



## **“Combating Conflict-Related Sexual Violence – Comparative Insights on International and National Capacities”**

### **Keynote Speech Michelle Jarvis, Deputy Head, International, Impartial and Independent Mechanism – Syria**

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#### **Introduction**

In the early 1990s, as a young law graduate in Australia, I started working on a research project on women and armed conflict initiated by two of Australia’s leading feminist international lawyers: Professor Hilary Charlesworth and Professor Judith Gardam. Their idea, very novel at the time, was that armed conflict affects men and women differently and that we must understand those differences to respond more effectively to the humanitarian issues arising out of conflict. Otherwise, the discriminatory gender hierarchy, with women and girls on the most disadvantaged rung, creates a risk of overlooking the specific needs of females.

To me, as a still naïve 25 year-old, this seemed like it should be obvious and uncontroversial.

But I was shocked by many things as I worked on that project in the early 1990s.

I was shocked at the resistance we encountered to the very idea that men and



women experience conflict differently. Everyone suffers during conflict was the frequent retort – it is not helpful to focus separately on men and women.

I was shocked by how hard it was to find any research materials focusing in a meaningful way on the distinctive experiences of women and girls during conflict.

And I was shocked by the failure to recognize how the discrimination that women and girls suffer throughout the world, exacerbates their experience of conflict and affects the international community's response to it.

Around the same time that we embarked on this research project, reports of the strategic use of rape in the Balkan conflicts grabbed the media headlines and provided one very compelling example of how gender influences conflict experiences. The world was outraged by the idea that rape had been carried out, if not pursuant to orders, then at least on a massive scale as an accepted part of the strategy of waging war. Estimates ranged from between 12,000 – 70,000 sexual violence victims, mostly women and girls. But back in 1993 when these reports first surfaced, the world struggled to provide effective responses to sexual violence, let alone the many other war time gender issues.

In the years that followed, the problem of sexual violence has received heightened attention, but often in a way that is disconnected from the broader analytical framework of gender and the myriad other gender issues that arise during conflict. This overlooks the reality that the same structural discrimination



drives all of these gendered experiences and that the root causes have to be tackled if we are to ever make any progress in combatting sexual violence and other gendered crimes.

During my time as a prosecutor at the Yugoslav War Crimes Tribunal – the ICTY – I saw up close how the failure to apply a gender lens created a risk of problematic justice outcomes.

To give just one example.

The July 1995 genocide in Srebrenica: over 7,000 men and boys slaughtered *en masse*. Up to 25 thousand women and children forcibly transferred out of the Srebrenica enclave.

Initially, given the gravity of the slaughter, the ICTY considered only investigating the killing of the men and boys, and omitting the forcible transfer from the planned Srebrenica case file. This only changed by a twist of fate. Radislav Krstic was the first person in the ICTY's custody tried in relation to the Srebrenica events. And there happened to be compelling video evidence of his personal role in directing the forcible transfer. So the course was corrected and the case proceeded with both the killing and forcible transfer components included.

Today, we know it was by looking at the combined impact of the killings and forcible transfer, that the picture of genocide was accurately revealed before the ICTY. This is a compelling example of how a gender inclusive approach



matters for all victims and survivors and for the overall quality of justice delivered.

Now, almost 30 years after starting on that research project in Australia, we are still striving for more inclusive approaches to addressing the impact of conflict. This has been an important focus of my work with the International, Impartial and Independent Mechanism for Syria – or the IIIM as we call it. The IIIM is part of the new breed of accountability actors: a “justice facilitator”. The IIIM works to support other justice actors to establish accountability for core international crimes committed in Syria, particularly war crimes, crimes against humanity and genocide. These justice actors include investigators and prosecutors in national jurisdictions around the world.

This evening, I want to share with you some observations about the progress that I have observed in the last 30 years, as well as some key challenges that remain and some opportunities that we should seize moving forward. From that early research project in Australia, to my work on accountability for crimes committed in the former Yugoslavia and Rwanda, to the IIIM’s work to assist national jurisdictions working on Syrian cases, there are many insights for promoting stronger, more coordinated action to achieve gender justice across many different jurisdictions: national, regional and international.

### **Recognising the gender differential in armed conflict**

In terms of progress, it is easy to be demoralized by the reality that conflict



related gender-based violence, including sexual violence, remains pervasive throughout the world. And that, today, most victims and survivors still do not receive justice. But we have seen some important changes in our conceptualization and understanding of the issues, that offers hope for better outcomes in future.

Foremost among them is much clearer recognition that gender influences the experiences that people have of conflict. The UN's Women, Peace and Security agenda, initiated in the Year 2000, has been a pivotal factor in this dawning awareness. This agenda has generated a long overdue focus on recording the gendered experiences of conflict.

We know for sure that gender fundamentally affects the experiences people have of conflict.

It affects the types of harms they suffer.

It affects the reactions of their families and communities to their suffering.

And it affects their prospects of justice for crimes committed against them.

If we want to deliver meaningful accountability, then gender matters.

And even with a crime like sexual violence that clearly affects both males and females, gender has an impact. For a start, as reported by the UN Special



Representative of Sexual Violence in Conflict, in 2021, women and girls accounted for 97 percent of reported cases of CRSV. We know that sexual violence can be inflicted on individuals regardless of their gender, but gender influences the particular form that sexual violence takes, as well as the reactions of families and communities to sexual violence victims and survivors.

