Gender-Based Violence and Justice in Conflict and Post-Conflict Areas

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OVERVIEW

The Avon Global Center for Women and Justice at Cornell Law School convened its inaugural conference on March 12, 2010, at the National Museum for Women in the Arts in Washington, D.C. \(^1\) Entitled “Gender-Based Violence and Access to Justice in Conflict and Post-Conflict Areas,” the conference brought together different stakeholders to exchange views and recommendations for advancing gender justice and ending impunity for conflict-related violence against women and girls. The event drew over 175 distinguished judges, scholars, prosecutors, policymakers, civil society representatives and advocates from both the public and private sectors. Participants included over 30 jurists from more than 15 countries, including current or former Supreme Court justices from four countries and nine judges from international tribunals. The keynote address was delivered by Professor Rashida Manjoo, UN Special Rapporteur on Violence against Women, Its Causes and Consequences. The *Cornell International Law Journal* will publish a special issue dedicated to the conference topic, featuring articles authored by several conference speakers.

This Conference Report provides a summary of the proceedings.\(^2\) The following themes in the form of recommendations emerged throughout the day’s presentations and discussions:

- **Deepen cooperation and coordination between international and domestic justice systems.** The cooperation of States is critical to give effect to arrest warrants issued by international criminal tribunals. Domestic courts also have a specific role to fulfill as regards the prosecution of comparatively “low-level” perpetrators – a role that is typically beyond the mandate of international tribunals. Further, cooperation among various jurisdictions may be required to address post-conflict gender issues, such as sexual violence committed against women by United Nations (UN) peacekeepers. Various speakers echoed the message that international tribunals cannot be expected to alone provide adequate justice and compensation to survivors of sexual and other gender-based violence during conflict. In particular, States may be better positioned to adopt a more holistic approach to justice by investing in women’s access to social, medical, psychological, economic and other rehabilitative measures.

- **Improve cross-sector dialogue and collaboration.** Pointing to the relevance of the exchange facilitated by the Conference itself, participants noted the benefit of cooperation among different sectors and actors that interact with survivors of gender violence. For example, judges and legal advocates benefit from the insights of medical professionals who treat survivors, but do not typically have the opportunity to exchange views and policy recommendations on the related issues. Deeper collaboration on gender issues is needed between government and civil society generally, but in particular as part of the post-conflict rebuilding process.

- **Broaden the concept of justice for victims-survivors.** The conference included substantial discussion on the concept of justice beyond retributive justice and prosecution. Medical and psychological care were emphasized as both immediate and ongoing priorities for victim-survivors of sexual and other forms of violence. Advocates working directly with conflict survivors also noted that basic family needs such as food and shelter can be some survivors’ main priority, sometimes outweighing interest in pursuing prosecution of crimes. Schemes of pecuniary reparations such as microfinance were also discussed, noting that attention should be paid to how reparations schemes can be developed in a manner that will be of long-term benefit to beneficiaries of such programs.

- **Improved evidence gathering.** There is a critical need for improving the quality and processes of evidence gathering at the investigative stage for the effective and fair prosecution of gender crimes at the national and international levels. Identified gaps include resource constraints (human capital, funds and technology), training of investigators, victim protection and access to crime scenes and witnesses.

- **Gender sensitivity and training.** Specialized training on gender issues should be made available (and, where appropriate, compulsory) for key actors impacting the treatment of victims of sexual and other gender-based violence. Such actors include investigators, prosecutors and other staff of national and international tribunals,

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\(^1\) This conference was made by possible by a grant from Avon Foundation for Women, and additional support from Virtue Foundation, Cornell Law School, the Berger International Legal Studies Program, *Cornell International Law Journal* and BarBri.

\(^2\) The Report seeks to memorialize key points raised during the presentations, but does not purport to include all points discussed during the presentations and question-and-answer periods following each panel. Recordings of the conference presentations are available on the Avon Global Center for Women and Justice website: http://www.womenandjustice.org.
judges, public agents such as police and custom officers, medical practitioners and peacekeepers. In addition, relevant standards of competence and ethics should be enforced.

- **Focus on prevention.** Attention must be paid to preventing – not just redressing – sexual and other forms of gender-based violence. While deterrence through criminal accountability and prosecution is important, prevention likewise requires a long-term view and entails significant investment in the form of education, training and legal reform aimed at dismantling engrained and systemic gender discrimination and barriers to accessing justice.

- **Increase women’s participation in post-conflict transition.** Women have a central role to play in securing peace and peaceful transitions, as set forth in UN Security Resolution 1325. Women should be directly and deeply involved with post-conflict transitions, including peace negotiations, peacekeeping forces and as officers and judges in the international criminal tribunals.
KEYNOTE ADDRESS

Professor Rashida Manjoo, UN Special Rapporteur on Violence against Women, Its Causes and Consequences: “The Recognition of Sexual Violence under International Law—Opportunities and Challenges”

Professor Manjoo’s remarks focused on the legal advances towards preventing and prosecuting violent crimes against women, particularly during and after conflicts. She commended the Rome Statute, which established the International Criminal Court (ICC), and the international war crimes tribunals for setting new standards to recognize sexual and gender-based crimes as violent acts – as opposed to linking such crimes to notions of morality and honor. She also highlighted how these standards have been integrated into the work of different human rights bodies through the progressive interpretation of provisions in core international human rights instruments.

Professor Manjoo commented on the development of certain UN Security Council Resolutions that specifically address gender violence during conflict. For example, Resolution 1325 (2000)\(^3\) recognizes the disproportionate impact of conflict on women and children, and affirms the role of women in preventing and recovering from conflict. The Resolution advocates implementing international humanitarian and human rights law frameworks to address violence against women during and after conflict, and calls for increased participation by women in all aspects of conflict prevention and resolution.

Resolution 1820 (2008)\(^4\) takes into account the use of sexual violence as a tactic of war to humiliate, disperse, dominate and instill fear in the population, and recognizes that sexual violence represents a threat to security and impedes the restoration of peace. Pursuant to Resolution 1820, the Secretary-General issued a report in 2009 that identified major factors contributing to and exacerbating sexual violence, including: (1) inadequate measures to prevent sexual violence and to protect citizens; (2) inadequate measures for combating impunity for sexual violence and (3) inadequate measures to address discrimination against women and girls in law and practice.

The most recent of these Resolutions, 1888 (2009),\(^5\) goes even further to call for the expansion of resources and expertise dedicated to the issue of gender violence, including through the following measures: the appointment of a Special Representative on Sexual Violence to strengthen existing UN coordination with governments, judicial representatives, military personnel and parties to an armed conflict; the creation of a team of experts to assist and enhance capacities of governments and security forces to cope with sexual violence and strengthen the rule of law to prevent impunity; and the establishment of women’s protection advisors in peacekeeping missions.

Professor Manjoo stressed that, despite progress, the international community must strengthen its resolve to ensure compliance and implementation of laws that protect women’s rights and security. To that end, Professor Manjoo called for an emphasis on: adequately training and holding accountable military forces, including both UN security forces and national military personnel; excluding sexual and gender-based crimes from amnesty in conflict resolution processes by using civilian courts as opposed to military courts; and improving the protection and treatment of witnesses and victims in international criminal law.

Professor Manjoo also called for strengthening domestic capacity to hold perpetrators of gender violence criminally liable, and to provide victims with a right to remedy that encompasses satisfaction, rehabilitation and assistance including medical treatment and psychosocial services.

Noting the escalation of conflict violence in cultures where violence and discrimination against women are prevalent, Professor Manjoo underscored the fundamental need to prevent discrimination and violence against women prior to, during and after conflict.


PANEL 1: PROGRESS AND GAPS IN INTERNATIONAL LAW IN SECURING JUSTICE FOR SURVIVORS OF GENDER-BASED VIOLENCE DURING ARMED CONFLICT


Distinguished panelists:

- H.E. Judge Joyce Aluoch, International Criminal Court (ICC)
- Judge Dennis Byron, President, International Criminal Tribunal of Rwanda (ICTR)
- Muna Ndulo, Professor of Law, Cornell Law School and Director of Cornell University’s Institute for African Development
- Valerie Oosterveld, Professor of Law, University of Western Ontario
- Patricia Viseur Sellers, Visiting Fellow, Kellogg College, University of Oxford

Discussion Overview

The first session framed the conference topic with a discussion of how international law and jurisprudence have developed to address gender crimes, and how it remains incomplete in securing justice for women and girls in conflict and post-conflict settings. The discussion acknowledged advances made since the Nuremberg and Tokyo War Crimes Trials, in which gender-based crimes were not charged despite the mass perpetration of such crimes during World War II. Notably, gender crimes committed during more recent conflicts have been charged and prosecuted by international criminal tribunals in groundbreaking decisions, leading to the development of “gender jurisprudence” specific to crimes committed during conflict.

The discussion highlighted that, in spite of important positive developments, international criminal tribunals are still hampered by various factors, including among others: (1) persistent bias in jurisprudence, especially regarding the element of “consent” to sexual acts; (2) lack of gender sensitivity and appropriate training of investigators and other criminal justice system actors; and (3) ongoing financial and resource constraints in funding, for example, extensive investigations.

