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EQUAL JUSTICE FOR WOMEN: A PERSONAL JOURNEY

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INTRODUCTION

In 1970, at age 29, I was already practicing as a litigation lawyer in criminal law and civil law in my home city, Durban, South Africa. Three years earlier, I had tentatively set up my own law practice, expecting to fold within six months. Some colleagues said that I was being presumptuous in believing that I, a female, could successfully head a law firm. At the time, I knew that they were right, but I had no choice. The law firms that I had approached for employment turned me down on one of three grounds:

1. Racial discrimination: I was told that white secretaries cannot take instructions from a non-white person;
2. Gender discrimination: I was asked “what’s going to happen when you fall pregnant?”; and
3. Class discrimination: I was told that because I did not come from a family of lawyers or businessmen, I was not likely to bring new clients to the firm.

In the three years that I was in solo practice, I represented many anti-apartheid and human-rights activists, trade unionists and students charged for protest activities, and members of opposition groups for infringing gag or banning orders imposed on them by the government. I also represented business clients, preparing their documents, advising and arguing their cases in court. In other words, I was recognized as a lawyer but discriminated against in ways that my male colleagues were not.

In the eyes of the law, as a married woman I was still a minor. Under the Marriages Act, marriages were registered as falling within the system of community of property wherein the wife was a minor, only the husband held the marital power to administer and control the joint assets, all the assets were

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registered as his property, and the wife lacked legal capacity to deal with her property or to enter into any transactions on her own. I was married under the community of property system and my husband exercised these controls over me. As a minor, I lacked legal capacity to enter into many of the transactions that male lawyers take for granted. The lease for my office premises as well as the firm's bank account needed my husband's consent and signature and, later, our motor vehicle and house were registered as his property alone.

That was the state of affairs when I submitted a contract of clerkship for registration with me as the principal and my husband, who had recently graduated from law school, as my articulated clerk, to the Natal Law Society. Such contracts were a mandatory requirement for anyone seeking admission as an attorney. The Council of the Law Society held a special session to deliberate over the legality of the contract entered by me as the principal and supervisor of my husband. They decided to accept the contract. I often wondered why they chose to overlook the technical illegality of the contract. Were they acknowledging the absurdity of characterizing women as minors when, in fact, they were adults exercising all kinds of rights and powers, or acknowledging the law's failure to keep pace with evolving norms and practices?

Looking back, I see this as one of my many early attempts to challenge discriminatory laws.

An attempt to revoke the minority status of women was made in a parliamentary bill in the early 1980s but was dropped when white Afrikaans women, whose husbands were in prominent government positions, objected on account of it being hurtful to the feelings of their husbands. The law was eventually changed and women are no longer minors lacking legal capacity, but the change only applies to those who have not opted out of the civil law system available to all citizens. These would be communities that by free choice or pressure follow African traditional law or religious systems of law that are still practiced in my country and many parts of the world. These systems sanction the patriarchal order, in which the man is the head of the household and polygamy is practiced. Women are the wards of fathers and husbands and have no right to inheritance and to own property. In conversations with judges from Africa, it is clear that many of them subscribe to the notion that the principle of equality between the sexes is a concept foreign to traditional and religious systems and that the latter must be respected.

Inequality of women is legally sanctioned in many parts of the world; if not in the letter of the law, then in widely sanctioned practice. Deeply entrenched cultural and social practices stemming from patriarchal systems, poverty, and discrimination continue to act as constraints against women's access to justice.

I. EQUAL JUSTICE: THE LAW AND THOSE WHO INTERPRET THE LAW

Two critical components of unequal justice, which hold the key to making justice equal, are laws and those who interpret and adjudicate the laws.

With regard to laws, it is surprising to many people when they realize that despite the extensive rhetoric and even despite many constitutional provisions on gender equality, there are laws all over the world that remain in force and discriminate explicitly against women. Citizenship laws commonly restrict women in ways that they do not restrict men from transferring the rights of citizenship to spouses and children. Men who marry foreigners can confer citizenship on their wives but women who marry foreigners cannot do so. Many countries have laws that stipulate different grounds for divorce depending on whether the divorce is initiated by a woman or man and treat them differently in post-divorce settlement of child custody and division of assets. Inheritance and royalty rights are restricted to male heirs. And a surprising number of countries have wife-obedience laws, which legally obligate wives to obey their husbands. Only recently in Kuwait did women get the right to vote. In Saudi Arabia, women are still struggling for the right to drive.¹

II. THE LAW AS IT WAS IN APARTHEID SOUTH AFRICA

My own experience in Apartheid South Africa was that the judiciary was greatly compromised in its ability to protect human rights against unjust, racially discriminatory laws. It was difficult to present human-rights defenses or refer to international law in the courts when the laws themselves were immoral and unjust and the judges were not receptive to foreign law.

