

SYMPOSIUM ON THE INTERNATIONAL CRIMINAL TRIBUNALS FOR THE FORMER
YUGOSLAVIA AND RWANDA: BROADENING THE DEBATE

GENDER JUSTICE BEYOND THE TRIBUNALS:
FROM CRIMINAL ACCOUNTABILITY TO TRANSFORMATIVE JUSTICE

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What are the legacies for gender justice of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR)? Darryl Robinson and Gillian MacNeil in this symposium describe the modernization of the law on sexual violence as a key legacy of the *ad hoc* international criminal tribunals.¹ However, this characterization does not capture the wider challenges that gender-based crimes have raised for the Tribunals, including other legacies of gendered hierarchies and inequalities. How, then, is it possible to move past these issues to build international criminal justice so that it transforms, rather than reproduces, gendered injustices?²

The Legacies of the Tribunals: Key Challenges for Gender Justice

Key challenge one: greater criminal accountability for gender-based crimes

The gendered gap in international criminal justice first became visible with the establishment of the Tribunals in the 1990s as a result of feminist campaigning. As Robinson and MacNeil describe, International Criminal Law (ICL) lacked both substantive definitions of, and procedural and evidential rules for, sexual violence offences. They note that the Tribunals made important progress in addressing these gaps. Further doctrinal innovations included developing modes of liability for sexual violence offences.³ The Tribunals established the legal basis of these crimes, showed that they were an integral part of the illegal conduct of these conflicts, and that they could be successfully prosecuted.

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¹ Darryl Robinson & Gillian MacNeil, *The Tribunals and the Renaissance of International Criminal Law: Three Themes*, 110 AJIL 191 (2016).

² See Jelke Boesten & Polly Wilding, *Transformative Gender Justice: Setting An Agenda*, 51 WOMEN'S STUD. INT'L FORUM, 75 (2015).

³ *Prosecutor v. Stakic*, Case No. IT-97-24 (Int'l Crim. Trib. for the Former Yugoslavia), *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44.

However, the subsequent record of the Tribunals also indicates continuing gendered justice gaps.⁴ This uneven record includes the significant gender imbalance between male and female witnesses, which does not reflect the high numbers of women who are victims of, or surviving witnesses to, non-gender-based crimes.⁵ It also includes inadequate fair labelling and inaccurate characterization of these offences. For example, sexual violence has not been appropriately described in charging in some cases, while in others it has not been accurately qualified as the appropriate offence. Finally, there has been inconsistent prosecution of criminal acts, and low conviction rates in prosecuted cases.

These gendered justice gaps can be attributed to four key issues. The first issues are substantive and evidential. These range from an overly restrictive judicial interpretation of substantive elements of offences, such as requiring proof of nonconsent (but not for other crimes), to an inaccurate application of evidential norms, such as imposing higher evidentiary standards of proof to establish links between senior officials and sexual violence committed by subordinates than for other crimes.⁶ Gender stereotypes and misconceptions are a second barrier. These include notions that conflict-related sexual violence is an exclusively opportunistic crime, or that survivors are reluctant to testify due to stigma. Third, institutional obstacles also block effective and equitable prosecutions. These include inadequate gender competence and/or expertise, lack of leadership or commitment to prosecution, and inadequate development or implementation of policy across the international criminal justice system.⁷

The fourth and final issue concerns the underdevelopment of gender-based crimes in legal doctrine and practice (as Jarvis' important discussion shows).⁸ In doctrinal terms, sexual violence offences require further substantive development. While rape and other crimes of sexual violence are clearly prohibited, there is no distinct offence of sexual violence under ICL. Rather, if the requisite international elements are met, sexual violence can be prosecuted as a war crime, crime against humanity, or genocide. Moreover, the Tribunals have not provided consistent definitions of sexual violence offences. For example, the distinction between rape, sexual violence, or sexual assault remains to be fully clarified, as does consent as an element of these offences. Other crimes, such as sexual enslavement or sexual torture, also require further elaboration. In practice terms, Tribunal prosecutions and judicial findings reveal an important but only partial picture of sexual violence in these conflicts. For example, their findings provide an incomplete picture of the different forms or pervasiveness of sexual violence against men and women. This picture does not sufficiently show the connection of these acts to wider patterns of gender-based *and* general crime categories. As a result, the Tribunals' bodies of jurisprudence only partially contextualize crimes of sexual violence within these conflicts.⁹