The distinguished speakers gave presentations on the topics noted below, followed by questions and answers moderated by Hon. Joanna Seybert.

ICC’s Role in Ending Impunity for Gender-Based Violence

H.E. Judge Joyce Aluoch identified specific developments, initiatives, and challenges relating to the ICC’s role in ending impunity for gender-based violence. The ICC is widely regarded as encompassing the most progressive international court in terms of gender sensitization. Developments and initiatives by the ICC have included:

- **Defining gender-based crimes.** The Rome Statute incorporates progressive, comprehensive definitions of sexual and other gender-based crimes in international criminal law;

- **Victim and witness protection.** The ICC devotes special attention to the protection of victims and witnesses of sexual and other gender-based violence. Specifically, the Court establishes a mechanism to facilitate victims’ testimony and assists with victims’ reintegration into communities so that they may rebuild their lives with a sense of dignity;

- **Victim participation.** The ICC provides victims the right to participate in the Court’s proceedings through legal representation; and

- **Victims’ Trust Fund and Victims and Witnesses Unit.** The ICC has designated funds to provide victims and witnesses necessary financial, psychological, and medical assistance.
Judge Aluoch also observed limitations and challenges that the ICC faces in its mission to end impunity for gender-based crimes, including:

- **Jurisdictional limitations.** The ICC is a court of last resort, in accordance with the principle of complementarity,\(^6\) thus, the Court has jurisdiction only when States are unwilling or unable to prosecute international crimes.\(^7\) Furthermore, the ICC focuses on the prosecution of high-ranking officials, while national courts remain responsible for prosecuting other perpetrators.

- **Enforcement limitations.** The ICC lacks enforcement capacity (e.g., does not employ a police force) to arrest and surrender suspects. Hence, in order to arrest and detain alleged perpetrators of crimes, the Court must rely on States’ cooperation.

- **Financial limitations.** Financial constraints pose a challenge to ensuring adequate victim and witness protection, as well as providing reparations. Judge Aluoch also pointed to the additional special needs of victims with HIV/AIDS, who require immediate assistance and medical treatment.

- **Evidentiary challenges:** Sufficient and reliable evidence is difficult to obtain in the post-conflict context, particularly in cases involving sexual crimes. Many challenges relate to the reporting of crimes, including the fear of stigmatization and the lack of reporting structures. In addition, some survivors consider that reporting crimes is less pressing than issues such as taking care of their children.

Further reflecting on victims’ reluctance to report crimes, Justice Aluoch made an analogy with the situation in Kenya (her country of origin) in the context of the post-election violence that occurred in 2008. She noted that the Commission of Inquiry established to investigate the election-related violence experienced problems in convincing victims of sexual violence to come forward to testify. The legislative apparatus for protecting witnesses was insufficient. This situation served as a useful lesson insofar as it prompted Kenya to establish an agency and protection body for witnesses, as well as a victims’ compensation fund, which were subsequently established to respond more proactively to the needs of crime victims.

Judge Aluoch emphasized the importance of ensuring cooperation between the ICC and States, as well as NGOs and other relevant actors, particularly in light of the jurisdictional and other limitations of the ICC. Justice Aluoch underscored the importance of States’ ratification of the Rome Statute and incorporation of the Statute’s provisions into domestic legislative systems, in order to join efforts with the ICC to end impunity for sexual and other gender-based crimes.

**The ICTR’s Contributions to International Gender Jurisprudence**

Judge Dennis Byron, President of the ICTR, spoke about the ICTR’s contributions to international jurisprudence on sexual violence, and challenges faced by investigators in the early years of the Tribunal. Recalling the prevalence of sexual violence in the events constituting genocide in Rwanda, Judge Byron acknowledged the difficulties originally confronted by the ICTR in recruiting competent personnel to investigate the violence. The first investigators appointed were not Rwandan; although skilled police officers, they lacked cultural familiarity with Rwanda as well as adequate gender sensitization training. Lack of local knowledge impeded the investigators’ understanding of certain euphemisms used by Rwandan women to express that they had been raped and, in turn, evidence-gathering in many cases was inadequate or misguided. For example, some women would say “he married me” to report that they had been raped. This euphemism was initially recorded literally by investigators, and only later was the expression understood to actually mean rape. Although there was a delay in appreciating the strong social stigma of sexual violence, Judge Byron explained that the ICTR has since taken measures to respond to these challenges, such as through the establishment of a Gender Desk within its Victims and Witnesses Unit.

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\(^6\) The Preamble of the Rome Statute, recalling the “duty of every State to exercise its criminal jurisdiction over those responsible for international crimes,” emphasizes “that the International Criminal Court established under [the] Statute shall be complementary to national criminal jurisdictions.” Rome Statute of the International Criminal Court (Rome Statute), A/CONF.183/9, July 17, 1998, entered into force July 1, 2002, preamble. See also Rome Statute, art. 1, on the application of the complementarity principle to the Court.

\(^7\) Article 17 (a) of the Rome Statute provides that the Court shall declare a case inadmissible where “the case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution.” Rome Statute, art. 17(a).
Judge Byron also acknowledged contributions of ICTR jurisprudence on the issue of sexual violence in armed conflict.¹⁸

- **Groundbreaking decisions on gender-based violence.** *Prosecutor v. Akayesu⁹* provided the first conviction for rape as an instrument of genocide,¹⁰ and the first definition of rape in international law.¹¹ The *Akayesu* definition of rape is based on the understanding that the central elements of rape cannot be captured through a mechanical definition referring to parts of the body. Through the adoption of a broader, conceptual definition, the Tribunal acknowledged the seriousness of the crime of rape. As noted by Judge Byron, rape is used for intimidation, degradation, humiliation, punishment and control. Like torture, rape is a violation of a person’s dignity. Even when the Tribunal later opted for a more mechanical definition of rape, the ensuing definition remained broad to some extent.

- **Progressive standards to prove lack of consent in rape cases.** The ICTR recognized in *Akayesu* that coercion may be inherent to circumstances during armed conflicts and, hence, victims’ lack of consent could be implied from circumstances. The possibility of inferring lack of consent from coercive circumstances was later confirmed by the International Criminal Tribunal for the Former Yugoslavia (ICTY) decision in *Prosecutor v. Kunarac*,¹² and the ICTR’s *Prosecutor v. Gacumbitsi¹³* and *Prosecutor v. Rukundo¹⁴*.

- **Focus on superior responsibility for rape.** Judge Byron noted ICTR cases which provided relevant jurisprudence on superior responsibility for rape, notably *Prosecutor v. Musema¹⁵* and *Prosecutor v. Bagosora¹⁶*. He underscored the importance of the Tribunal’s focus on superior responsibility as a crucial step in establishing that sexual crimes can constitute war crimes, genocide and crimes against humanity. Such crimes are more than simply collateral damage of armed conflicts.

Acknowledging the potential influence of the ICTR’s jurisprudence on international and national courts, Judge Byron discussed the importance of victims speaking out about their experiences. Judge Byron also identified the need to provide, both during and after trial, adequate assistance to witnesses and victims of sexual violence, especially those infected with HIV/AIDS.¹⁷

**Addressing Violence against Women Committed by UN Peacekeepers**

Professor Muna Ndulo contributed insights regarding an often-ignored component of conflict-related violence: sexual exploitation and violence committed by UN peacekeepers during peacekeeping operations.¹⁸ Professor Ndulo noted that

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there are currently 17 peacekeeping operations in the world, with more than 110 countries contributing approximately 100,000 peacekeepers. Sexual exploitation and abuse, including rape, sex-trafficking and prostitution of adults and children, are perpetrated by peacekeepers in the context of these operations. Beyond the physical and psycho-social trauma inflicted on the victim, thousands of survivors are left pregnant with no financial support and are ostracized within their communities. The so-called “peacekeeping babies” are likewise ostracized, and face the additional burden of determining their paternity and nationality. Furthermore, domestic courts lack the jurisdiction or resources to compel the peacekeeper fathers to pay child support.

Professor Ndulo identified factors that contribute to this form of post-conflict crisis. First, armed conflicts increase the vulnerability of the local population by leading to or exacerbating the shortcomings of already-weak judicial systems, corrupt or nonexistent police forces and a collapsed economy. Further, extreme poverty and power differentials between peacekeepers and the local population may cause individuals to turn to prostitution as a source of income. However, Professor Ndulo argued, poverty of the local population should not be held as an excuse for sexual abuse and exploitation perpetrated by peacekeepers.

Professor Ndulo noted that a complicating factor is that, due to their special status as UN military personnel, peacekeepers are often free from prosecution by the host state. In fact, prosecution of crimes committed by peacekeepers during missions is difficult. First, there is uncertainty as to the applicable law. The Geneva Conventions, which govern the treatment of civilians during conflict, do not address UN peacekeeping operations, which are non-combat forces. Further, the Geneva Conventions typically apply to state entities, whereas the UN is an inter-governmental organization. Although the UN has developed a Code of Conduct to be signed by all UN personnel, and has adopted a “Zero Tolerance” policy on the issue of sexual violence, the bulletins created for staff are not legally binding on military personnel, who remain under the jurisdiction of their own governments.

