

SEXUAL VIOLENCE: STANDING BY THE VICTIM
ADDRESS TO THE HAGUE COLLOQUIUM ON SEXUAL VIOLENCE AS AN
INTERNATIONAL CRIME: CROSS DISCIPLINARY APPROACHES TO
EVIDENCE

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Ms. Ku,
Distinguished Participants,
Ladies and Gentlemen.

I wish to thank the organizers of this colloquium for inviting me. Today, I speak as the High Commissioner for Human Rights, and also as a committed and long-time advocate for women's rights and gender equality, and as such someone who believes that today's discussion is essential. Moreover, as a former president of the International Criminal Tribunal for Rwanda, and a judge at the International Criminal Court, I can only warmly welcome your debate.

At the outset, let me say that I am heartened by the progress made so far regarding the prosecution of sexual violence. The jurisprudence and methodology developed by international justice mechanisms, as well as national tribunals or regional courts, has made great strides. Yet we are still wanting in our capacity to fully describe, understand and address the real experience of sexual violence from the victim's perspective.

OHCHR has closely studied whether the programmes, policies and the normative architecture which form the basis of the work of the international community in a post-conflict setting, provide adequate access to justice for women seeking it. From this perspective, my Office, jointly with the nongovernmental organization Medica Mondiale, organised a conference entitled "Seeking Justice" last year. Our purpose was to gather a variety of views and experiences on the topic of sexual violence and justice. This event was attended by women from 26 countries, the majority of which had recently been in conflict.

Many among the participants had themselves experienced such violence and had sought to end impunity through formal justice mechanisms. Their purpose had been to ensure that sexual violence be prosecuted and perpetrators held accountable.

Three fundamental questions emerged from that conference.

They are:

- Whether the **law** has actually succeeded in describing women's experience of violence;
- Whether the ways in which sexual violence is **investigated** assist in the understanding of that experience from a woman's perspective; and

- Whether, in fact, our current practices **actively discriminate** in the delivery of justice.

Against this background, I will outline for your consideration some thoughts on the normative framework that anchors the prosecution of sexual violence. I will then briefly examine how the legal architecture at our disposal can contribute to more effective investigations. Finally, I will discuss how we can draw from methodologies of other legal processes to bolster the ability of international criminal justice mechanisms to prosecute sexual violence.

Distinguished Participants,

Let me reiterate that from today's vantage point, considerable progress has been made from the time when violence and related offences against women were merely seen as crimes of honour. Indeed, there has been a quantum leap forward in the prosecution of sexual violence before international tribunals. The jurisprudence of these courts represented a watershed for women whose war-time suffering had long been considered as an inevitable by-product of conflict, or as "collateral damage" that could be more easily tolerated and, consequently, disregarded.

Through the work of international courts, we have been able to establish once and for all that —where threshold criteria are met—rape during international or internal armed conflict is a war crime, a crime against humanity, and may constitute an element of genocide. It is a crime, often planned and systematically perpetrated, that must be explicitly prosecuted as such.

I will leave to others to revisit the evolution of rape as a crime under international law. It is, however, important to highlight here the inclusion of an explicit reference to rape in the statutes of the ad hoc international criminal tribunals for the former Yugoslavia and for Rwanda, the post-conflict special courts and the ICC. Subsequent judicial interpretations of the ad hoc tribunals, as well as explanatory paragraphs from the ICC, proscribe sexual violence.

The normative framework is, therefore, in place. However, if we take even a cursory look at the extent of the prosecution of sexual violence perpetrated during conflict, it is clear that we are only addressing the tip of the iceberg in terms of cases examined, and merely scratching the surface in terms of our understanding of how women experience violence.

The Issue of Consent and the Trauma of Description

The experience of law that remains in the minds of women is how they are treated in the courtroom, as it is there that justice is expected to be delivered. Stemming from actual cases heard in court, some questions have emerged consistently. These questions revolve around the dilemmas of whether, in their interaction with formal justice mechanisms, women have been encouraged to come forward and whether they felt that they have obtained justice or, conversely, whether the process itself has re-traumatised them and alienated potential witnesses. The core elements of this debate concern the concept of "consent" — or lack thereof — on the part of the women, and the extent to which women are subjected to the most intrusive questioning in order to establish the "nature" of the assault.

