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Ilaria Bottigliero

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ILARIA BOTTIGLIERO

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University of Catania
School of Law
CRIO Centre of Research on International Organizations
Villa Cerami
I – 95124 Catania
Italy

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WOMEN IN ARMED CONFLICT

Ilaria Bottigliero*

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I. Women and War

It is a well-known fact that women suffer disproportionately in times of war, political instability and ethnic tensions. During the conduct of hostilities, women often become the target of sexual and gender violence, ethnic cleansing or genocidal policies not only as individual victims, but also as a mean by which to weaken the community under attack.

Consider the case of some 200,000 Bangladeshi women raped during the 1971 nine-month Liberation War that marked the secession of Bengali East Pakistan from West Pakistan to become the independent State of Bangladesh. It is estimated that around 200,000 women were forcibly held in army barracks and cantonments across Bangladesh and systematically raped by Pakistani army regulars. Tens of thousands of mothers were forced to give their children up for adoption because their children were branded "enemies-children".

Consider also the case of large numbers of Muslim women who were raped during the communal mobs erupted in the Indian western state of Gujarat in February 2002. So far, most of the rape victims have seen no action taken against their attackers, both because the police seem unwilling to take their complaints seriously and because women are under a lot of pressure to withdraw their statements.

Many of these crimes are committed in situations of armed conflict or war. Therefore, today we are going to have a brief overview of the law protecting women during war, as well as the remedies women can access to obtain some form of justice in case of serious violations of human rights and humanitarian law.

II. Throughout History

Despite the fact that women are a target during war and political unrest, historically, women have not figured prominently in either the laws of war or in war crimes tribunals. Crimes of a sexual nature did not figure as independent categories in the Nuremberg or Tokyo Charters adopted in the aftermath of the Second World War. This resulted in major injustices towards women. For example, the omission from the Tokyo Charter of an independent category of crimes of a sexual nature proved especially deleterious for women in Asia. Thousands 'comfort women' were victims of sexual slavery by the Japanese army, and have awaited justice and redress

for a long time. A few are still alive, protesting for the harm suffered and asking for apologies and compensation.

We had to wait until 1949 to see a specific provision under international law protecting women against violence in time of war. The Fourth Geneva Convention became the first international instrument to codify a specific provision of this kind. Article 27(2) protects women against Aany attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault. These acts (non-exhaustive list) are prohibited in all places and under all circumstances, irrespective of the nationality, race, religious beliefs, age, marital status or social condition of the woman. Although prohibited however, these violations were not considered criminal acts under the Convention, therefore they did not rise to the level of war crimes. If a soldier raped a woman, or if women were held in situation of sexual slavery, the offenders would not risk any criminal sanction, but only disciplinary sanctions.

The situation did not change much by 1977, when Protocol I additional to the Geneva Convention was adopted. Article 76 of Additional Protocol I, reiterated the 1949 provision and stated thatAwomen shall be the object of special respect and shall be protected in particular against rape, forced prostitution and any other form of indecent assault. Mention to 'attacks on the honour' of a woman was scrapped, as considered an outdated notion, but the rest of the provision remained the same, including the fact that violence against women was not criminalized. States were not ready to have rape or sexual violence as a criminal offence.

III. ICTY and ICTR

Some of the weaknesses of the Geneva Conventions and Protocols have been addressed in the 1990s within the efforts of the UN Security Council to prosecute and punish serious violations of humanitarian law in the former Yugoslavia and Rwanda.

In particular, the prohibition of rape found new application in the Statutes of the two International Criminal Tribunals for the Former Yugoslavia and for Rwanda, adopted by the Security Council in 1993 and 1994 respectively. For the first time, rape was clearly recognized as a crime against humanity giving rise to individual criminal responsibility under international law. However, the two Statutes failed to recognize rape as a war crime and did not cover any other form of sexual or gender-based vio-

lence. This is because at the time of the Tribunals' establishment, the UN Security Council decided to grant the ICTY and ICTR competence only over well established crimes recognized as such in customary international law, and rape was not considered as a well-established enough war crime.

In practice, this resulted in some serious limitations in the actual prosecution of the crime of rape under each Statute, at least during the early phase of the operation of the Tribunals. Whenever the Prosecutor wanted to issue an indictment on counts of rape, he or she had to fulfil the higher threshold of a crime against humanity, including the widespread and systematic character of the act (against the civilian population, with knowledge of the attack). Fortunately, this gap in the law has been at least partially filled by the jurisprudence of the two tribunals, such as for example in the *Akayesu Case* of 1998, which has expanded the material coverage of the Statutes with respect to crimes of sexual and gender violence.

As these examples suggest, despite the many improvements and developments in the law of armed conflicts, women have been left mainly at the periphery of international humanitarian law, especially in terms of prosecution and punishment of crimes of sexual and gender violence. In particular, rape and other crimes of sexual violence committed on a large scale or in a systematic manner are not easy to prosecute.