Another challenge to prosecution is the multi-categorization of UN peacekeeping troops. Peacekeepers include various categories of personnel governed by different rules and procedures. These troops may include members of national military contingents and military officers, UN civilian police and military observers, UN civilian staff, UN volunteers, and individual contractors. Individual troop-contributing states under the Status of Force Agreements (SOFAs) have exclusive responsibility for the conduct and discipline of their own troops according to their own national laws and military regulations. Peacekeepers are, in effect, generally immune from prosecution in host states; the host state would need to seek a waiver of immunity before prosecuting in the host state.

Professor Ndulo urged that the international community must ensure that troop-contributing states take appropriate action against nationals who have engaged in such criminal conduct. However, cases may arise where the conduct for which a peacekeeper is suspended does not constitute criminal conduct in the home state. In addition, taking a peacekeeper into custody may be challenging if the accused is no longer in the territory of the host state, especially because extradition is not always an available option.

Another complicating factor is that host states do not always have a judicial system that meets international fair trial standards; thus, national systems may create additional human rights concerns in prosecuting peacekeepers accused of crimes during peacekeeping missions.

19 Professor Ndulo has written that: “[a]s recently as November 2007, the United Nations confirmed that it was sending home 100 Sri Lankan peacekeepers stationed in Haiti because of accusations of sexual abuse and sexual exploitation. The allegations included the abuse of underage girls and solicitation of prostitutes. In Côte d’Ivoire in August 2007, 800 peacekeepers were suspended on allegations of engaging in sex with minors. In 2007 there were reports that United Nations peacekeepers in southern Sudan engaged in sexual abuse and sexual exploitation of women. Also, a June 2008 Save the Children report stated that it believed that sexual abuse is widely underreported especially with regard to children who may be afraid to come forward and report complaints to investigators.” See id. at 143.

20 Professor Ndulo noted that reports estimate 24,500 peacekeeping babies in Cambodia, and 6,600 in Liberia.

21 For example, the legal age for consent to engage in sex may vary among countries, as does the criminalization of prostitution.
Looking forward, Professor Ndulo suggested that long-term solutions to stopping sexual violence by peacekeepers should include addressing its root causes – in particular, inequality, poverty and power imbalances. Professor Ndulo proposed various short-term measures to address impunity for such crimes:

- **Creating multiple opportunities for prosecution.** Professor Ndulo suggested passing a UN Security Council Resolution to require states to reinforce UN action by criminalizing sexual violence by peacekeepers. A Resolution could call on States to set up field courts for peacekeepers and to extend domestic courts’ jurisdiction to enable the accountability of peacekeepers outside national jurisdiction.

- **Revising the content of SOFAs** in order to address the issue of immunity of peacekeepers from prosecution by states other than their home state. If this is not possible, then a stronger focus must be set on prosecution of peacekeepers by their home states.

- **Adopting legislation** enabling “peacekeeping children” to claim support and, whenever possible, nationality from their fathers.\(^2\)

- **Focusing on preventive measures**, such as awareness-building, on-the-ground training and enforcement of discipline in peacekeeping units, for more effective treatment of the issue.

In the discussion following Professor Ndulo’s presentation, it was noted that the issue of peace-keeping violence highlights the need for gender-balanced peacekeeping forces, as the presence of more female peacekeepers would seem to lower the risk of sexual violence on local populations during peacekeeping operations. It was also suggested that peacekeeping agreements should consistently integrate provisions making sexual and other gender-based violence violations of the agreement.

**Lessons Learned from the Special Court for Sierra Leone**

Professor Valerie Oosterveld discussed the jurisprudence of the Special Court for Sierra Leone (SCSL) as it relates to charges of sexual and other gender-based jurisprudence. Professor Oosterveld noted that the SCSL deserved special attention because it was near the end of its mandate\(^2\) and, importantly, because its jurisprudence provides helpful guidance on how to address gender-based violence in conflicts. Professor Oosterveld particularly reflected on the impact of *Prosecutor v. Sesay, Kallon & Gbao*\(^2\) (known as the “R.U.F. case”\(^5\)), which offers a detailed and nuanced analysis.

Professor Oosterveld observed that the *R.U.F.* case provides **guidance on how gender-based violence may fit into the wider spectrum of crimes** that may be committed during armed conflicts, including apparently gender-neutral crimes. In the *R.U.F.* case, the Court turned to evidence of rape, sexual slavery and other acts to find crimes against humanity and war crimes, including the war crime of terrorism. In particular, the Court described the sexual violence committed by the R.U.F. against both women and men as perverse,\(^6\) and considered that the savage nature of such violence was aimed at spreading fear, breaking the will of the population and subjugating them to control. Sexual violence against the population was a deliberate attempt to destroy the family nucleus and undermine cultural and social structure.

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\(^2\) In the open discussion/Q&A following the panel presentations, a conference participant suggested that one possible solution is through the new Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance (Nov. 23, 2007).

\(^2\) As noted by Professor Oosterveld, it is estimated that the Court will have its final appeal in 2011, although certain matters (such as ongoing witness protection, preservation of and access to archives) may be assumed by a residual mechanism even after the Court closes.


\(^5\) “RUF” refers to the “Revolutionary United Front.”

\(^6\) Acts included brutal rape, insertion of objects into victims’ genitalia, rape of pregnant women and forced sexual intercourse between captured civilians.
The *R.U.F.* case provided the first conviction of sexual slavery (designated as such) and forced marriage by an international or hybrid tribunal.27 The case also recognized the nature of forced marriage as a serious and multidimensional gender-based crime, comprising sexual and non-sexual components. For example, “wives” are expected to fulfill sexual as well as domestic functions; they are expected to show loyalty for the “husband” and may also have a reproductive role. The SCSL Trial Chamber also described the use of the term “wife” by the R.U.F. as psychological manipulation. Moreover, victims of forced marriage by the R.U.F. carry lasting stigma that hampers their reintegration into society. The *R.U.F.* Trial Chamber considered that the prosecution need not prove lack of consent for forced marriage and sexual slavery perpetrated during the conflict in Sierra Leone.

The SCSL made significant pronouncements on sexual and other gender-based violence through its *R.U.F.* case. However, as Professor Oosterveld pointed out, in the subsequent *Civil Defence Forces* case,28 the judgment issued by the Trial Chamber included almost no reference to gender-based crimes despite what was widely considered obvious perpetration of such crimes by the Civil Defence Forces.29

Professor Oosterveld advocated following the approach taken in the *R.U.F.* case in order to place gender-based violence in the context of all crimes committed in armed conflicts, as such an approach takes into account and deepens understanding of the inter-connected role that such violence plays in periods of conflict.

**Persistent Gaps in International Humanitarian Law**

Ms. Patricia Viseur Sellers drew on her extensive experience as Legal Advisor for Gender and prosecutor at the ICTY (1994-2007) and as a Special Legal Consultant to the Gender and Women's Rights Division of the UN High Commissioner for Human Rights to identify gaps in international humanitarian law’s response to sexual and other gender-based violence. Ms. Viseur Sellers focused on four issues: (1) girl-children recruited as child soldiers; (2) “lack of consent” as an element of rape; (3) the absence of a general crime encompassing all gender discrimination; and (4) patriarchal constructions of peace.

- **Girl-children recruited as child soldiers**

Acknowledging that the SCCL and the ICC have charged defendants for use and recruitment for use of children in hostilities (e.g., the ICC case *Prosecutor v. Lubanga*), Ms. Sellers deplored that there is no comprehensive prohibition on the use of child soldiers. Under current international law, “use of children in hostilities” is prohibited, as is “recruitment of children for use in hostilities”; however, recruitment *per se* of children is not yet prohibited. As a result, international law currently overlooks the recruitment of girl-children during conflict for purposes other than participation in combat. This omission stems from a gender-biased assumption that only boys are recruited during armed conflicts, and only for the purpose of participation in hostilities. However, girls have been recruited during many armed conflicts (including in Sierra Leone and in the Democratic Republic of Congo) and for purposes other than direct participation in hostilities. Girls are recruited in large part for sexual purposes rather than combat; thus, these girl-children do not fit the definition of the crime of child soldiering. Ms. Sellers emphasized the need to prohibit recruitment of child soldiers *per se* in addition to the use and recruitment of children for use in hostilities. Accordingly, policy initiatives based on such prohibition of recruitment of children are necessary to enable international humanitarian law to adapt to facts and provide more adequate protection to girl children.