In the case of *Akayesu* which I adjudicated in 1998, I defined rape as a "physical invasion of a sexual nature committed in circumstances which are coercive." This was the first judgement on rape emanating from the ad hoc tribunals. I framed my decision in this manner because it was evident that, in the circumstances that were being described, there was no place whatsoever for the consideration of consent. I hoped that this ruling would remove the age-old practice of focusing on the

conduct of the woman victim in order to establish the guilt of the perpetrator. That decision was not appealed. I was glad at the time....no one likes to be appealed! I felt that this was indicative of a more enlightened understanding of rape. I was wrong, since qualifications to the tribunal's initial decision were added.

The ICTY added the need for specific descriptions of the nature of the assault (*Furundijza*). This could require the victim to reconstruct and painfully re-live all phases of her rape, as well as furnish graphic descriptions of it.

I will not go into the details of all the subsequent case law. I leave this task to Kelly. Let me simply add that subsequent court definitions have allowed the possibility of raising consent in particular situations. They didn't overturn the concept of coercive circumstances, but they introduced troublesome qualifiers. In practice, this has meant looking at the crime through the gaze of the perpetrator not that of the victim, as well as describing it in his terms and from his perspective.

We must consider the impact that such an approach has on the willingness of women to come forward and testify.

With its own description of the crime, the ICC has attempted to rebuild the fire-wall against admitting the element of consent.

However, the ICC's definition has yet to meet the test of practical application. In the meantime, the cracks in the "brickwork" remain in evidence, as an expert meeting organized by OHCHR determined.

My own views on the matter of consent in the context of rape in warfare are grounded both in principle and in experience. I will never forget the witnesses who came before the ICTR with harrowing accounts of atrocities. Despite the personal pain that re-living unspeakable abuse caused them, these individuals refused to remain silent or tacitly tolerant about violations of human rights. Their testimony helped to dismantle barriers to dialogue and to mend and restore the very foundations of peaceful coexistence, for it is the establishment of truth that fosters reconciliation.

The Elements of Joint Criminal Enterprise and the Duty of Enquiry

Ladies and Gentlemen,

Allow me to briefly illustrate how key legal concepts applied by the ad hoc international tribunals may have an impact on investigations. The first of such concepts is known as joint

criminal enterprise which has obvious application in cases of sexual violence.

This concept refers to any individual who plans, instigates, commits, orders or abets the execution of crimes. It does not require the direct hand or the physical participation of the accused in the perpetration of the criminal act. Rather, it applies when this individual participates in criminal conduct with a plurality of actors. The case law of the tribunals has given us direction as to how to conduct investigations. We know that commanders have been found responsible for the "incidental murders and rapes" that were deemed to be the "natural and foreseeable consequences of an ethnic cleansing campaign.

Further, the tribunals have recognised that sexual violence could be a natural and foreseeable consequence of other wartime violations, rather than merely the outcome of the actions of errant soldiers whose abuses are not directly the responsibility of their commanders. The responsibility lies not just with the military leaders, but with their political masters as well.

This brings us to the concept of the duty of enquiry which lies with anyone in a superior position, military or civilian, who knew or had reason to know that crimes were being perpetrated

or about to be committed, and failed to take necessary and reasonable measures to prevent them and to punish those responsible.

Let me reiterate and summarize the key elements of the cases from the tribunals. To begin with, international justice has now deemed rape as a natural and foreseeable consequence of a lack of discipline in cases involving other violations of international humanitarian law. Further, it has established command responsibility and upheld the duty of enquiry to reflect the obligation of persons in a position of responsibility and authority to prevent violations from occurring, and to punish perpetrators when such crimes are committed. In addition, it considered that culpability could involve all those engaged in sexual violence crimes, directly or indirectly.

Now, I submit to you that the need to examine consent is at odds with coercive situations, particularly in wartime.

Imagine the events that led to these and similarly-grounded judgments as they actually took place in real life. Picture the school where women were held with unrestrained soldiers; the prison camp guarded by drunken, ill-disciplined troops; the compound, surrounded by Hutus, where terrified Tutsi women had sought refuge and protection. Place these situations in their

very real context of ethnic cleansing and genocide and then ask yourselves if consent could have anything to do, or have any meaning at all, in such circumstances.

Analogies and Contiguity

Distinguished Participants,

With its landmark resolution 1325 of 2000, the Security Council recognized that there is a fundamental difference in the way in which men and women experience conflict. Further, it reminded the international community of its obligations and responsibilities under international human rights treaties and international humanitarian law, including the Geneva conventions. It instructed all UN Member States to uphold human rights and non-discriminatory principles when these States are engaged in conflict, peace-making and peace-maintenance. Crucially, the resolution asserted the vital role that women play or must be called to play in putting an end to conflict, including peace negotiations, as well as in post conflict reconstruction.

