

The Anonymous Past: Women and International Justice

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For centuries women have been the predominant victims of war crimes, crimes against humanity, even genocide. But only in the past decade has that dubious status been acknowledged or have women been permitted into the power circles that decide what international law forbids and how its prohibitions can be effectively enforced. Women's participation in international humanitarian law—its substance and the policymaking—is still fragile and it needs continual reinforcement. But their contributions in the last ten years have been formidable. The changes they have fought for and won in amazing ways show that gender does matter in war and in peace.

One of the chroniclers of women's pioneering journey into international law, Professor Kelly Askin, author of four volumes on Women and International Humanitarian Law and a fellow worker at the Yugoslav Tribunal, has commented in Dickensian fashion—"these are the best of times, these are the worst of times." Women are now represented in more international power

positions than in any other time in recorded history, but their numbers are neither equitable nor comparable to men by any measure. They are finally breaking out of their prior stereotypically gendered roles in U.N. and other international organizations—roles concerned with women’s issues exclusively—agencies labeled as having “marginalized power and limited impact.” But as my own experience at the International Criminal Tribunal for the former Yugoslavia has shown, their foothold is tenuous and the specter of tokenism (even tokenism at the top) still haunts. Meanwhile—again to quote Professor Askin—“with increased technology, information, and struggles for equality come . . . greater and more frequent demonstrations of cruelty, power and subjugation” in which women are the primary victims. A few informational bullet points make the point.

Today about one in every 150 persons on earth (40 million) is displaced (refugeed) by armed conflict or human rights violations; 75% of the displaced are women and their dependent children.

During the conflict in the former Yugoslavia, there were an estimated 20,000 victims of sexual assault; an international expert panel concluded that practically every female over the age of 12 who survived the genocide in Rwanda had been raped.

There were no Bosnian women at the Dayton Peace negotiations in 1995; at the first Arusha peace talks on Rwanda-Burundi, only two of the 126 delegates were women.

At the U.N. Secretariat staff, the rate of progress among women in professional and high policy-making categories increases at 1% a year edging toward equality by 2012. The most senior grades are at a 10% female representation level; in the professional category as a whole they are 38%. The Security Council has repeatedly passed resolutions proclaiming its commitment to

the importance of women and their perspective in the peace process.

In the judicial domain, the war crimes tribunals of the ICTY and ICTR, as well as the other 17 other international courts with a total of 210 judges, only 13 are women. We will have only one regular member of my 16-person court after I leave. Until a year or so ago, the ICTR never had more than one woman judge since 1994. The International Court of Justice has one woman out of 15. The prestigious U.N. International Law Commission created in 1947 to codify and recommend changes in international law has only recently had its first woman among its 34 members. Auspiciously, the new International Criminal Court has just elected 7 women to its 18 person tribunal.

The Engines of Change

Ironically, the emergence of women and their unique plight in times of armed conflict onto the international humanitarian law scene was sparked in large part by the media coverage and subsequent public outrage engendered by the widespread and systematic use of rape and sexual abuse as a tool of war subordination and subjugation during the Yugoslav war of 1991–95. Historians suggest similar violations have always occurred in prior wars—but what was different in this Yugoslav conflict is that enterprising and courageous on-the-scene media exposed those crimes as they were happening for a shocked world to see. When the U.N. set up the Yugoslav Tribunal in 1993, for the first time it included in the ICTY charter specific mention of rape in Article 5 as a recognized crime against humanity. The same was true a year later when the Rwanda Tribunal was set up in 1994. Half a century before, in Nuremberg and Tokyo, extensive crimes against women were acknowledged and documented as violations of the customary norms of international law but usually buried in the indictments and presented under generic labels such as inhumane treatment or crimes against honor.

The specific inclusion of sexual assaults against women as war crimes in the two ICTY and ICTR charters can be traced to a heavy lobbying effort by the NGOs concerned with women's issues, many of the same groups who had pursued equality in the form of the Convention for the End of All Discrimination Against Women (CEDAW). Madeleine Albright was the American Ambassador to the U.N. at the time the Tribunals were established, and her interest in women's parity helped put it on the front burner. The first American judge appointed to the ICTY was Gabrielle Kirk McDonald, whose place I took when she retired.