- **“Lack of consent” as an element of rape**

Ms. Sellers criticized that legal definitions of rape continue to require “lack of consent” as an element of rape, failing to take into account that a woman may consent to a sexual act in certain circumstances simply as a means of survival. International

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27 As acknowledged by Professor Oosterveld, the crime of forced marriage had already been dealt with by the SCCL in the AFRC case, but no conviction had been entered. See *Prosecutor v. Brima, Kamara & Kanu (AFRC Case)*, Case No. SCCL-04-16 (June 20, 2007). Furthermore, it should be noted that the ICTY has convicted defendants for acts of sexual slavery in *Prosecutor v. Kunarac*, Case No. IT-96-23-T & IT-96-23/1-T (Int’l Crim. Trib. for the Former Yugoslavia Feb. 22, 2001); however, charges against the defendants were based upon rape and enslavement, as the ICTY Statute makes no explicit mention to sexual slavery as such.


29 The majority of the Trial Chamber almost uniformly rejected the admission of evidence of gender-based crimes, sometimes on questionable grounds, in Professor Oosterveld’s view.
tribunals have acknowledged that circumstances beyond consent should be considered in order to prove rape. Also, in conflict and post-conflict situations, surrounding circumstances might be more revealing than actual “consent” given to sexual acts. Ms. Viseur Sellers advocated for the elimination of consent from the elements required to establish rape, and recommended a focus instead on the circumstances. Ms. Viseur Sellers further observed that children should never be considered able to consent to sexual acts. She noted that international humanitarian law could draw analogies from the concept of statutory rape in domestic law (providing that individuals under a certain age are unable to consent), and from the explicit disregard of consent under the UN Human Trafficking Protocol.30

- Absence of a general crime to encompass all gender discrimination

Ms. Viseur Sellers explained how discrimination against women and girls comprises different layers of discrimination. She stressed that the bundle of discrimination against women and girls is greater than the sum of its individual parts, yet there is no crime to refer to such a “bundle.” In this regard, Ms. Viseur Sellers pointed to the crime of apartheid, in which different layers of racial discrimination add up to the crime of “apartheid,” especially when governmental policies promote such racial discrimination or fail to protect a part of the population from it. Ms. Viseur Sellers posited that the absence of a crime addressing different layers of gender discrimination reflected a serious gap in identifying and understanding patriarchy and its impact in times of peace and conflict. Ms. Viseur Sellers therefore proposed consideration of “patriarchy” as a potential term for a crime that would encompass the different layers of discrimination against women and girls.

- Patriarchal constructions of peace

Ms. Viseur Sellers further stressed that the elimination of patriarchy is a necessary step towards peace. Peace, she remarked, has until now mostly been gendered in a masculine way. For example, people generally assume that “post-conflict” means that peace is achieved. However, if peace is assimilated to the absence of armed conflict, women will never actually experience peace. This point is illustrated by the widespread perpetration of sexual and other gender-based violence in post-conflict settings, notably even by peacekeepers. Ms. Viseur Sellers recommended defining peace under a more gender-inclusive perspective, such as “peace from all human rights violations,” “absence of all discriminations,” and “presence of true justice.”

PANEL 2: NATIONAL INITIATIVES AND TRAINING INNOVATIONS TO ADDRESS GENDER JUSTICE AND GENDER-BASED VIOLENCE

Moderator: Hon. Ann C. Williams, United States Court of Appeals for the Seventh Circuit

Distinguished panelists:

- Justice Elena Highton-Nolasco, Vice President, Supreme Court, Argentina
- Joseph Kamara, Deputy Prosecutor, Special Court for Sierra Leone; President, Sierra Leone Bar Association
- Judge Virginia Kendall, U.S. District Court for the Northern District of Illinois
- Justice Shiranee Tilakawardane, Supreme Court, Sri Lanka
- Justice Georgina Wood, Chief Justice, Supreme Court, Ghana

Discussion Overview

The second session focused on some of the practical challenges associated with responding to gender-based violence, including through initiatives and trainings focused on domestic court systems. Through various queries posed by Hon. Ann Williams, the speakers highlighted innovations and “best practices” that have better equipped their respective jurisdictions to identify and respond to the specialized needs of gender-based violence victims. For example, Argentina has created the Office of the Woman, staffed by personnel specially trained in gender issues. Sri Lanka has developed a judicial training protocol that incorporates gender issues. Ghana has established special courts that deal specifically with domestic violence and gender-based violence issues. Sierra Leone and other countries have established legal aid programs that focus on combating gender-based violence through the pro bono work of bar associations. In the United States, a program is being developed to train first responders in hospitals, law enforcement and immigration to recognize and assist women and girls who have been trafficked.

The speakers also discussed the significant role of social movements in demanding accountability for past atrocities and the negative impact of amnesty laws in hindering prosecution of gender crimes in national courts.

Argentina

Justice Elena Highton-Nolasco discussed steps taken to end impunity and amnesty for crimes committed against women during Argentina’s military regime following the 1976 military coup.

Justice Highton-Nolasco began by providing some background on the coup of 1976, which ushered in a regime during which over 350 detention camps were established for the physical and mental torture of thousands of women and men. Rape in these camps was commonplace, and it has been estimated that over 30,000 individuals were forcibly disappeared. A group of fourteen women first went to ask for the disappeared. This group, known as the “Mothers of the Plaza de Mayo,” eventually grew to 300 or 400.

During this regime, an estimated 500 babies were born into captivity. The mothers were tied to a bed and blindfolded. When they gave birth, the mothers were killed, and the children were given to military personnel to sever all original family ties. The “Grandmothers of the Plaza de Mayo” tried to locate the children, and 101 children were eventually found. The Grandmothers helped place into the Convention on the Rights of the Child the “Argentine Clause,” which addresses the right to identity.31 Today there is a new movement called “Hijos,” which aims to find approximately 400 children that are still missing.

31 See Convention on the Rights of the Child, adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989, entry into force 2 September 1990, art. 7 (“1. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents. 2. States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular
Justice Highton-Nolasco explained how Argentinean national courts have played an important role in restoring family
ties and nullifying adoptions in related cases. Significantly, baby-kidnapping—the practice of taking babies at birth from their
mothers and giving them to military families—and rape were carved out as exceptions to the post-regime amnesty laws,
permitting prosecution of those crimes. However, while there were many cases filed for baby-kidnapping, no case was ever
filed for rape. In 2005, the Supreme Court declared the amnesty laws null and void; since then, there have been 70
convictions of military personnel for the atrocities committed during the regime, and many trials are still ongoing.

Commenting on what the Supreme Court is doing to educate the public about their rights, Justice Highton-Nolasco stated
that Argentina has in the past year passed a new law on non-violence against women. Apart from the Office of Domestic
Violence in the Supreme Court, Argentina has also created an Office of the Woman in an attempt to heighten awareness
about women’s rights and gender cases, including within the judiciary.

Responding to a question regarding how the judiciary can engage civil society, Justice Highton-Nolasco elaborated
further on the Supreme Court’s establishment of the Office of Domestic Violence, and how that office relies on and functions
with the input of different stakeholders. The office employs medical doctors, psychologists, social workers and lawyers to
help the victims. The office is open 24 hours a day, 7 days a week. There, service providers can conduct a risk assessment
for victims, and victims are accompanied to the appropriate court if they desire. In coordination with the office, some groups
will also provide legal aid to the victims. The police stations directly refer the cases to the Office of Domestic Violence. To
better address issues of domestic violence on a more widespread scale, the provincial supreme courts in Argentina are
establishing similar offices. Thus, the judiciary has recognized the need for these services through the establishment of a
pilot program, and replicates these efforts across the country once proven successful.

Sierra Leone

Speaking from the experience of both a prosecutor at the Special Court for Sierra Leone and President of the Sierra Leone
Bar Association, Mr. Joseph Kamara discussed the prosecution of gender violence that occurred during the recent conflict
in Sierra Leone. After the Revolutionary United Front (RUF) began its brutal invasion in 1991, women were first distributed
to commanders, and the remaining women were passed on to the foot soldiers. The Armed Forces Revolutionary Council
(AFRC) subsequently overthrew the government and formed an alliance with the RUF. These events emboldened the RUF
to leave the jungle and invade the city, where they looted, burned and raped women on a massive scale. There was also a
government-backed militia group involved in the conflict called the Civil Defence Forces (CDF).

Mr. Kamara emphasized the notable action that the Special Court for Sierra Leone took to try the leaders of all the various
factions, which included the RUF, AFRC and CDF. He explained that, in the CDF case, it was a challenge to identify victims
and encourage them to come forward. Mr. Kamara remarked that while there was evidence of rape and sexual violence in
that case, the gathering of such evidence was difficult. For instance, investigators’ language barriers posed problems
when taking victims’ testimonies. It was necessary to understand, for example, that when a victim said, “He brought me into
his room,” it meant that she was raped.

Mr. Kamara also pointed out that there were challenges in establishing a rapport between the investigators and the
victims. In response to a question from Judge Williams asking what the Prosecution did to build the victims’ confidence, Mr.
Kamara described the use of confirmation exercises. Mr. Kamara explained that in order to confirm the victims’ testimonies
presented in writing, investigators went out to the villages to meet the victims in person. The investigators had to work
through the village chief or counselor, in whom the women confided. Mr. Kamara remarked that the trial continued while this
lengthy process took place. In addition, the Prosecution in the CDF case confronted a particular difficulty when the Chamber
refused to authorize the modification of charges to reflect new facts learned through the confirmation exercises.