Building on those premises and closing a gap in the Security Council's action, resolution 1820 of 2008 affirms that sexual violence against women is a tactic of war and thus a security

issue of literally vital concern. As such, it demands commensurate responses. I am greatly encouraged by this development, since I believe that both in situations of war and of peace, sexual violence must be examined and judged by fully taking into account the victim's perspective and experience.

In order to do that better, we can draw from other legal regimes which have established norms relevant to our discussion by way of contiguity or analogy.

From this perspective, I wish to posit that human rights law and its cardinal principles of non-discrimination help to bolster the application of criminal law and international humanitarian law in cases of sexual violence, among others.

Indeed, a comparative analysis of human rights standards at the regional level is indicative of the trajectory of international law concerning to rape. Of particular interest is, for example, the case of *MC v. Bulgaria* heard by the European Court of Human Rights, a case concerning the rape of a young girl. I will not go into the details of this case but merely address why it is significant:

In formulating their decision, the European judges took into account jurisprudence from the international ad hoc tribunals in relation to coercive circumstances. While raising the issue of consent, the court went on to state that law and practice must reflect the changing social attitudes requiring respect for the individuals' **sexual autonomy and equality**. It is hard to see how this interpretation could be faulty: women are not walking around in a permanent state of sexual availability.

In Africa, eleven heads of State signed the 2006 Pact on Security, Stability and Development in the Great Lakes Region in which similar conclusions were reached. It was determined that the anti-rape legislation in all these African countries had been drafted from the male perspective and that such an approach could hardly account for women's experience. To correct this inequity, the 2006 agreement provided a new definition. It stated that sexual violence occurs if a person: "with intent, knowledge, recklessness or negligence... violates the sexual autonomy and bodily integrity of any woman or child."

In sum, the law at different latitudes and under different circumstances is moving forward to encompass the perspective and experience of the victims of sexual violence. At times, this movement has produced an encouraging cross-fertilization of

legal approaches which, hopefully, will benefit victims everywhere.

Dear Colleagues,

Let me turn now to elements that are relevant to the context of investigations of sexual violence. In this regard, international agreements, particularly the United Nations Convention on Transnational Organised Crime and its Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, are of particular interest.

The underlying rationale of the anti-trafficking protocol is that an individual cannot freely consent to be trafficked. Indeed, when the elements of the crime of trafficking have been established, the consent of the individual is irrelevant.

Intelligence based and solid police work can trace the trafficking chain from the beginning to the end. Effective investigative methodology can probe the conditions of work and the level or absence of remuneration as indicators of labour exploitation. It follows that, technically, it is entirely possible to investigate and prosecute trafficking without the need for a victim to actually testify. Thus, a good prosecutor should be able to argue a case without individual testimony by establishing the planning, the *modus*, and the effects of the crime.

I submit to you that the application of this approach to investigations of rape in armed conflict could also yield optimal results.

Let me reiterate that sexual violence is almost invariably the foreseeable consequence in situations of conflict and in a climate that fosters mass atrocities. In reconstructing the entire chain of responsibility and authority, we must hold accountable all the perpetrators and their political and military enablers.

In this perspective, we must do a better job of ensuring that victims of sexual violence obtain full and real justice. To this end, we should never lose sight of the fact that countries experiencing conflict or recovering from war often have weak institutions. An originally patchy or damaged judicial and police infrastructure often makes the system unable or unwilling to address cases of sexual violence. As a result, impunity is the rule rather than the exception. Impunity is also compounded by the fact that often victims of sexual violence cannot find and identify perpetrators. Thus, they are left with no judicial recourse. This can affect a large group. Indeed, the majority of victims of sexual violence in armed conflict cannot either seek or obtain justice.

Allow me to take this opportunity to draw your attention to an OHCHR pilot project currently under development. This initiative involves an assessment in the Democratic Republic of Congo of alternative ways in which, beyond formal justice mechanisms, reparation and other remedies could be made accessible to victims of sexual violence. The idea is to empower them by shifting the stigmatization of sexual violence from the victim to the perpetrator and by providing or facilitating access to assistance. Moreover, we will explore how to create a public and/or quasi-judicial forum for victims that will recognize the harm that has been done to them with a view to ensure the effective implementation to their right to remedy and reparation.

Ultimately, whether through formal justice system or through alternative means, we always need to pose the right questions to the right people. We need to devise procedures that are truly protective and supportive of the victims.

This important forum can help frame sexual violence from their perspective. Above all, we must strive for an outcome that does not re-traumatise the victims in their quest for justice.

Thank you.