In 1962, Nelson Mandela, charged with engaging in illegal protest activities, challenged the inherent potential for injustice in an apartheid court where all the judges were white and the laws were passed by whites. The magistrate said to him: "After all is said and done, there is only one court today and that is the white man's court. There is no other court."²

The Terrorism Act of 1967 gave the South African authorities unlimited power to detain thousands of men, women, and children and hold them indefinitely in solitary confinement for purposes of interrogation. The Act prohibited any court from determining the validity of the detentions or ordering habeas corpus relief. My husband was also detained during these times when the numbers of deaths of detainees in custody had reached fifty-two persons. He was a lawyer and had given me his power of attorney, which enabled me to apply to the High Court on his behalf for an injunction against the use of torture upon him by the security police. Attached in support of the application were affidavits recounting torture and ill treatment by ten other men who had been held in detention contemporaneously with him but were in court facing trial. Ours was the first successful challenge to the Terrorism Act that resulted in an order restraining the police from using unlawful methods of interrogation. The court relied on fundamental principles of

1. For these and many other discriminatory laws in force, see *EQUALITY NOW, WORDS AND DEEDS: HOLDING GOVERNMENTS ACCOUNTABLE IN THE BEIJING + 10 REVIEW PROCESS* (2007), http://www.equalitynow.org/english/wan/beijing10/beijing10_en.pdf.

2. See 3 THOMAS KARIS ET AL., *FROM PROTEST TO CHALLENGE: A DOCUMENTARY HISTORY OF AFRICAN POLITICS IN SOUTH AFRICA, 1882-1964*, at 726 (Gwendolyn M. Carter & Thomas Karis eds., 1977).

common law and also ordered that a copy of the order be served on my husband.³ The case drew public attention to the abuse of the law and provided precedent in trials that followed for lawyers to challenge the reliability of evidence from detained persons.

Two such cases, in which I was the defense attorney, involved the trials of multiple persons from the Unity Movement and the African National Congress charged for political opposition activities under the Terrorism Act.⁴

I contacted the Washington-based Lawyers' Committee for Civil Rights Under Law, established at the initiative of President John F. Kennedy. They sent Dr. Louis Jolyon West of the University of California, Los Angeles, an eminent psychiatrist, to give expert evidence on Depression, Dependence, and Debility Syndrome and its effect on long-term detainees, causing them to want to please their interrogators. He had conducted extensive tests on U.S. prisoners of the Korean War and in the Patty Hearst case, on behalf of the U.S. government. His evidence was accepted as expert and authoritative, but the court dismissed our argument that evidence produced under these conditions was inherently unreliable. Many convictions and sentences of life imprisonment, of persons including prominent members of government today, resulted from the testimony of witnesses held *incommunicado* by the security police.

I was convinced that knowledge of international law and internationally accepted fair trial norms would help us strengthen defense arguments. International humanitarian law courses were not offered in South Africa at the time; nor were we familiar with international conventions, South Africa having been expelled as a member of the United Nations. I took time off to study at Harvard and received my first education in international law and development.⁵

After graduation, I had no idea how or when I would have the opportunity to apply the knowledge I had gained. Back home some people questioned the value of my studies, as they did not help me charge a higher fee. Little did I realize that the study of international and human rights law would put me in an excellent position later to serve as a judge on the International Courts, where the challenge for judges was how to deliver impartial justice, including restorative justice for victims in the context of massive crimes against the population.

During my years as a student at Natal University, I read the case reports of the Nuremberg Nazi trials and was particularly interested in the decisions holding judges accountable. It motivated me to write my doctoral thesis on the judicial function of interpreting and adjudicating the laws. The focus of my dissertation was on the role of judges who served in the Apartheid system, at a

3. *Paranjothee Anthony Pillay v. Minister of Justice*, 1971 (unreported) (S. Afr.).

4. *State v. Kader Hassim and 13 Others*, 1972 (unreported) (S. Afr.); and *State v. Harry Gwala and 9 Others*, 1976 (unreported) (S. Afr.).