At the domestic level, domestic courts are often unwilling or unable to prosecute and punish crimes of a sexual or gender nature committed on a large or systematic scale. Often, the reasons for these weaknesses have to do with extra legal considerations preventing women from accessing justice on an equal basis as men, such as the level of education and the family background of the woman, cultural, traditional religious barriers, including the fact that many Asian cultures tend to stigmatize crimes of a sexual nature and severely marginalise the victims of these crimes in society.

At the international level, judicial and quasi-judicial mechanisms dealing with international crimes such as *ad hoc* tribunals, truth and reconciliation commissions or other investigative bodies have mostly ignored crimes of a sexual or gender nature. Therefore we need to ask ourselves: can international criminal law assist in these kinds of situations?

IV. How Can International Criminal Law Help?

It is precisely in these kinds of situations, where domestic courts are ei-

ther unwilling or unable to prosecute crimes of concern for the international community as a whole, that international criminal law can help. In particular, the International Criminal Court represents a major opportunity for women to enjoy their basic right to seek and obtain justice for crimes of a sexual or gender nature committed either during war or in peace time

V. The International Criminal Court

The ICC was set up in 1998 as a permanent, judicial institution to prosecute and punish individuals for genocide, war crimes, crimes against humanity and eventually the crime of aggression.

VI. Basic facts

The Rome Statute of the ICC was adopted in 1998 and it entered into force in July 2002, which means that it can only prosecute crimes committed after this date. (120 States voted in favour; 7 States voted against: China, Libya, Iraq, Israel, Qatar, United States, Yemen; 21 States abstained). At present, 139 countries have signed the Statute and 110 have ratified it - meaning that more than half of the world's countries have now joined the Court. There are however major exceptions, namely the US, China, Russia, India and Japan[1]. So far, there are four situations under in-

[1] To date, out of the 35 countries in the Americas, 25 have become States Parties to the Court: 10 in the Caribbean (Antigua and Barbuda, Barbados, Belize, Dominica, Dominican Republic, Guyana, St. Kitts and Nevis, St. Vincent and the Grenadines, Suriname and Trinidad and Tobago); 14 in Latin America (Argentina, Brazil, Bolivia, Chile, Costa Rica, Colombia, Ecuador, Honduras, Mexico, Panama, Peru, Paraguay, Uruguay and Venezuela,); and Canada. Despite the active participation of many Asia and Pacific governments at the Rome Conference, meetings of the Preparatory Commission and Assembly of States Parties, as well as current representation at the International Criminal Court (ICC) by Judge Sang-Hyun Song of the Republic of Korea and Judge Fumiko Saiga of Japan, the region remains significantly underrepresented at the ICC. To date, only 13 States, including Australia, Afghanistan, Cambodia, Cook Islands, Fiji, Japan, Marshall Islands, Mongolia, Nauru, New Zealand, the Republic of Korea, Samoa and Timor L=Este have become States Parties to the ICC. Although the Salomon Islands, Thailand and the Philippines have signed the Statute, they still need to ratify the ICC treaty. European civil society and governments, including the European Union and its Member States, are among the Court=s staunchest supporters and have played absolutely crucial roles in the historic establishment of the ICC. Europe and the Central Asian Republics today have 41 States Parties, 7 signatories (Armenia, Kyrgyzstan, the Kingdom of Monaco, the Republic of Moldova, the Russian Federation, Ukraine and Uzbekistan) and 6 non-signatories (Azerbaijan, Belarus, Kazakhstan, Turkmenistan, and Turkey and the Holy See) to the ICC. The Middle East and North Africa (MENA) at this time has one State Party to the

vestigation by the ICC: Northern Uganda, Democratic Republic of the Congo, Central African Republic and Darfur - Sudan (three referred by state parties and one by the Security Council).

VII. Why does the International Community need the ICC?

Whenever we are faced with crimes of great magnitude, involving a large number of victims, often committed in a climate of political unrest or war, domestic courts are often unwilling or unable to prosecute and punish those responsible for major crimes such as genocide, war crimes or crimes against humanity. Take for example a country like Rwanda after the 1994 genocide that killed almost a million people: some 80% of judges and lawyers were targeted and killed during the genocide. It was practically impossible for the country to have proper trials following the restoration of political order. Rwanda was unable to prosecute. Or consider Yugoslavia - a country in which many of the war criminals are still considered war heroes, therefore there is a clear unwillingness to prosecute and punish them domestically. We are experiencing a similar situation in Darfur, where State authorities have been unwilling to deal with the situation and to prosecute and punish those responsible. It is in this kind of situations that the ICC has the power to intervene, to restore justice, to break the circle of impunity and to give victims a chance to receive some form of redress.

ICC - the Hashemite Kingdom of Jordan, which ratified the Rome Statute in 2002. The Comoros Islands and Djibouti, both members of the Arab League, are also states parties to the Rome Statute, having ratified in August 2006 and November 2002, respectively. Jordan has played a leading role in the establishment of the ICC through its Presidency of the Assembly of States Parties (ASP) from 2002 to 2005 and active involvement in the Trust Fund for Victims. Eleven more states (Algeria, Bahrain, Egypt, Iran, Israel, Kuwait, Morocco, Oman, Syria, UAE and Yemen) are signatories to the Rome Statute and have been key participants in the meetings prior to and since the Rome Conference of 1998. Iraq, Lebanon, Libya, Qatar, Saudi Arabia, and Tunisia did not sign the Rome Statute, but have also participated at the meetings leading up to and since Rome. Some countries in this region have indicated that they are waiting for the crime of aggression to be defined before considering ratification or accession to the ICC. Thirty African countries have ratified the Rome Statute, making Africa the most represented region in the Assembly of States Parties.