The women's NGOs—particularly the Global Campaign for Women's Rights—secured not only explicit recognition of rape as a crime against humanity, punishable in an international criminal tribunal, but the adoption of a position for a legal advisor to the Chief Prosecutor for Sexual Assault Crimes, a position now held for eight years by Patricia Sellers, an African-American woman. The women's lobbying groups were also successful in getting the ICTY to adopt Rule 96, providing for special protections for victims of sexual assault, i.e., no evidence of prior sexual conduct could be admitted, no need for corroboration of the victim's testimony, and limited scope for the consent defense, which excludes consent under conditions of detention, threats, or other duress. A Victims and Witnesses Section was also established to provide counseling and assistance to all witnesses with special emphasis on staffing by women for sexual violence victims. In addition to a woman President for two years (the Rwanda Tribunal has also had a woman President for several years now), there have been two women Chief Prosecutors. Indeed one might have thought that we had entered a new era in which women's newly prominent roles in international humanitarian law would bloom like a thousand flowers. A new breed of respected and productive international women legal scholars sprang up to dissect outdated notions of international law as they affected real life problems and women and to propose new concepts that would more truly reflect women's claims for parity in the realm of international humanitarian law.

And for sure there have been significant advances made in a relatively short period—advances which will hopefully be carried over into the new Permanent International Criminal Court to which the U.S. government has not become a participant. Article 36 of the new Court's Statute, for instance, requires adequate representation of women among the judges and staff. ICTY and ICTR jurisprudence meanwhile has filled in the interstices of what constitutes rape, or sexual outrages against the dignity of women or girls, i.e., making them perform nude in front of men even if they are not physically touched; it has proclaimed that rape may constitute the crime of torture and be a tool of genocide; it has deflated the argument—raised early on—that short of rape, sexual assaults are not “serious” crimes fit for Tribunal jurisdiction. The debate over whether rape can be a war crime under Article 3 as well as a crime against humanity under Article 5 has been settled with a verdict of “both.”

And in the past year, the first prosecution based entirely on crimes of sexual enslavement and rape was brought against three Bosnian Serb soldiers who had kept young women and girls confined in a house for their pleasure—much along the lines of the Japanese “comfort women.” The convicted defendants received sentences upward from 28 years.

These are praiseworthy achievements. The wartime violation of women's human rights—like domestic violence in peacetime—long invisible to law enforcement bodies has been forced onstage. The historical reticence of male-bound institutions—be they municipal police stations or international law-making bodies—to address violence against women has been surmounted, or at least we hope so. The national prosecutors and courts who down the line must take over the responsibility for prosecuting most war crimes and crimes against humanity have been alerted to the fact that the international community has defined the norm to include crimes against women.

The Tasks Ahead

But make no mistake. There is much more to be done. The struggle

for women to take and keep power positions in the humanitarian law explosion is not over. Since its beginning only two of the 16 members of the Yugoslav Tribunal—different ones at different times—have been women. (There is much more ethnic and racial than gender diversity; not more than one member can come from the same country and third-world countries are in general adequately represented.) Despite attempts to generate interest and enthusiasm for women candidates among the national governments who nominate judges for election by the U.N., not a single woman other than Florence Mumba from Zambia—a member since 1996—was put forth in 2001, and she just squeaked through at the bottom of those elected. Similarly the Tribunal in Rwanda where rapes were a pervasive weapon in the genocidal campaign has had only one woman among its nine members since its beginnings in 1994. Thank heavens, the international press raised enough of a fuss about our elections so that when the 27 *ad litem* judges (who supplement the regular corps of judges at the ICTY, each one sitting on a single case), were nominated, a sizeable portion were women and the first 5–6 *ad litem*s already assigned are women. But that is not good enough; the *ad litem*s, while a valuable resource, do not have the same powers or prestige as the full-time judges and will not sit on the appeals court which ultimately has the last say on what this new body of evolving humanitarian law is.