Mr. Kamara observed that a blanket amnesty provided to some warring factions made prosecutions difficult in local
courts. Because international law does not recognize amnesties, the Special Court for Sierra Leone became responsible for
prosecuting the perpetrators.

where the child would otherwise be stateless”); art. 8 (“1. States Parties undertake to respect the right of the child to
preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful
interference. 2. Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall
provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.”), available at
In response to a question regarding whether pro bono requirements and legal aid services are successful in post-war contexts, Mr. Kamara discussed how Sierra Leone has established a legal aid scheme through the pro bono work of the bar association. He estimated that, during peacetime, 90 percent of the victims who suffer gender-based violence know their perpetrators. There is a tendency for wives, in particular, to cover for their husbands. For that reason, it has been important to have measures such as ‘self-help desks’ in order to encourage women to come forward and report gender crimes. Additionally, Mr. Kamara noted that many men in Sierra Leone have begun to view gender-based violence differently. For example, when a judge asked Mr. Kamara how he would prioritize the different offenses in a particular case, Mr. Kamara stated that he told the judge that rape was a worse offense in his mind than murder.

**International Trainings on Trafficking of Persons and Intimate Partner Violence**

**Judge Virginia Kendall** focused her remarks on the international trafficking of persons. As Judge Kendall noted, post-conflict areas are fertile grounds for human trafficking; enabling factors in this context include weak rule of law, widespread fear, social destabilization, high levels of poverty and destruction of the family nucleus. Further, traffickers are motivated by high levels of profit; human trafficking is more profitable than arms-dealing and second only to drug trade.

Judge Kendall highlighted particular challenges in eradicating human trafficking:

- **Public corruption.** Generally people take money at airports, customs, or transportation stops, making human trafficking a lucrative trade.

- **Multiple definitions of “public official.”** It is difficult to prosecute public corruption related to human trafficking because the definition of “public official” for bribery purposes is not uniform around the world. She emphasized that it is necessary to address the public corruption aspect more effectively and to prosecute people more along the path from the source country to the receipt country.

- **Identifying victims.** Traffickers are very good at assimilating victims into society, and victims often have a fear of law enforcement because law enforcement officials are many times the corrupt officials who assist traffickers in the source country.

Judge Kendall then remarked that the word trafficking is euphemistic: human trafficking is slavery, and everyone should be brazen enough to name it as such. There is thus currently a lucrative slave trade on the national and international level.

Judge Kendall noted that, while the United States has a comprehensive anti-trafficking law, it is not implemented in all aspects; enforcement must be better addressed domestically and internationally. In reply to Judge Williams’ question about what should be done in the United States to help the victims of human trafficking, Judge Kendall stated that a protocol is being developed to train first responders in hospitals, law enforcement and immigration to recognize victims and inform them of their rights.

Responding to a question regarding the **efficacy of trainings involving both judges and lawyers**, Judge Kendall described her work in Kenya with the Lawyers Without Borders training program. Lawyers Without Borders has travelled to Kenya to deliver a skills training and trial advocacy course based on an intimate partner violence case file. Part of the program focuses on courtroom skills for attorneys, and a separate part of the program is for judges only. Judge Kendall found that involving both judges and lawyers in training programs can bring to light ways in which courtroom procedures and practices can be improved using existing rules. One such practice that was addressed in the program is that judges need not make it so difficult for evidence to be presented in cases involving gender violence crimes. To admit a photograph into evidence, the custom in Nairobi calls for testimony by the individual who took the photograph (as opposed to a witness testifying to the accuracy of what is visible in the photograph). If the person who took the photograph lives 500 kilometers away from the court, requiring that testimony is going to impede successful prosecution. Thus, the involvement of lawyers and judges in trainings conducted by the same group allows the training program to address some of the gaps and practical issues identified by the other group of participants. This can lead to tangible positive results in the courtroom.

Judge Williams added that one of the traditions in the United States is the American Inns of Court, where judges and lawyers can meet in neutral territory to discuss issues such as trial techniques. In Judge Williams’ view, the more judges and lawyers can get together, the better off everyone will be. Judge Williams remarked that there is a real gap between the bench and the bar; additional collaboration may be an effective way to close this gap.
Sri Lanka

Justice Shiranee Tilakawardane discussed training innovations in Sri Lanka to combat gender bias in the courts. Justice Tilakawardane began by speaking about bias towards women-victims of domestic violence in the courts. She stated that prejudicial attitudes towards women-victims of domestic violence discourage cases from being brought to court, despite Sri Lanka’s domestic violence legislation.\(^{32}\) She remarked that this issue hit her personally when she was presiding over a case involving a husband’s assault on his wife, resulting in a broken jaw. Dismissive of the harm that the husband caused, another judge remarked to the victim and her husband: “Can’t you get back together? After all, you’re a family.”

Justice Tilakawardane described a judicial training protocol in Sri Lanka that assisted judges in better understanding gender issues. The protocol is premised on the concept that judicial decision-making is a social phenomenon and that each judge has unconscious biases. Justice Tilakawardane pointed out general social expectations of tradition and society’s failure to challenge patriarchy. She emphasized that judges must realize that members of society are not receiving equal treatment. Women should be treated as substantive equals to men. Judges should give fair and empathetic hearings so that all rights are upheld and victims can be heard. In that regard, she observed, allowing the victims to speak to the judge is particularly important.

In terms of delivering judicial trainings, Justice Tilakawardane remarked that it is important to have judges involved in conducting judicial trainings alongside gender specialists. Because the process of educating judges is a delicate issue, judges may not participate if the training is delivered or perceived to be delivered in the wrong manner. In response to a question regarding the engagement of other organizations to conduct such trainings, Justice Tilakawardane noted that the Sri Lankan judiciary is duly careful about the selection of partners. There is one NGO that participates in the training; however, NGOs rarely give speeches or presentations during the training.

Commenting on how conflict situations particularly affect women, Justice Tilakawardane stated that in times of conflict, women are often the first victims. In that regard, she noted that ethno-nationalistic policies create a regression, and women are viewed as the “mascots of the culture.”

Justice Tilakawardane emphasized that an important partnership between men and women must be forged to create a collaborative response to combat this discrimination.

In response to a question regarding the prospective value of creating regional courts for gender justice in post-conflict situations, Justice Tilakawardane stated that having regional courts could help serve as a “check and balance” as well as an almost supervisory role over national courts. She noted that there are not many South Asians on international courts. In her opinion, regional cooperation between Asia and Africa would be an improvement as the two regions share many common factors, such as a history of colonization.

Ghana

Chief Justice Georgina Wood discussed the Ghanaian judiciary’s efforts to strengthen the role of law and access to justice in the national court system. According to Chief Justice Wood, Ghana has adopted an “all-hands approach” to address these issues, through engagement of the chiefs in Ghana, both men and women, civil society, police, and human rights advocates. Chief Justice Wood described a conference that she hosted in Accra, Ghana, in November 2008 regarding the role of the judiciary in promoting gender justice in Africa.\(^{33}\) She stated that the Accra conference opened the eyes of the conference participants to related struggles, and highlighted the potential contribution of the judiciary in responding to the growing problems of gender injustice.

One of the immediate steps taken in Ghana after the Accra Conference was the establishment of a domestic violence court in Accra. Sensitivity, skills, and temperament are taken into account in the selection of judges for this court. Chief Justice Wood remarked that the judges must understand very clearly that the parties in the court are to be treated with


dignity and respect. The judges also must have knowledge of HIV/AIDS and other related health and social issues that often come into play in domestic violence cases.

In light of the court’s success, judges recognize the need for these special services and specialized training. Ghana is therefore planning to replicate the Accra domestic violence court elsewhere in Ghana.

Chief Justice Wood underscored that gender-based violence is a human rights issue, and should be cast as such. While noting that there is an attitude in Ghana that regards women as the weaker sex, she stated that no one in the justice sector would like to be identified as someone who ignores human rights.

Chief Justice Wood noted that Ghana’s approach to addressing gender justice has involved building a strong judiciary. In that regard, the Supreme Court’s leadership role has been important. Chief Justice Wood remarked that people associate a strong Supreme Court not with a “confrontational” court, but with a strong, constitutional and effective court. Over time, Ghana’s Supreme Court has interpreted human rights provisions liberally, and the approach has been to benevolently promote and advance human rights across the board. This view, Chief Justice Wood stated, has given impetus to lower courts as they have been called upon to interpret laws specific to gender violence or women’s and children’s issues.

Responding to a question regarding the Supreme Court’s application of international law, Chief Justice Wood explained that the Supreme Court first applies national law. However, if there is difficulty in interpreting the law or if the law is unclear, then the Court looks to foreign jurisprudence and international law for guidance.