VIII. Why a Special Focus on Women in the International Criminal Court?

Because women and girls suffer disproportionately during war, the Rome Statute of the ICC contains a number of important and progressive provisions expressly designed to target crimes of a gender and sexual nature and to protect women victims and witnesses of such crimes. Under the Rome Statute, gender-related crimes are extensively covered under both the category of crimes against humanity and of war crimes.

As for Crimes Against Humanity (Art. 7(1)(g)), the Rome Statute prohibits the following acts: Asexual slavery, enforced prostitution, forced pregnancy[2], enforced sterilization, or any other form of sexual violence of comparable gravity. In addition to this specific provision on sexual violence, Art. 7 also contains a gender component in its coverage of 'enslavement' and 'persecution'. The crime of 'enslavement' specifically includes trafficking in persons, in particular women and children. The definition of 'persecution' comprises for the first time acts against groups or collectivities identifiable on the basis of gender. As a result of this innovation, persecution against a group or a collectivity identifiable on the basis of its gender is for the first time a crime against humanity, a provision which can have enormous repercussions in situations in which women are subject to persecution as a group simply because of the fact that they are born female.

As for war crimes, Art. 8 of the Rome Statute on war crimes represents one of the main innovations of the Rome Statute on gender protection, because it introduces for the first time a separate category of war crimes related to sexual violence. The adoption of the ICC Statute changed this

[2] The Statute further defines the crime of 'forced pregnancy' as: the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy. 'Forced pregnancy' could be applied for example to the case of Bosnia-Herzegovina, where the Serbs were raping Bosnian women and keeping them in detention in order to have Serb babies. *See* the harsh debate over the inclusion in the text of the words 'forced pregnancy' (a broad concept involving keeping the woman pregnant for purposes contrary to international law) instead of 'forcible impregnation' (a narrower concept related to forcibly making a woman pregnant), a concept supported by the Holy See. It was feared that the insertion of 'forced pregnancy' would create a domestic obligation to provide forcibly impregnating women access to abortion. Finally, an agreement was reached which permitted the inclusion of forced pregnancy on the condition that this would not interfere with national legislation on abortion.

situation. As a result, the following acts are now war crimes, no matter whether they are committed in international or internal conflicts: Arape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization and any other form of sexual violence also constituting a grave breach of the Geneva Conventions or a serious violation of common art. 3.

This is quite a step forward not only for the development of the law on sexual violence, but also for the development of international humanitarian law in general. Thanks to the Rome Statute, today we have a separate category of war crimes of a sexual and gender nature, which will make prosecution much easier than before.

IX. How Can Women Access the Court?

At the Rome Conference, States decided not to provide victims with an independent capacity to institute proceedings before the ICC. As a consequence, victims have only 'indirect' access to the Court through the action of the Prosecutor. More specifically, at the very initial stages of the judicial process, victims can provide the Prosecutor with information on a specific situation.

If, on the basis of such information, the Prosecutor considers that there are sufficient grounds to initiate the investigations, then the process can be started.

The ICC also provides for a system of protection of victims of crimes of a gender and sexual nature in ICC proceedings. Usually, victims and survivors of genocide, crimes against humanity and war crimes are quite reluctant to talk about their personal experiences and their sufferings. In the case of women and girls who have suffered mass rape or other kinds of gender violence, this reluctance becomes even stronger. Often, women associate the sexual violence they have suffered with a sense of shame. Many of them experience rejection and marginalization from their own community because of the sexual nature of the violations. In traditional societies, the 'shame' linked to crimes of a sexual nature has prevented women from accessing justice, in addition to being marginalized and stigmatized by society. Also women are generally less educated than men, they fear repercussions if they access justice administration, they are politically less organized and less supported in society.

In Rome, delegates and NGOs tried to come up with concrete solutions to facilitate the judicial process in instances of sexual crimes. As a result,

the Rome statute contains several provisions for the protection of victims of gender or sexual violence. For example, judges can take special measures for the protection of the safety, physical and psychological well-being, dignity and privacy of victims having regard to their gender and to the nature of the crime, in particular where the crime involves sexual or gender violence (Art. 68). Also, there is the possibility to conduct in camera proceedings, should the victim prefer such option, or the presentation of evidence by electronic or other special means. Finally, the ICC Statute establishes a Victims and Witnesses Unit, with the task of protecting all victims, but especially those who suffered from crimes of a sexual nature (Rule 16).

In terms of reparations, Judges have the power to award reparation in the form of compensation, restitution of property, rehabilitation, or in other forms. The necessary funds for compensation will come either from fines and forfeitures directed directly against the offender, or from a Trust Fund where states, organizations, private individuals, etc, can make voluntary contributions in favour of the victims.