5. I was fortunate to be awarded a scholarship. Students at Harvard who were actively campaigning against investment in South Africa noted that Harvard had not had a single black student from South Africa. The Harvard-South Africa scholarship was set up by the then president, Derek Bok, and I was the third recipient, enabling me to graduate in the L.L.M. class of 1982. I returned to study for the S.J.D. in 1988.

time when apartheid had been declared a crime against humanity by the international community.

III. THE SOUTH AFRICAN CONSTITUTION

As you know, Apartheid ended and South Africa became a democratic state under President Nelson Mandela in 1994.

The pursuit of equal justice has been advanced by the adoption of democratic systems and constitutions by formerly authoritarian states, allowing the judiciary the discretion to refer to international norms. The South African Constitutional Court is a case in point in its interpretation of social and economic rights and domestic violence.

IV. DOMESTIC VIOLENCE AGAINST WOMEN

In the beginning, I had little understanding or patience with the women who came to me with their legal problems. I thought that they should be more assertive and should try to stand up for themselves. When too many women said to me, “we came to you because you are a woman lawyer and will have a woman’s perspective,” I began to listen to their voices. I slowly developed an understanding of the endemic discrimination endured by women and the lack of legal remedies available to us. I represented women who were beaten by their spouses and forced to flee their homes to seek safety for themselves and their children. There were no shelters and no possibility of obtaining injunctions, of securing maintenance orders for the women or children, or of removing the abusive husband from the marital home. The legal system focused more on protecting property and commerce than on personal lives.

When Rookmin Maharaj came to see me one day back in 1983, I felt that something more than chasing the law was called for. Rookmin had been brutally slashed with an axe and left for dead by her husband. She recovered but suffered permanent disfigurement, and I was helping her to obtain compensation from her husband. She agreed to tell her story on television and was interviewed in my office. These kinds of media exposure are common today, but when it is done for the first time, as was the case here, it shocked people and drew dramatic attention to the widespread incidence of domestic violence. My client was both lauded for her courage in breaking the silence and derided for shaming the family name. I risked sanctions for flouting the rules against advertisement by lawyers.

Inspired by Rookmin, an academic colleague and I opened an advice center for victims of domestic violence at the university in Durban and set up the first shelter, staffed by volunteers. We wrote and published a basic guide to protective and legal remedies. It was a little nothing common sense booklet. Much to my surprise, women referred to it as their bible. Without information about their legal rights, women are unable to access justice.

In my work at the Advice Center and later as a trial judge in the International Criminal Tribunal for Rwanda, I learnt of the overwhelming incidence of violence against women, both in times of war and in peace. Much of the violence is gender based with extensive risk to women’s lives, their dignity and physical, mental, sexual, and reproductive health.

The South African Constitutional Court decisions are instructive for their pragmatic interpretation and application of laws and policies against the realities of subordination and gender hierarchy, and for their forthright pronouncement that the state “has a duty under international law to prohibit all gender-based discrimination.”⁶

V. INTERNATIONAL LAW

International law, as I and those of my generation were taught it, dealt with inter-state relations. It has developed into new dimensions: international criminal law, international humanitarian law and international human rights law. If we add to this trend the growth of international criminal law and its emphasis on the criminal responsibility of the individual, the role of the individual as subject and object of international law is unassailable.

International law, now, increasingly plays a role in shaping state policy and domestic law in advancing protection of human rights. Developments in international criminal justice were at a standstill for fifty years, since the Nuremberg and Tokyo tribunals of 1945. It is only in the last fifteen years that it made remarkable progress, beginning with the establishment by the United Nations of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) in 1993 and 1994, followed by ad hoc international and hybrid courts in East Timor, Kosovo, Sierra Leone, Cambodia, Iraq, and Lebanon and the adoption of the Rome Statute in 1998, establishing the International Criminal Court (ICC).⁷

A. *The ICC and the Progression of International Law Jurisprudence*

One of the most important provisions of the Rome Statute creating the ICC is Article 21(3). It states that the application and interpretation of law must be consistent with internationally recognized human rights, without any adverse

6. *Carmichele v. Minister of Safety and Security*, 2001 (10) BCLR 995 (CC) at ¶ 62 (S. Afr.).

