005, rape charges were withdrawn in exchange for a guilty plea in the *Bisengimana* case. Rape charges seem to be the first to go. Also, there is a fear that defendants will plead guilty to avoid being transferred to Rwandan courts after the Tribunal closes its doors. This may lead to even more dropped rape charges.

Another challenge for the Tribunal is that many women who survived rape during the genocide are dying of HIV/AIDS, thereby limiting the number of women who are willing and able to come testify of the rapes. Combine this with the approaching closing dates for the Tribunal and it may result in rape acquittals, dropped charges and other missed opportunities to prosecute gender crimes.

In conclusion, despite all the challenges the Tribunal has faced, and will likely face in the coming years, it has made important milestones. At the time of the Nuremberg trials, rape was grossly overlooked as a normal consequence of war and was viewed as too atrocious to prosecute. Sixty years later, we know that rape can be a tool of genocide, the gravest crime against humanity. We also know that all those who incite violence against women, be they government leaders, business people, newspaper editors or women themselves, will be held accountable.

Thank you.