DOmUMENTARY FILm: IN THE SHADOW OF EVIl

Before the third panel, a documentary film entitled “In the Shadow of Evil” was shown. The film poignantly depicted the systematic and widespread nature of sexual violence occurring in the Democratic Republic of Congo (DRC) and highlighted how sexual violence is used as a weapon of war, disproportionately impacting women and young girls. The injuries that victims sustain include head injuries and injuries of the genitalia, which sometimes results in fistula or leaves the younger victims with permanent damage to or loss of their reproductive organs. The film also makes the point that, in addition to causing physical and psychological devastation to victims, sexual violence destroys the social fabric of families and communities.

The documentary featured the work of the Panzi Hospital, a hospital founded and led by conference speaker Dr. Mukwege. The hospital is devoted to providing medical and surgical assistance to victims of sexual and other gender-based violence in the Southern Kivu province of the DRC.

34 A vaginal fistula can be described as “an abnormal passage that connects the vagina to other organs, such as the bladder or rectum, resulting in leakage of urine or feces into the vagina” or “as a hole in the vagina that allows stool or urine to pass through the vagina.” See Mayo Clinic, Vaginal Fistulas, http://www.mayoclinic.org/vaginal-fistulas/ (last visited Aug. 27, 2010).

35 The General Referral Hospital of Panzi (GRHP) is located in Bukavu, capital city of the South Kivu province of the Democratic Republic of the Congo. It is located 8 km south of the city on a national road going west between Bukavu and the Uvira territory, lying along the Ruzizi River in the Mushununu quarter of the Ibanda zone. One of the missions of the hospital is the provision of treatment to survivors of sexual violence and surgical repair for women suffering from fistulas of the urogenital tract. See The Panzi Hospital of Bukavu, http://panzihospitalbukavu.org/ (last visited Aug. 27, 2010).
PANEL 3: BROADENING THE CONCEPT OF JUSTICE FOR WOMEN SURVIVORS OF CONFLICT VIOLENCE

Moderator: Erica Steinberger, Partner (ret.) of Latham & Watkins LLP and member of the Avon Global Center Steering Committee

Distinguished Panelists

- Fatou Bensouda, Deputy Prosecutor, International Criminal Court
- Dr. Kelly Askin, Senior Legal Officer of International Justice at the Open Society Justice Initiative
- Dr. Ebrahim Elahi, Assistant Professor of Ophthalmology, Mount Sinai Medical Center; Director, Fifth Avenue Eye Associates; Director, International Affairs, Virtue Foundation
- Dr. Denis Mukwege, Founder and Director, Panzi Hospital, DRC
- Anita Bernstein, Professor, Brooklyn Law School

Discussion Overview

This interdisciplinary session focused on broadening the concept of justice for survivors of sexual and other gender-based violence beyond the conventional retributive approach centering on the prosecution of perpetrators. The distinguished speakers drew from their individual expertise and research to highlight ways and exchange ideas regarding how a victim-focused approach could address survivors' needs.

Panelists recognized how international criminal law plays an important role in advancing retributive justice through prosecuting sexual and other gender-based crimes committed during conflict. Further, although the ad hoc criminal tribunals and the ICC have made notable progress in the prosecution of sexual and other gender-based crimes, much remains to be done. There was general agreement among the speakers that retributive justice alone does not comprehensively address the myriad of difficulties faced by women-survivors of sexual and other gender-based violence, including psychological, medical, economic and social needs. It was underscored how survivors must additionally overcome stigmatization to reintegrate into their respective communities. A holistic understanding of “justice” could thus take into account survivors’ particular needs in conflict and post-conflict contexts.

A broad construction of reparation was advanced, with medical, surgical and financial dimensions. Given that repeated violence on the same victim can be particularly damaging, there should be a focus on prevention of such crimes. Panelists favored a collaborative effort between grassroots organizations, the judiciary and medical personnel to overcome the hurdles involved in securing holistic justice to women-survivors of sexual and other gender-based violence.

Asserting the symbolic and actual importance of pecuniary reparation, it was stressed that there is no single formula for securing justice for victims; adequacy and appropriateness of the chosen method depends on particular circumstances. Microfinance as opposed to microcredit was suggested as a potentially effective method of providing pecuniary reparations.

Furthermore, panelists stressed that the present focus on prosecuting high-level perpetrators (i.e., those with command responsibility) must also extend to low-level perpetrators. This would also aim to mitigate recurrence of crimes. It was also noted that in cases where prosecution is not possible because the judicial infrastructure is in disarray due to conflict, alternatives to prosecution should be considered.

Structured as an interdisciplinary roundtable, Ms. Steinberger led a discussion centered on the topics set forth below.

Progress made by the ICC and international tribunals in prosecuting gender crimes

Ms. Fatou Bensouda observed that, in the past 60 years, much progress has been made in prosecuting sexual and other gender-based crimes in international tribunals, although the system still leaves much to be desired. She pointed out that the ICC draws upon the jurisprudential developments and the decisions of the landmark cases of the ad hoc tribunals. She also stated that the progressive codification of rape as an element of genocide in the ICC, for instance, is attributable to the
ICTR’s landmark case *Prosecutor v. Akayesu*, a case in which rape was defined as an element of genocide, for the first time in history. She also alluded to the notable jurisprudential developments of the ICTY, ICTR and SCSL. For instance, the SCSL’s finding, that forced marriage amounts to a crime against humanity, is now codified in the ICC Statute.

Ms. Bensouda noted that the ICC prosecution office has been criticized as ignoring the sexual and gender violence aspects of conflict. For example, in *Prosecutor v. Lubanga*, certain sexual and other gender-based violence crimes initially were not charged along with the charges of conscription of child soldiers. However, the Office of the Prosecutor has since then brought evidentiary proof of the sexual and gender dimension of enlisting and conscripting children, namely how girl-soldiers are used as sexual and domestic slaves. Accordingly, the prosecution has asked for re-characterization of the charges.

Ms. Bensouda alluded to the ICC’s increasingly progressive trend of charging sexual and other gender-based crimes. In *Prosecutor v. Bemba*, rape has been charged as a crime against humanity and war crime. Sexual and other gender crimes have been charged in *Prosecutor v. Al-Bashir* and *Prosecutor v. Kony*.

Ms. Bensouda observed that obtaining testimonial evidence remains a challenge. She attributed this problem to underreporting and the reluctance of stigmatized witnesses to speak out. However, in some cases, women seem increasingly willing to report and demand justice, especially in the DRC and Central African Republic. She further acknowledged that NGOs facilitate and supplement the ICC’s work by providing information and assistance.

Dr. Kelly Askin added that the tribunals’ progressive work should not be ignored, particularly given the relative novelty of international tribunals and the concept of imposing individual responsibility for genocide, crimes against humanity and war crimes. She underscored that, until relatively recently, impunity and disregard of sexual and other gender-based violence were the norm in international criminal law. It should be borne in mind that there was no progress in the nearly 50-year-period between the first international tribunals (Nuremberg and Tokyo) and the ICTY, despite the existence of international law mandating protection for women and girls.

Dr. Askin noted that, in spite of their imperfections, the ad hoc tribunals and the ICC represent a major paradigm shift from impunity to criminal accountability for sexual and other gender-based violence. Due to the lack of their own enforcement mechanisms, international tribunals face daunting challenges. Dr. Askin hailed the tribunals’ remarkable progress in the short period of their existence. Indeed, they have come a long way from the early years. Whereas in 1993 the prosecution of rape as a war crime was debatable, rape can now be prosecuted as a war crime, a crime against humanity, an act of genocide, enslavement, torture and persecution. Dr. Askin stressed, however, that much work remains, given that ad hoc tribunals are new and that permanent courts are slow and expensive.

**Prosecution as necessary but not sufficient to address victims’ needs**

As Dr. Kelly Askin highlighted, although prosecuting those individuals with the greatest responsibility is vital in a post-conflict scenario, however, prosecution alone is not sufficient. Some victims may be in search of retributive justice while others have different priorities. These needs may include shelter, food, psychological care, care for their children, and medical support.

Dr. Askin stressed the need for alternative forms to prosecution. The focus thus far in post-conflict justice has been prosecuting those persons with the greatest responsibility for wartime crimes; however, there are thousands of low-level

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37 See *Prosecutor v. Lubanga*, ICC-01/04-01/06 (Trial case commenced Jan. 26, 2009).

38 See *Prosecutor v. Bemba*, ICC-01/0501/08, Pre-trial Chamber II (June 15, 2009). Ms. Bensouda asserted that this is the only case in international criminal law where allegations of sexual crimes outnumber those of murder and physical injury.

39 See *Prosecutor v. Al-Bashir*, ICC-02/05-01/09, Warrant of Arrest issued by Pre-Trial Chamber I (March 4, 2009).

40 See *Prosecutor v. Joseph Kony*, ICC-02/04-01/05, Warrant of Arrest issued by Pre-Trial Chamber I (Sept. 27, 2005). Ms. Bensouda recounted that Kony had complete control over the girl soldiers and at one point in time had about fifty girls in his household as sexual slaves. Some were as young as six years old. He was able to choose when to distribute the girls to the commanders as rewards.
perpetrators who should also be held accountable. Given the great number of these low-level suspects and the incapacity of domestic courts to prosecute every case, Dr. Askin underscored the need to find alternative measures of justice.