7. Rome Statute of the International Criminal Court, art. 1, U.N. Doc A/CONF.183/9 (July 17, 1998) [hereinafter Rome Statute], available at <http://untreaty.un.org/cod/icc/statute/romeofra.htm>. The Statute entered into force on July 1, 2002. The International Criminal Court is premised on universal respect for a system of justice which is under threat when serious crimes go unpunished. The preamble to the Rome Statute states that the parties are:

Conscious that all peoples are united by common bonds, their cultures pieced together in a shared heritage, and concerned that this delicate mosaic may be shattered at any time

Determined to these ends and for the sake of present and future generations, to establish an independent permanent International Criminal Court in relationship with the United Nations system, with jurisdiction over the most serious crimes of concern to the international community as a whole.

Id. at pmbl.

distinction founded on grounds such as gender,⁸ age, race, color, language, religion or belief, political or other opinions, national, ethnic or social origin, wealth, birth or other status.

The jurisprudence of other international tribunals and human rights bodies, as well as national courts, on the interpretation and application of human rights norms is a critical guide to the ICC, bearing in mind that the ICC's primary competence is trying cases of individual criminal responsibility. For example, many regional and international charters and treaties guarantee the right to a fair trial,⁹ including the Rome Statute.¹⁰ The ICC will no doubt consult the best practices of other institutions, both national and international, for the interpretation and application of fair trial norms set out in the provisions. One of the challenges facing the Court is that of balancing the fair trial rights of accused with the institutional need for an expeditious trial. At the ICTY, for instance, the *Milosevic* trial went on for over three and a half years.¹¹ And at the ICTR, the *Butare* case involving six accused is in its eighth year.¹²

This exchange of jurisprudence between national and international Courts should not, however, be made within a hierarchical structure based on an institution's mandate or its supporters. Instead, courts should use each others' jurisprudence when appropriate and weigh it according to the governing statute and the relevance of the jurisprudence.

The International Court of Justice (ICJ), ICTY, ICTR, and the European Court of Human Rights (ECHR) have referred to each other's jurisprudence in their decisions.

8. Article 7(3) of the Rome Statute defines the term "gender" as referring to "the two sexes, male and female, within the context of society. The term 'gender' does not indicate any meaning different from the above." Rome Statute, *supra* note 7, art. 7(3).

9. See, e.g., International Covenant on Civil and Political Rights, art. 14, Dec. 16, 1966, 999 U.N.T.S. 171, available at <http://www2.ohchr.org/english/law/ccpr.htm>; Convention for the Protection of Human Rights and Fundamental Freedoms, art. 6, Nov. 4, 1950, 213 U.N.T.S. 221, available at <http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/EnglishAnglais.pdf>.

10. Rome Statute, *supra* note 7, art. 67(1). The ICC statute contains general principles and standards of criminal law and critical standards for criminal courts developed in human rights jurisprudence; in particular, criminal courts must be established by law and must follow the rule of law. The prerequisite for punishment is legislative definition prior to the commission of the crime, captured in the maxims incorporated into the titles of articles 22–24 of the Statute. *Id.* art. 22 (*Nullum crimen sine lege*); *id.* art. 23 (*Nulla poena sine lege*); *id.* art. 24 (*Non-retroactivity ratione personae*).

The principles of legality provide justice and fairness for the accused, prevent the abuse of power and strengthen the application of the rule of law. These provisions in the statute, derived from human rights law, give the ICC legitimacy.

11. Prosecutor v. Milosevic, Case No. IT-02-54. The prosecution case, Kosovo Phase, started on February 12, 2002.

12. Prosecutor v. Nyiramasuhuko, Case No. ICTR 98-42. This case involves numerous defendants and is known as *Butare*, after the prefecture where the charged crimes were alleged to have occurred.

In the ICTR case of Ferdinand Nahimana, Hassan Ngeze and John Bosco Baragyzwa, known as the *Media* case,¹³ we considered the jurisprudence of the Nuremberg trials, the ECHR, as well as jurisprudence of the United States,¹⁴ in determining the guilt of the accused on charges of direct and public incitement to commit genocide based on conveying “a message of ethnic hatred and a call for violence against the Tutsi population.”¹⁵ We also referred to all the U.N. Conventions to interpret when speech is protected and when it constitutes a crime.

The ICTR *Media* case underscores how important it is to refer to the jurisprudence developed by other institutions,¹⁶ particularly when international legal principles have not been addressed directly by an international criminal tribunal in almost sixty years.

In its first decisions of the past three years, the ICC judges have also referred to established jurisprudence in interpreting the Rome Statute.