As I mentioned, we have had two women prosecutors for both the Yugoslav and Rwanda Tribunals, and an extremely able advisor on women issues at the ICTY. There is also a cluster of women among the senior litigators. But it is still unclear that any true priority for women's problems has yet permeated the organization. Attitude on gender matters down the line is crucial. There has to be a sense of awareness from the moment a war crimes investigation begins that gender-related crimes are a priority; the field workers have to start looking for information and evidence about war crimes against women years before an indictment is written and a prosecution begun. They have to be trained in what questions to ask and what kind of evidence to

look for. If the forthcoming ICC is to do better in this regard it must insure from the beginning that women are placed in supervisory and policy-making prosecutorial positions down the line (not just at the pinnacle). If women are to assume their rightful policy-making positions in the enormously important developing field of international humanitarian law, attention must be paid to the structural systems of bodies that interpret and enforce the new humanitarian law. My fear is this—the world of academia that studies us is studded with female stars—but the world that operates the system is still very much on the cusp as far as progress for women is concerned.

Final Thoughts

A final word. The new breed of women international scholars has been busy documenting women's systematic exclusion from the early development of international law, and their omission from representative positions in national states, the U.N., and international organizations, with tragic effects on issues pivotal to women throughout the world. Even when the focus has finally turned to women in the past few decades, it has generally been with respect to blatant gender-specific discrimination, i.e., the Convention to Eliminate All Discrimination Against Women (CEDAW). But this kind of formal legal parity is just the beginning and never enough by itself. Women soon find out that apparently non-gender specific principles of human rights are quite differential in their relevance and application to women's lives. Women's lives in underdeveloped countries are so different from men's that a male norm for equality is totally inappropriate and often useless in bringing them out of economic and social subjugation. Thus U.N. conferences and commissions on population, the environment, social development, education, and housing have only begun to integrate women's social roles as primary caregivers and caretakers into a human rights agenda. The trend unfortunately is to enlarge and expand the articulation of formal rights while *de facto* inequality continues unabated but even there to give only token acknowledgement to enforcement of any kind.

Equality for women defined as rights equal to men's is not a satisfactory standard. Indeed it may ultimately impair or deny women's ability to achieve full realization of their human rights and fundamental freedoms. Real equality has to challenge the underlying masculine-dominated structure of global economic, political, and legal systems.

Even in my limited corner of the world scene, I can see this. A war crimes tribunal would be remiss to operate a witness protection unit that treated men and women witnesses alike. Women—especially victims of sexual assault—suffer an additional burden of stigma when they go public with their experiences; they need a different kind of reassurance, counseling; the ways in which they can be intimidated and retaliated against in their home communities are more varied and more insidious. The physical and mental effects of bodily assaults are different for men and women; the indirect effects on women of losing their husbands, fathers and sons in terms of community standing and ability to start-up new lives is more far-reaching and culturally based. Indeed in the recent Srebrenica decision—the first genocide conviction at the Yugoslav Tribunal—we used the inevitable and predictable effect on their wives and children of the mass killings of young Muslim men as a proof of genocidal intent on the part of the Serbian perpetrators. To make a difference in women's lives, humanitarian and human rights law must be reality-based with a continual focus on women's lives in the here and now and on what economic, political, legal, and cultural obstacles to change are embedded in their current status. Bars against open discrimination against women in favor of men will change a little but not enough.

The tasks ahead are enormous; but a decade ago they were not even defined. Women—in academia and especially women in international organizations and NGOs—have made a real difference in putting women's special problems in conflict situations center stage. What remains is to make inroads on the fundamental problems that implicate their human rights in war and in peace. The women scholars and activists have shown that international humanitarian law is permeated with a male norm—combatants

are given priority over civilians; combatants are mostly men, civilians are mostly women; more rules protect the male combatants and breaches of those rules are considered graver than those affecting civilian women; the rules that do affect women are directed primarily to their perceived status as weaker beings and to interfere with their sexual and reproductive roles. International humanitarian law is still of limited relevance to their most basic problems in times of unrest—displacement and refugee arrangements, distribution of aid and assistance, training of military peacekeepers. In the words of Michele Jarvis, an Australian writer, human rights advocate, and my colleague at the Tribunal, “as long as men make the decisions for women, irrespective of how well-intentioned they may be, the particular experiences of women in armed conflict will always be overlooked.” That goes double for human rights in peacetime.

Women have landed on the global scene but the engagement is just beginning. I hope some of you out there will be part of that engagement in the decades to come.