Dr. Ebrahim Elahi concurred with Dr. Askin and noted that, in his experience working with victims of acid attacks in Cambodia and Liberia, retributive justice is generally not the first priority of survivors. Many survivors want closure regarding the crime that was committed, but retribution is not a main concern. Rather, survivors’ first concerns are their health needs and the perception of their community status resulting from the attack. In Dr. Elahi’s experience, when the victims reach a point where they are concerned about retribution, it is a sign that they have advanced in their treatment.

Victims’ need for medical and psychological assistance

Dr. Denis Mukwege described how the women whom he treats have been raped in traumatizing conditions. When rape victim-survivors arrive at the hospital for treatment, their first concern is that they have contracted a deadly disease. Their psychological trauma is further exacerbated by the fact that sometimes the entire community has witnessed the rape, and there is a general assumption within the community that the victim is HIV positive. When women know their HIV status and are certain they are HIV negative, they wish to publicize the result in their community.

Dr. Mukwege maintained that the medical center represents a first step in the victims’ healing process, and that the first reassurance made to the victims is that they can indeed survive. He stated that the length of healing varies by individual case; however, the medical recovery is the shortest part of the healing process. Medical recovery marks the beginning of a long, painful process of restoration accompanied by psychological and socio-economic difficulties. In Dr. Mukwege’s 10 years of experience working with victims, it has been only in the past 3 years that he has seen a pattern of women seeking retributive justice. Echoing the earlier observations of Dr. Elahi, Dr. Mukwege stated that when women begin to demand justice, it is a sign of physical and psychological healing and reclamation of their dignity – and it is at this point that the justice system plays an important role in the victims’ healing.

How medical centers can partner with local judicial systems to secure justice for victims

Dr. Mukwege expressed the view that cooperation and partnership between the judicial system and the hospitals is important, but might prove very difficult in practice. In the DRC, political instability is a barrier to victims’ ability to vindicate their rights. Delays in the judicial system and complexities inherent in the Congolese situation give rise to women’s reluctance to move forward with justice. Sometimes “accessing justice” involves waiting for more than three months before appearing before a magistrate. Moreover, the impartiality and credibility of the Truth and Reconciliation Commission – which ended its work in 2005 without a final report – is dubious, as it was composed of warlords and partisans of the political system.

The need for protection, prevention, and guarantees of non-recurrence

Dr. Mukwege described to participants how many of the rape victims that he treated return to their villages only to be raped again. Hospitals are obliged to provide victims with financial, logistical, and medical assistance until the victims have the opportunity to appear before the national justice system. Even when these victims return to the hospital, it might be too late for medical treatment because their conditions have been severely aggravated by the subsequent attack.

According to Dr. Mukwege, victims of violence in the DRC are disappointed in the national and international justice systems because the systems have not been able to halt such recurring violence or bring key players to justice. At the national level, various factors contribute to an atmosphere of impunity, including the lack of neutrality and political bias of the system, the absence of effective prosecutions, and the army's continued appointment of soldiers who have committed rape. At the international level, the ICC’s inability to bring to justice individuals such as Jean Bosco Ntaganda – who is widely considered responsible for many war crimes in the DRC – sends a message to victims that the international justice system is impotent.

Dr. Mukwege also pointed out that child soldiers are brainwashed to believe that they will receive power, food and protection. He laments that the demobilization process does not include measures aimed at changing the mindset of child soldiers. Consequently, these children continue to roam with guns and without any effective intervention. Unless national and international programs take measures aimed at changing children’s mentalities, violence will continue.
Dr. Elahi also emphasized the need to focus on prevention rather than restoration, taking an analogy from medicine. Just as strengthening efforts in medical research aimed at prevention—rather than surgical research aimed at restoration—yields better results, Dr. Elahi advanced the view that prevention of gender-based violence will be a more effective tool than prosecution after the harm has materialized.

Commenting on the possible ripple effects of sexual violence during times of peace, Dr. Elahi noted that the effect begins from a behavior and develops in the environment. He asserted that the effects of the conflict violence extend to times of peace and give rise to copycat crimes. Conflict violence causes societal instability and psychological trauma that lead to fragile conditions and an overall environment of violence. This increases women’s vulnerability and the amount of violence that takes place. Moreover, he deplored the absence of punishment that points to an atmosphere of impunity. Referring to his experience working with acid attack victims, he indicated the need to consider acid violence a human rights issue and not only a gender-based violence issue.

**Pecuniary reparations**

Professor Anita Bernstein commented that in light of the immediate medical needs of the victims, the importance of pecuniary reparations may not be evident; however, reparations give the victims a driving force and something tangible with which to move forward. Professor Bernstein asserted that pecuniary reparations have symbolic and practical significance to victims. On one hand, giving pecuniary reparations constitutes a validation and recognition of the harm that survivors of sexual and other gender-based violence have suffered. On the other hand, pecuniary reparations assist survivors in handling their economic difficulties.

Professor Bernstein pointed out that the United Nations General Assembly High Commissioner for Human Rights, after declaring that victims of sexual and gender violence are entitled to reparations, stated in 2006 that reparations should take into account restitution, compensation, rehabilitation, satisfaction and guarantees of non-recurrence. However, it might not always be possible to attain all goals. Professor Bernstein asserted that reparations should be assessed from the victim’s perspective and needs. This means that the stakeholder validates what has happened in terms of a loss to herself in a way that prosecution and adjudication do not provide. All of this, however, should be in accordance with an understanding that the reparations are not meant to be compensatory.

Furthermore, in determining the remedy to be given, Professor Bernstein opined that the sexual or non-sexual nature of the crime should not be determinative due to the blurred boundaries between the two. For example, in the crime of forced marriage, women are victims of sexual violence, non-sexual labor and psychological abuse. Therefore, it is not always easy to draw a sharp line between sexual and non-sexual violence. Ranking circumstances in terms of severity and urgency of needs, however, may be helpful. Sexual violence, widowhood and single motherhood could be seen as conditions that require most urgent pecuniary repair.

Professor Bernstein discussed the relative benefits of microfinance schemes and microcredit schemes. Whereas microcredit schemes are based on the idea of giving small loans with the plan of enhancing economic development, microfinance schemes involve conveying wealth to victims in small amounts. In such a case, the recipient does not have to pay back the money. Instead, individual recipients are named shareholders. The idea is to provide survivors with partnerships or shares in businesses, with the potential to govern the corporation. Professor Bernstein asserted that co-optation can be avoided in this scheme because the conveyance of a share is less liquid than microcredit. Moreover, the recipient could leverage it to earn more money. Professor Bernstein pointed out that this scheme can provide positive economic returns for the community. Finally, she noted the importance of working in partnership with particular attention to schools, which she considered more important than mere cash reparations.

**The complementary role of NGOs to local and international justice mechanisms**

In discussing how NGOs can complement justice systems, Dr. Kelly Askin cited the work of the Gender Desk Court initiative in South Kivu, DRC, which works in partnership with the American Bar Association Africa Division. Dr. Askin stated that she was inspired by the Panzi Hospital’s mobile medical clinics and thought of ways that the Open Society Justice Initiative could bring some measure of justice to victims who live in remote areas where they are not able to access courts. This new court aims to complement the work of the ICG (which is trying the high and middle-ranking architects of crimes) by prosecuting lower-ranking physical perpetrators of sexual and other gender-based violence. The court also has jurisdiction over issues such as divorce, property rights and land rights. For many women, these gender justice courts on the
ground present the only means of accessing justice. Dr. Askin hopes that the number of such courts will increase in the near future. She is optimistic that with ingenuity and resources, these courts will make a meaningful impact in many lives.

In response to a question regarding what types of efforts are being made by civil society to combat sexual and other gender-based violence, Deputy Prosecutor Fatou Bensouda praised the work of the many people working on the ground and in grassroots organizations. She further stated that their success can be inferred from the many witnesses that come out at great risk to testify. For example, in the DRC, despite small facilities, community radios raise awareness by allowing people to ask questions to judges about the ICC and other legal-related issues. This is very informative to the public. Additionally, she hailed victims' associations that are organizing and documenting facts and accounts that may be necessary for future reference.
PANEL 4: INTERNATIONAL COURTS: THE JUDICIAL EXPERIENCE

Moderator: Hon. Barbara Rothstein, U.S. District Court for the Western District of Washington; Director, Federal Judicial Center; member, Avon Global Center Steering Committee

Distinguished Speakers

- Judge Patricia Whalen, War Crimes Chamber, Court of Bosnia-Herzegovina
- Judge Carolyn Temin, Pennsylvania Court of Common Pleas
- Hon. Justice Florence Mumba, Chair, Electoral Commission, Zambia; Judge, Extraordinary Chambers for Courts of Cambodia
- Judge Inés Weinberg de Roca, Argentina, UN Tribunal
- Justice Shireen Fisher, Special Court for Sierra Leone

Discussion Overview

The final session of the conference focused on the experience of judges on international courts and tribunals. The moderator, Hon. Barbara Rothstein, began by discussing her work as the Director of the Federal Judicial Center. She stated that part of the Federal Judicial Center’s mandate is to work towards strengthening the international rule of law. She explained that this work informed her questions posed to the panelists concerning their experience as judges on international courts.