B. The ICC and Sexual Violence Crimes

The Rome Statute is a landmark not only for creating a permanent International Criminal Court but also for incorporating substantive, procedural and structural provisions essential to the Court’s capacity to fairly prosecute and judge gender crimes. In this respect, the Rome Statute seeks to end impunity for perpetrators of sexual and gender crimes as well as provide a process that is respectful and protective of women survivors.

The Rome Statute addressed some of the gaps in the traditional treatment of sexual violence crimes in international treaties and tribunals. The ICC Statute enumerates a number of sexual violence crimes unprecedented in international criminal law. For the first time, rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity were explicitly incorporated as both crimes against humanity and war crimes.

As mentioned earlier, Article 21(3) of the Rome Statute provides an overarching principle against gender and other forms of discrimination and provides that “the application and interpretation of the law . . . must be without any adverse distinction founded on grounds of gender.” The definition of the term “gender” recognizes social construction of gender distinguishing biology and social roles and encompasses male and female persons.¹⁷

13. Prosecutor v. Nahimana et al., Case No. ICTR-99-52-T, Judgment and Sentence, ¶¶ 981–82, 991–1010 (Dec. 3, 2003).

14. *Id.*

15. *Id.* ¶ 971.

16. *Id.* ¶ 945 (referring to the “power of the media to create and destroy fundamental human values” recognized by the International Military Tribunal at Nuremberg).

17. At a seminar, hosted by the Women’s Initiatives for Gender Justice and held at the ICC on February 17, 2006, the following views were expressed by participants in relation to Article 21(3) of the Statute:

This provision has broad impact, requiring, for example, that gender violence be investigated and prosecuted consistently; that decisions on

1. Rape

Rape is not one of the enumerated acts in the Genocide Convention of 1948. The Convention was adopted verbatim into the statutes of the ICTY, ICTR and ICC and therefore rape, unlike killing, torture or serious bodily and mental harm, is not a free-standing act of genocide. The ICC Statute has not revised the Genocide Convention to specify women as a group or to specify rape as an enumerated act. However, the ICC Elements of Crimes document provides that serious bodily or mental harm includes acts of rape and sexual violence.¹⁸ The precedent for this was established in the case of *Akayesu*,¹⁹ in which I participated as one of three trial judges.

2. Prosecutor v. Akayesu

The case is important for it is the first trial and conviction of genocide, and rape constituting genocide, since the adoption of the Convention on the Prevention and Punishment of the Crime of Genocide of December 9, 1948. Also in the year 1998, we had convicted and sentenced to life imprisonment Jean Kambanda,²⁰ the former Prime Minister of Rwanda, for genocide and crimes against humanity on a guilty plea. He pled guilty to all except the sexual violence counts, which were withdrawn by the prosecutor.

Akayesu was a former mayor of Taba commune in Rwanda. The prosecutor had charged genocide, crimes against humanity and war crimes, but had not explicitly charged any sexual assaults as the basis for those crimes. I asked a question relating to rape of a witness testifying to the crime base, and during the trial all three judges asked questions of a mother who, when called for her evidence of the killings, volunteered testimony of the rape of her six-year-old daughter.

Subsequent to questions from the bench about the alleged rape of the child, the prosecutor had the sexual crimes investigated and the Court allowed her

complementarity take into account the state judiciary's capacity to prosecute sexual and gender violence crimes in a non-discriminatory way; that the elements of crimes be developed so as to be gender inclusive and non-discriminatory; that the rules of evidence and procedure preclude gender discriminatory stereotypes; that the courtroom be an enabling one, minimizing trauma for women and men survivors of sexual violence; and that witness protection and participation take into account the particular risks to women witnesses as well as interests of the victims of gender and sexualized violence.

Women's Initiatives for Gender Justice, Gender Seminar, ICC (Feb. 17, 2006).

18. Elements of Crimes of the International Criminal Court, art. 6(b)(1) at n.3, U.N. Doc. PCNICC/2000/1/Add. 2 (2000) [hereinafter Elements of Crimes], available at <http://daccessdds.un.org/doc/UNDOC/GEN/N00/724/27/PDF/N0072427.pdf?OpenElement>.

19. See Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment (Sept. 2, 1998).

20. Prosecutor v. Jean Kambanda, Case No. ICTR-97-23-S, Judgment and Sentence, pt. IV (Sept. 4, 1998).

application to amend the indictment by the addition of rape charges. The defense was given extra time to prepare for the new charges.