Moving beyond sexual violence offences, gender-based crimes more generally require significant development. Despite the absence of a specific offence of sexual violence, these crimes are the most visible of gender-based crimes in academic and public understandings of the legacy of the Tribunals. However, sexual violence is not the only gender-based crime committed in conflict. As the Tribunal cases reveal, other gender-based crimes are also likely to form an integral part of the conduct of conflict. The Tribunals have made

⁴ For discussion, see SERGE BRAMMERTZ & MICHELLE JARVIS, PROSECUTING CONFLICT-RELATED SEXUAL VIOLENCE AT THE ICJ (2016); HILMI ZAWATI, FAIR LABELLING AND THE DILEMMA OF PROSECUTING GENDER-BASED CRIMES AT THE INTERNATIONAL TRIBUNALS (2014); and Office of the Prosecutor, Best Practice Manual for the Prosecution of Sexual Violence, ICTR (2014).

⁵ Victims and Witness Section & The Castleberry Peace Institute, Echoes of Testimony (2016). Comparable witness statistics are not available for the ICTR.

⁶ See Prosecutor v. Milutinovic et al., Case No. IT-05-87-T, Trial Judgment, V.1, para. 201 (Int'l Crim. Trib. for the Former Yugoslavia, Feb. 26, 2009); and Prosecutor v. Kajelijeli, Case No. ICTR-98-44A-T.

⁷ BRAMMERTZ & JARVIS, supra note 4; and Office of the Prosecutor, supra note 4.

⁸ BRAMMERTZ & JARVIS, supra note 4.

⁹ See Id. at 216-219 and 320-332.

important steps in recognizing gender-based crimes as core crimes in their jurisprudence.¹⁰ However, this jurisprudence has not adequately developed these gender elements of existing core crimes, such as elaborating how attacks directed towards women on the basis of their gender can be an element of genocide. It has also not sufficiently developed the criminalization of other distinctive harms experienced by women in war, such as the disproportionate impact of particular means and methods of warfare upon women as members of the civilian population.¹¹

Key challenge two: linking criminal justice and social transformation

The key second challenge of gender justice after the Tribunals concerns how to better link international criminal accountability to broader processes of social change in conflict settings. This challenge recognizes that international criminal accountability will provide only a partial component of the wider agenda of transformative gender justice. In the Symposium, Milanović, Kendall, and Nouwen acknowledge the limits of the “retributive legal form” of international prosecutions in effecting postconflict transitions in Rwanda and Yugoslavia.¹² However, addressing this challenge also requires acknowledging that international prosecutions of sexual violence alone do not provide gender justice, whether in terms of addressing the individual material and social needs of survivors, or the broader collective challenge of transforming gendered inequalities. The fragmented approach of criminal and civil justice policies to sexual violence and gender-based crimes in Rwanda and the former Yugoslavia has been particularly damaging for survivors of these crimes and for these postconflict societies. These legacies of the Tribunals show the necessity of linking international criminal justice to national prosecutions of gender-based and sexual violence crimes. They also show why it is essential to integrate prosecutions and national postconflict processes, and to include women and gender policies in those postconflict processes.

A Dual Strategy for Transformative Gender Justice

To move gender justice beyond the current trend of the modernization of sexual violence norms and practices requires a dual strategy. This strategy involves developing a new international instrument, such as a convention on the prohibition, prevention, and punishment of sexual violence and gender-based crimes, which fully articulates these elements of gender justice prosecutions. It also involves formulating framework principles that incorporate criminal justice into peace agreements and national prosecutions, as well as linking criminal prosecutions and civil justice programs (including reparations, advocacy, economic and psycho-social support).

Convention On The Prohibition, Prevention, And Punishment Of Sexual Violence and Gender-Based Crimes

The proposed convention would set out the offences of sexual violence and gender-based crimes. It would also incorporate a full range of implementation, enforcement, and referral policies and mechanisms. Ideally, this would take the form of a general multilateral treaty agreed to by state parties and supported by the United Nations, with the aim of establishing generalizable rules equivalent to the general practice of states

¹⁰ For example, *Prosecutor v. Krstić*, Case No. IT-98-33, Appeals Judgment (Int'l Crim. Trib. for the Former Yugoslavia, Apr. 19, 2004); and *Prosecutor v. Akayesu*, ICTR-96-4 respectively.

¹¹ See JUDITH GARDAM & MICHELLE JARVIS, *WOMEN ARMED CONFLICT AND INTERNATIONAL LAW* (2001).