The distinguished judges on the panel shared various experiences and reflections, ranging from personal background and professional development, to practical challenges faced by judges. The discussion highlighted certain challenges associated with serving on an international court, including:

- Navigating the judicial appointment process;
- Variation in how lawyers and judges from different judicial systems (e.g., civil law and common law jurisdictions) approach certain issues;
- Varying standards of qualifications and ethics;
- High popular expectations of international courts without due recognition of limitations, such as procedural constraints and financial costs; and
- Underrepresentation of women on the courts.

Appointment process for international courts

Judge Patricia Whalen noted that there is no general pre-determined or traditional route to being appointed to an international court. She described her own path to serving on the Court of Bosnia-Herzegovina, noting that it was her experience in harmonization of law that brought her into this court, rather than any specific field of traditional practice. Judge Carolyn Temin agreed that the process of selection and appointment is not always clearly laid out. She gave the example that when she was applying for a position on the Court of Bosnia-Herzegovina, it was not clear to which authorized entity her application should be addressed.

Justice Florence Mumba, on the other hand, stated that the procedure for application and appointment to the ICTY was well developed and was based on an election process in the UN General Assembly.

Judge Inés Weinberg de Roca cautioned that a vote-based system can result in an extremely politicized process for selecting judges for international tribunals. She noted that in the ICTR judicial selection process, it is the country that has been elected to a position on the tribunal, not an individual; where an individual judge is no longer able to dispose of her or his duties because of retirement, death, or any other reason, it is that judge’s home country that has the authority to select a replacement judge. Judge Weinberg de Roca recognized that there has been some development in the way the
international community approaches judicial appointments and that the process is becoming less politicized and more open to input from other members of civil society, such as individuals, and NGOs.

*The impact of different legal system backgrounds on international courts*

Judge Rothstein asked the panelists about the challenges that arise from having judges from different judicial systems – *e.g.*, civil law and common law – serve together on the same bench.

**Judge Carolyn Temin** noted that national and international courts impose different requirements on judges, especially with regard to experience and qualifications. For example, some national courts require judges appointed to international tribunals to have extensive criminal law experience, while some national courts do not. This results in having judges of varying levels of expertise and education serving together in the same court.

Judge Temin highlighted other important aspects of having different judicial backgrounds, such as the permissible level of interaction between local lawyers and judges afforded under different legal traditions. Judge Temin explained that common law judges may hold different views about the respective role of lawyers and judges than their civil law counterparts, who comprise a majority of judges on international courts. She noted that it was important for judges to be open to learning about other systems and to accepting that other systems may have different but valuable, and perhaps better, approaches to an issue. Additionally, Judge Temin noted the challenge of incorporating local lawyers and judges into the international courts. She referenced her experience on the Court of Bosnia-Herzegovina to illustrate this point. In that court, she noted, the majority of the international judges were from civil law jurisdictions, the minority were from common law jurisdictions, the local judges and lawyers were a product of the previous communist Yugoslav regime and the new laws to be applied by the Court were created by committees and based on common law. Thus, not only were common law and civil law traditions in tension, but local lawyers and judges were also learning the law as they were using it. Judge Temin also noted that a change in the facilities standards from the judge’s home country to the international court might pose a further difficulty for the judge.

**Justice Shireen Fisher** discussed her experience on the Court of Bosnia-Herzegovina and agreed with Judge Temin that the hybrid laws did pose a challenge. Justice Fisher stated that, unlike the ad hoc tribunals and the Special Court for Sierra Leone, which are established for a specific jurisdiction within a limited time frame, the Court of Bosnia-Herzegovina entails building a new judicial institution. Justice Fisher described her work with Court of Bosnia-Herzegovina as an inspiring time, as every matter was a matter of first impression, and required collaboration amongst common law lawyers, civil law lawyers, and former Yugoslav communist lawyers. Justice Fisher noted that practical difficulties did arise in deliberating in two languages, Bosnian and English.

Judge Whalen recalled her own experience on the Court of Bosnia-Herzegovina, which is a national institution. One of the benefits of having judges from different legal systems serving together is the transfer of skills. Commenting on the international courts’ role in post-conflict capacity building, Judge Whalen underscored that capacity building means that judges’ national counterparts must have the confidence and support to develop independent solutions.

*Certification of judges on international courts*

Justice Fisher remarked that there is currently no system of certifying judges for appointment to international courts and tribunals. Justice Fisher proposed the development of a standardized way to ensure that a judge has three qualities: (1) competence; (2) knowledge of the law; and (3) ethics. Justice Fisher observed that those critical qualities are not consistently prioritized in the selection process. She noted that there have been many capable judges despite the absence of such certification; however, it is unacceptable for even a single judge to lack any of those qualities. Justice Fisher emphasized that judges should have those three qualities not only because they form the law with which judges work, but also because the victims deserve good judges. Finally, Justice Fisher noted that another significant problem is the lack of ethical codes for international judges and mechanisms to enforce ethical rules.

Judge Weinberg de Roca remarked that the UN Appeal Tribunal is in the process of developing a code of ethics, which will be sent to the UN General Assembly. She also mentioned that each international tribunal should create its own code of ethics if there is no external authorized body that could impose such a code.

*Expectations for international courts*

In response to a question concerning whether people are expecting too much from international courts, Justice Mumba replied that she believes people will continue to criticize the courts because they do not understand the courts’ limitations, such as: (1) their statutes; (2) how the courts were established; (3) the types of crimes they can try; (4) their procedural rules; and (5) the punishment they can administer. As an example of a limitation, Just Mumba described how the ICTY was not able to hear victims’ full stories because they testified as witnesses rather than as victims. The Tribunal rejected the proposal to allow the victims to testify in greater detail because it thought that the trial would become too protracted. The ICTY concluded that principles of international criminal law protected the rights of the accused to have
an expedited trial. Justice Mumba contrasted the procedure at the ICTY with the Extraordinary Chambers of the Courts of Cambodia, where the victims are treated as civil parties who have legal representation and are allowed to freely participate during the trials.

Justice Mumba also remarked upon the emotional response that trials of this type often evoke. Victims who have been personally harmed or who have lost family members as a result of international crimes may perceive any sentence as being too “light” because the perpetrator remains able to return to his community and family after serving the sentence, although the victims may have been denied this possibility. Justice Mumba commented that the international context cannot provide an answer to all victim expectations. To fully satisfy victims’ expectations and needs, she stated, it is also necessary to look to solutions at the national level. Furthermore, these solutions should include a wider spectrum of services, such as medical and psychological support, employment services, and training.

Judge Weinberg de Roca noted that the ICTR often faces criticism for being too slow in delivering justice. She stated that one reason for the delay, however, is that given the importance of creating a comprehensive record of what happened, the victims are given ample time to testify even if their testimony might not have a direct impact on the outcome of the case. Judge Weinberg de Roca also commented that one reason for the ICTR’s high costs is that the accused has a right to choose defense counsel, and the accused often choose expensive counsel. Judge Weinberg de Roca remarked that certain delays in the activities of the international tribunals were inevitable: investigations are time-consuming, and witnesses often must travel from abroad to testify. She noted that it would have been easier and preferable in many ways to have the tribunal located where the crimes were committed, but that is not always possible, especially for security reasons.

**Influence of women on international courts**

Commenting on the influence that women judges have had in international criminal courts, Judge Weinberg de Roca noted that Justice Navanethem Pillay of the ICTR and Justice Mumba of the ICTY played important roles in focusing attention on the issue of sexual crimes. She additionally noted that female judges now outnumber male judges on the ICC.41

Justice Mumba discussed the role of women judges in the ICTY. In particular, she described the impact of women judges presiding over the case *Prosecutor v. Kunarac et al.*, which considered whether consent to rape was relevant in circumstances of detention. Justice Mumba remarked that it was important to recognize that, in a conflict situation, women lose hope while in detention, and they become even more vulnerable. In detention, women become a mechanical tool of the soldiers. Further, soldiers detain women to punish the women’s community leaders, typically males. Women judges in the ICTY had to work to dismantle assumptions that women victims are able to give or withhold consent in such extreme circumstances. Justice Mumba explained that the women who fought this battle behind the scenes during deliberations really made a difference. She emphasized that there is a need for gender-sensitivity training for both male and female judges, especially in post-conflict situations. In that regard, she stated that training is particularly necessary for men to help them understand that sometimes women have no choice and rape cannot be reduced to a simple matter of consent.

Justice Mumba noted that civil society can be effective in ensuring that judges appointed to the international tribunals have a sufficient and relevant background on gender issues. For example, civil society organizations can verify the proposed judges’ domestic background, public behavior and positions on issues. Consistent with remarks made throughout the conference, the

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