Closer to my own experience as a judge, it is the case that rape has been classified as a war crime for decades, but it was never successfully prosecuted until women started to play a role in the International Criminal Tribunals. When in the *Akayesu* case all three judges asked questions about the alleged rape, my impartiality, and not that of my two male colleagues, was challenged by the defense, on appeal. Similarly, Judge Florence Mumba in the ICTY rape case of Furundzija had her impartiality challenged when the defense argued that her participation as a delegate to the U.N. Commission on the Status of Women rendered her biased. This is the kind of prejudice that women judges have to contend with, but I can say from my own personal experience that having men and women with gender sensitivity in judicial deliberations can make all the difference.

Witnesses of the Tutsi ethnic group, such as witness “JJ,” testified to numerous acts of gang rapes and sexual violence perpetrated upon them during the Rwandan conflict. Based on the testimony, we delivered the first conviction in history of rape as an act of serious bodily and mental harm, constituting the crime of genocide. The Court found on the basis of the evidence that sexual violence was directed solely against Tutsi women with the intention of destroying the Tutsi ethnic group as a whole and thereby meeting the elements of the crime.

3. *Definitions of Rape and Sexual Violence*

The *Akayesu* case was also groundbreaking in defining rape. We stated in the decision that we found no commonly accepted definition of the term “rape” in international law and defined rape as:

[A] physical invasion of a sexual nature, committed on a person under circumstances which are coercive. The Tribunal considers sexual violence, which includes rape, as any act of a sexual nature which is committed on a person under circumstances which are coercive. Sexual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact²¹.

We stated that rape was a form of aggression and, like torture, is used for such purposes as intimidation, degradation, and humiliation. The definition focused on the concept of rape in situations of mass violence.

The conceptual definition of rape in *Akayesu* is broadly formulated; it is not limited to conventional notions of rape requiring penetration, nor does it require “lack of consent” as an element of the crime, which appears in some national jurisdictions.

I must say that the testimony of one of the witnesses motivated me to re-examine traditional definitions of rape. Witness “JJ” was being asked by the prosecutor, in respect of each of the multiple rapes she endured, whether there was penetration: “I am sorry to keep on asking you each time—did your attacker

21. *Akayesu*, Case No. ICTR-96-4-T, Judgment, ¶ 688.

penetrate you with his penis?” Her answer was: “That was not the only thing they did to me; they were young boys and I am a mother and yet they did this to me. It’s the things they said to me that I cannot forget.”

Her words led me to enquire into the law’s perception of women’s experience of sexual violence, and its consequences during armed conflict. In this case, the alleged acts of rape occurred as part of a widespread and systematic attack against a civilian population.

The *Akayesu* definition has been incorporated virtually verbatim in several jurisdictions, including my own (South Africa) and in both California and Illinois, where gender violence for civil purposes is defined in part to include “[a] physical intrusion or physical invasion of a sexual nature under coercive conditions.”²²

The definition has been applied variously by other trial chambers in the ICTR, ICTY, and Special Court for Sierra Leone (SCSL).²³ However, the jurisprudence that has emerged is far from consistent and does not provide clear precedents for the ICC. In the case of *Furundzija*, the ICTY declared the *Akayesu* definition to be not specific enough and, based on its evaluation of national jurisdictions, re-asserted the mechanical definition of rape requiring proof of sexual penetration, by the penis or an object.²⁴ A third definition was established in the *Kunarac* case in the ICTY.²⁵ There the trial chamber concluded that the “true common denominator” is the “violations of sexual autonomy,” and set out three requisites for the crime of rape, including force or threat of force and lack of consent.²⁶

The *Gacumbitsi*²⁷ trial chamber of the ICTR had found that the circumstances surrounding the rape for which he was convicted were so coercive as to negate any possibility of consent. On appeal, the prosecutor invited the Appeals Chamber to consider the issue of consent as one of “general significance for the Tribunal’s jurisprudence” and argued that non-consent is not an element of rape as a crime against humanity or as an act of genocide.²⁸ Instead, the prosecutor argued, consent should be considered as an affirmative defense available to the defendant.²⁹ The Appeals Chamber ruled that non-consent and knowledge were elements of the crime of rape and that non-consent may be inferred from coercive

22. See Catharine A. MacKinnon, *Defining Rape Internationally: A Comment on Akayesu*, 44 COLUM. J. TRANSNAT’L L. 940, 956 n.74 (quoting CAL. CIV. CODE § 52.4(c)(2) (West 2003) and 740 ILL. COMP. STAT. 82/5(2) (West 2004)).