¹² Sara Kendall & Sarah M. H. Nouwen, *Speaking of Legacy: Toward an Ethos of Modesty at the International Criminal Tribunal for Rwanda*, 110 AJIL 212 (2016); Marko Milanović, *The Impact of the ICTY on the Former Yugoslavia: An Anticipatory Postmortem*, 110 AJIL 233, 235 (2016).

supporting customary rules. This approach aims to create rules that are generally accepted norms at the international level, together with obligations to investigate and prosecute these crimes. These would be similar in operation to the Geneva Conventions of 1949 and the grave breaches enforcement obligations.

The first aim of the proposed convention would be to address the current challenges of gender justice for sexual violence prosecutions. This approach would address the fragmented nature of the existing legal framework by developing a comprehensive definition of the offence of sexual violence covering all conflicts by all actors at all levels of responsibility. This definition should build upon the customary international rule that prohibits sexual violence in conflict. It would aim to “codify” important legal developments of the offence of sexual violence in international law. It would also seek to clarify current substantive and evidential issues (such as the issue of consent), and to extend the existing rules so that they articulate the substantive elements of the offence, and modes of liability, and widen the category of actors subject to these obligations. These rules would aim to create obligations upon all actors in conflict, whether the conflict is international or noninternational, and whether the actors are state, nonstate, or third party actors in transnational conflicts.¹³ This is necessary to address remaining differences in applicable law governing these situations of conflict, and questions as to which law serves as the basis for the imposition of individual criminal responsibility in national or international courts.

Accordingly, the proposed convention would set out sexual violence as a differentiated, specified and serious criminal offence under international criminal law.¹⁴ This would set out the elements of the offence, criminal responsibility, and applicability, including:

- (1) the category of acts of a sexual nature prohibited under international law (the elements of sexual violence offences);
- (2) the modes of commission of the acts in the coercive circumstances of genocide, crimes against humanity, or armed conflict, whether internal or international (the contextual elements of international crimes);
- (3) the responsibility of state and non-state actors, including United Nations peace-keeping forces, private military companies, and paramilitaries;
- (4) the modes of liability of military and civilian leadership and their responsibility for other armed actors, regardless of their relationship to state parties to the conflict;
- (5) the application of these norms to all victims, whether or not they belong to any party to the conflict.

With this approach, the convention would be able to specify the different forms of perpetration of conflict-related sexual violence. It would differentiate between gender-based crimes classified in terms of the core crime categories that give the conduct its character as an international crime, which would include (i) nexus to armed conflict, (ii) an attack upon a civilian population, or (iii) the destruction of a protected group. It would thereby enable the development of sexual violence offences as part of general crime categories, as well as a distinct offence rising to the level of an international crime.

The convention should also set out compliance, enforcement, responsibility, and reparation obligations of equivalent gravity to other serious violations of international humanitarian law, and draw on existing obliga-

¹³ See Patricia Sellers, *Sexual Violence and Peremptory Norms: The Legal Value of Rape*, 34 CASE W. RES. J. INT'L L. 287 (2002).

¹⁴ See Kirsten Campbell, *The Gender of Transitional Justice*, 1 INT'L J. TRANSITIONAL J. 411 (2007).

tions under this legal regime. To strengthen implementation, the instrument should include mechanisms and measures such as:

- investigative commissions and referral mechanisms to appropriate international bodies;
- obligations to investigate and prosecute, including the obligation to establish universal jurisdiction;
- review mechanisms and standards for prosecutions, including review of conflict-related sexual violence patterns of prosecution, trial practices, and sentencing; and
- “outreach” and public information strategies within judicial and security sector institutions.

The second aim of the proposed convention is to address the challenges of providing gender justice for gender-based crimes. Accordingly, this requires developing both the legal categories of gender-based crimes, and improving legal practice in this area. To do this, the proposed convention would build upon and expand the proposed approach to sexual violence outlined above. However, this is a considerably more complex task. Jarvis cautions that focusing on sexual violence as a separate category can be in tension with the aim of situating sexual violence in the context of other gender harms and crimes committed in the course of the conflict.¹⁵ At a normative level, the issue is how to capture different patterns of sexual violence in elements of crimes, modes of liability, and evidential standards, such that sexual violence can be linked to other gender based crimes and contextualized within the broader patterns of illegal conduct of contemporary forms of conflict. This issue is integrally tied to the fundamental challenge of rearticulating gender harms in ICL.¹⁶ This requires revising existing substantive elements of core crimes to incorporate a gender framework. For example, Patricia Sellers argues that the core crime of genocide should include gender, gender identity, and sexual orientation as protected groups, and Jarvis identifies persecution, unlawful attacks on a civilian population, and definitions of armed violence as areas for further development of a gender perspective.¹⁷ However, achieving this second aim also requires integrated policy and practice across all sections of judicial institutions and all sectors of the international criminal justice system seeking to prosecute these crimes. The strategy of developing a convention on sexual violence and gender-based crimes is only one building block for addressing these wider challenges that gender-based crimes pose to international criminal justice.