23. See, e.g., Prosecutor v. Delalic, Case No. IT-96-21-T Judgment, ¶¶ 478–79 (Nov. 16 1998).

24. Prosecutor v. Furundzija, Judgment, Case No. IT-95-17/1-T, Judgment, ¶¶ 180–85 (Dec. 10, 1998).

25. Prosecutor v. Kunarac, Kovać, and Vuković, Case No. IT-96-23-T & IT-96-23/1-T, Judgment, ¶¶ 440, 457–60 (Feb. 22, 2001).

26. *Id.* ¶ 440.

27. Prosecutor v. Gacumbitsi, Case No. ICTR-2001-64-T, Judgment, ¶¶ 321–33 (June 17, 2004).

28. Gacumbitsi v. Prosecutor, Case No. ICTR-2001-64-A, Judgment ¶¶ 148–50 at 55 (July 7, 2006).

29. *Id.* at 55, ¶ 149.

circumstances without the need to introduce evidence of the victim's lack of consent.³⁰

The ICC has made even greater advances in recognizing sexual crimes. The "Elements of Crime" for rape largely incorporates the conceptual and gender-neutral aspects of the *Akayesu* definition as well as the mechanical body-part and consent-based definitions.³¹

As the ICC has not had any trial, these and other elements of the enumerated sexual violence crimes are yet to be adjudicated.

Ten years after the *Akayesu* rape decision, many have expressed disappointment that more investigations and trials of sexual violence against women during conflict are not occurring. They look to the ICC with hope of justice for victims.

C. Provisions in ICC Statute that Promote Advancement of Equal Justice

I shall make brief reference to some of the provisions in the ICC Statute that offer potential for advancement of the course of equal justice.

As noted above, new gender crimes have been incorporated that do not appear in any other international instrument or in any national laws. These crimes are not new to women, but are born of their experiences during wars and conflicts.

1. Evidentiary Rules Relating to Sexual Violence

The Rules of Procedure and Evidence safeguard victims in sexual violence cases from intrusive, unfair or prolonged questions or re-traumatization. Testimony of the victim need not be corroborated,³² and evidence of other sexual conduct of the victim will be excluded, whereas other types of evidence are subject to a balancing of the probative value of the evidence against prejudice to a fair trial.³³ This is similar to the rape shield laws in the United States.

30. *Id.* at 56–57, ¶¶ 153–55. It has been suggested that the decision has not resolved all the tensions in the substantive law: A definition of sexual violence that includes non-consent unnecessarily points to the behaviour of the victim and ultimately contradicts itself. It is therefore questionable whether it was adequate to "refine" the *Akayesu* definition to the point of introducing non-consent as an element of the crime, and moreover, whether it was appropriate to do so on the basis of national laws meant to apply to sexual violence in times of peace. As defined, sexual violence must be consistent with all other crimes under International law, and so must be the question of consent. "In International law, understood in this limited, though extraordinarily important context, crimes of rape and other forms of sexual violence, constituting part of the listed core crimes, per se occur under coercive circumstances that make genuine consent impossible." Wolfgang Schomburg & Ines Peterson, *Genuine Consent to Sexual Violence under International Criminal Law*, 101 AM. J. INT'L L., 121, 140 (2007). Judge Schomburg was one of the judges on the *Gacumbitsi* appeals bench. *Id.* at 121 n.1.

31. See Elements of Crimes, *supra* note 18, art. 7(1)(g)-1.

32. See ICC Rules of Procedure and Evidence, R. 63(4), available at http://www.icc-cpi.int/library/about/officialjournal/Rules_of_procedure_and_evidence_English.pdf.

33. See *id.* R. 71; Rome Statute, *supra* note 7, art. 69(4).

Because the crimes within the jurisdiction of the ICC are serious atrocities, consent is generally not an issue in sexual assault forms of the crimes. Under Rule 72 of the Rules of Procedure and Evidence, evidence of consent will be presumptively unacceptable and subject to judicial assessment in camera prior to introduction. Rule 70(d) of the Rules of Procedure and Evidence articulates a set of principles respecting evidence in cases of sexual violence that are designed to preclude inferences of consent where the circumstances are coercive, where the person is incapable of giving genuine consent and where the victim is silent or does not resist. Rule 70 also precludes inferences, with regard to credibility, character or predisposition to sexual availability based on prior or subsequent sexual conduct of the victim or witness.

2. Victim Participation

The ICC is the first court at the international level to provide for victim participation in proceedings. The Rome Statute fills a gap in justice by explicitly providing for the right of survivors to participate in the justice process, directly or through legal representatives, by presenting their views and concerns at all stages to the Court.

Such participation is subject to judicial supervision and must not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. The Court must aim to achieve an equitable balance between a number of legitimate goals.

This is an important and innovative opening in international criminal courts providing direct access to justice for survivors of ICC crimes. The rules require the Court to ensure that the distinct interests of different victim groups be represented, including victims of gender violence.

3. Protection of Victims

The Court is required to protect the safety, dignity, privacy, and the physical and psychological well-being of victims and witnesses, taking into account factors such as age, gender, and health, in particular crimes involving sexual or gender violence or violence against children. These concerns may be safeguarded by measures respecting confidentiality, anonymity, and preventing re-traumatization.

The ICC provides for the creation of a Victims and Witnesses Unit (VWU), which is a unit established within the Registry of the Court. The VWU holds ongoing consultation with civil society organizations on the needs and goals of victims. The VWU provides protective measures, security arrangements, counseling and other appropriate assistance for witnesses, victims, and others at risk on account of their testimony. Furthermore, this unit must include staff with expertise in trauma.

4. Reparation for Victims

The U.N. statutes of the ICTY and ICTR focused on justice by way of prosecution of perpetrators and neglected to provide for restorative justice in the form of reparation for victims. When I was President of the ICTR, I addressed a

letter to the U.N. Secretary General³⁴ on behalf of the judges and in response to complaints from Rwandans of injustice. Rwandans at one stage called a boycott of the Tribunal and were particularly aggrieved in their belief that the Tribunal was providing HIV/Aids anti-retroviral medication to detainees in its custody, whereas victims of the genocide in Rwanda were not receiving any aid or treatment. We requested the United Nations to remedy the gap in the Statute, and make provision for compensation for victims.

The ICC Statute and Rules contain an elaborate reparation regime.³⁵ For the first time in history an international criminal court will give victims direct access to request and receive reparation. The Court will establish principles of reparation and, in certain cases, award reparations to, or in respect of, victims including restitution, compensation, and rehabilitation. The Court may invite and take into account representations from or on behalf of the convicted person, victims, other interested persons, or interested states.

The Assembly of States Parties has established a Trust Fund, as provided in Article 79, for the benefit of victims who have suffered harm as a result of crimes within the jurisdiction of the Court, and the families of such victims. The Trust Fund is charged with implementing court orders for reparation, assisting those in immediate need and developing programs aimed at helping to rebuild lives and communities. Three projects already in place are: a rehabilitation program in Bukavu, South Kivu, the Democratic Republic of the Congo, for victims of rape; an interactive radio program in Bunia, DRC, to help victims speak out and overcome stigma and marginalization; and a reconstructive surgery program in Northern Uganda for disfigured victims.

5. Gender Representation

Another aspect of the ICC that will advance the cause of equal justice for women are the gender representation requirements. The Statute requires that the need for a “fair representation of female and male judges” be taken into account in the selection process. A similar provision applies to the recruitment of staff in the Office of the Prosecutor and all organs of the Court. The ICC has more female judges than any prior international court: eight of the eighteen judges are women.

CONCLUSION

The Rome Statute requires that in the process of selection of judges, prosecutors, and other staff, the need for legal expertise on violence against women or children be considered. This provision recognizes both the importance attached to gender crimes in the work of the Court and the need for expertise and sensitivity to ensure effective processes.

34. Letter from Judge Navanethem Pillay, President of the International Criminal Tribunal for Rwanda to the Secretary-General of the United Nations (Nov. 9, 2000) annex to U.N. Doc. S/2000/1198 (Dec. 15, 2000).

35. See Rome Statute, *supra* note 7, arts. 75, 79; ICC Rules of Procedure and Evidence, R. 94–99, available at http://www.icc-cpi.int/library/about/officialjournal/Rules_of_procedure_and_Evidence_English.pdf.

To ensure that gender crimes are investigated, the Office of the Prosecutor will have to appoint legal experts on specific issues including sexual violence.

To conclude, the ICC began its first trial at the end of March 2008 and is well placed to render both retributive and restorative justice.