Framework Principles for Peace Agreements and National Criminal Justice: Linking Criminal And Civil Justice For Sexual Violence and Gender-Based Crimes

An integral part of the wider challenge of transformative gender justice involves recognizing that international criminal accountability will only be a partial component of the larger transformative agenda of gender justice. Unless this approach is taken, international prosecutions will be less successful in providing accountability for gender-based crimes, and will not fully provide justice to these groups of victims. Ultimately, these failures can jeopardize postconflict reconciliation. International and national prosecutions must involve active engagement with the affected victims and with broader society in order to develop effective postconflict strategies to end impunity and nonrecurrence of these crimes.

On this basis, it is necessary to consider how to tie international criminal accountability to broader processes of social change in national conflict settings. While domestic prosecutions are now seen as the cornerstone

¹⁵ See BRAMMERTZ & JARVIS, *supra* note 5, at 7.

¹⁶ This point was identified in dialogue with Nela Porobic Isakovic, Michelle Jarvis, Gorana Mlinarevic, Patricia Sellers, and Du-bravka Zarkov.

¹⁷ See Patricia Sellers, *Sexual Violence in Conflict: A War Crime*, HOUSE OF LORDS PAPER NO. 23, HOUSE OF LORDS SELECT COMMITTEE ON SEXUAL VIOLENCE IN CONFLICT, (Apr. 12, 2016); and BRAMMERTZ & JARVIS, *supra* note 5, at 16.

of international criminal justice, they cannot function effectively without better strategies for addressing the considerable difficulties that prosecutions of gender-based crimes face in national jurisdictions. These include:

- the broader conflict and postconflict context;
- existing obstacles in domestic systems, such as legal or cultural norms or practices;
- harmonization of standards (such as international legal norms) and best practice (legal and institutional) between international and national courts;
- how to build upon legal traditions of national cultures in establishing or developing national prosecutions; and
- the provision of sufficient economic and political resources for effective prosecutions.

One crucial aspect of this effort will be to develop framework principles that can provide the basis for integrating strategies for criminal and civil accountability for conflict-related sexual violence and gender-based crimes at national and international levels. These guiding principles would establish the basis for the negotiation of peace agreements, and the accompanying development of national criminal and civil justice strategies. The principles ought to incorporate the international standards for prosecutions set out in the proposed convention, such that they would establish investigative, implementing, and review mechanisms, together with relevant standards of criminal and civil accountability.

These principles should include at least four key elements:

- (1) meaningful and active participation of women and inclusion of gender justice policies in all levels of peace talks and decision-making mechanisms, as well as in all criminal and civil justice institutions, and any bodies responsible for implementation;
- (2) assessment of gaps in existing criminal and civil justice provision at the national level, such as the lack of capacity or legal basis for prosecuting offenders or compensating victims of sexual and gender-based crimes;
- (3) identification of implementing mechanisms and parties, including review, report, “outreach” and public information elements; and
- (4) provision of reparations, psycho-social and economic support, and strategic advocacy.

To implement this dual strategy would require support within, and across, institutions in all sectors. Institutional reform would include prioritizing competence in gender issues and conflict-related sexual violence expertise, together with centralizing gender issues in all relevant activities, including equal representation of men and women at all levels. It is clear from the experience of the Tribunals that an integrative approach that addresses these issues at international and national levels is necessary to combat continuing cultures of impunity for sexual violence and gender-based crimes. It is also essential to provide more equitable and effective postconflict gender justice and peace building in national jurisdictions.¹⁸

Addressing sexual violence and gender-based crimes in conflict remains a critical area for developing gender justice for international crimes. A dual strategy for international criminal accountability that develops a convention for sexual violence and gender-based crimes, together with framework principles for peace

¹⁸ See Rashida Manjoo & Calleigh McRaith, *Gender-Based Violence and Justice in Conflict and Post-Conflict Areas*, 44 CORNELL INT'L L.J. 11 (2011).

agreements and national prosecutions, is the best next step for building transformative gender justice. With this strategy, international criminal justice can not only build upon the important legacy of the Tribunals, but also move beyond its impasses.