So, in principle, we now acknowledge that gender is relevant to addressing conflict-related experiences. But at least when it comes to core crimes accountability work, we have struggled to move beyond theoretical awareness to fundamentally changing our approach to our daily work – to really integrating a gender analysis as a core part of our workflows.

In the first phase of our work at the IIIM, we have focused intensively on aggregating material on crimes committed in Syria already collected by other documenters. This has given us valuable insight into some of the overall trends in documentation work. What we have seen are gaping holes when it comes to documentation specifically reflecting the voices and experiences of women, girls and others disadvantaged by discriminatory gender norms. For example, we know that the use of chemical weapons in Syria has a profoundly different impact on women and girls. But it is not reflected in the material we initially gathered. So we are using the IIIM's targeted investigation capacity to fill the gap. Without proactive efforts and dedicated strategies, we are still prone to missing the gender differential in our accountability work.

Unfortunately, it is not as simple as just telling our investigators to go out and



collect relevant evidence.

We need to understand the reasons why certain voices are silenced. And then we need proactive strategies for addressing the problem.

For example, one of the most alarming things I have heard during my time working at the IIIM, is that some Syrian women and girls who have been released from prison describe the abuses they suffer upon returning to their families and communities as even more damaging than the treatment they received in prison. Due to the assumption that they have been subjected to sexual violence while in prison, women and girls may be shamed, shunned, ousted, beaten or killed. When we think of the brutal treatment we know is inflicted inside Syrian prisons, the reality that the suffering of women and girls may be even worse upon release is beyond shocking.

If we want to facilitate justice for women and girls, we have to understand how this kind of discrimination operates to silence their voices and we have to adjust our approaches to address it. And we need to insist on having gender disaggregated data to inform our accountability work.

We sometimes fall into the trap of treating gender as a marginal issue – something that might be added onto our “core” accountability work if there is time. But gender is not a marginal issue. Generally speaking, women and girls make up at least half the population of conflict affected communities, often substantially more. There are also others disadvantaged by gender



constructions. If we have an approach that does not respond to all these experiences, we are missing the majority of victims and survivors in our accountability work.

### **Proving that accountability for CRSV is possible**

Another area of obvious progress: we have clearly demonstrated that accountability for conflict-related sexual violence is possible, even if, unfortunately, not yet the norm. We should not forget the significance of these hard-fought successes. Back in the early 1990s, as the ICTY started out its work, there were genuine concerns that the framework of international criminal law would be a barrier to sexual violence prosecutions, that stigma would prevent women from speaking out, and that rape would not be accorded much priority given all of the other horrendous crimes committed during the conflict. Today, we have a growing body of precedents confirming that sexual violence can be successfully prosecuted, if we pay attention to creating the right conditions. At the ICTY, of the 161 persons indicted, 93 ultimately faced charges relating to sexual violence crimes.

Even if belatedly, most of the other international or hybrid courts and tribunals also have successful sexual violence prosecutions on their books.

When it comes to the International Criminal Court, the Rome Statute of course codifies the broadest range of sexual and gender-based crimes in the history of international law. Gender is also expressly recognized as one of the





discriminatory grounds for persecution as a crime against humanity. We now also have two important sexual violence convictions at the ICC: *Ntaganda* and *Ongwen*.

We have also seen contributions to accountability for conflict-related sexual violence by national jurisdictions that are exercising universal or extraterritorial jurisdiction concerning core international crimes. For example, last year, a German court sitting in Koblenz convicted a Syrian intelligence services official of crimes against humanity, including rape and sexual abuse, for acts inflicted on detainees in Al Khatib prison in Damascus. This adds to a growing body of precedents on conflict-related sexual violence prosecutions in national jurisdictions around the world.

But still, we see a worryingly consistent pattern of sexual violence charges initially being missed out, mischaracterized, or eliminated in the course of criminal proceedings – a pattern that is reasonably predictable across international, regional and national courts and tribunals.

We now have the accumulated experience and expertise to break this pattern and we should insist on this moving forward. Crucial in the process is getting clear on the barriers to successful sexual violence prosecutions in each specific conflict context and developing proactive strategies to address them. At the IIIM, we are working closely with Syrian civil society, and other relevant actors, to understand the gendered barriers that prevent victims and survivors from speaking out. For example, we know there is an urgent shortage of shelters for



survivors of gender-based violence in Syria and alarmingly insufficient long-term psychological support. These structural gender barriers are real, but we cannot see them as an excuse for inaction. We have to work collectively on finding solutions.

We must also ensure that we are not focusing in a narrow way on sexual violence to the exclusion of other harms in conflict. For example, in the Syrian context, there are clear links between the fear of sexual violence and expulsion crimes as well as the forced early marriage of girls.

More generally, we need to understand sexual violence as part of the broader inclusive justice challenge.

Within the affected communities, structural disadvantage often obscures the voices and experiences of certain victims and survivors.

And within accountability institutions, similar biases may mean that the work overlooks the experiences of these same people. For example, I think we must admit that the experiences of LGBTIQ+ people and people with disabilities are still a worrying blind spot in accountability work.

### **Bold steps: pushing legal boundaries**

Related to successes in securing convictions for sexual violence, we have also seen important examples of bold steps to push the legal boundaries regarding



sexual violence that have secured norm setting precedents.

One of the most compelling examples is recognition that sexual violence could be a constituent act of the crime of genocide.

In 1997, I arrived at the ICTY to work as an intern for the then Legal Advisor for Gender Issues, Patricia Sellers. At that time, the ICTY Chief Prosecutor double hatted as the Chief Prosecutor of the Rwanda Tribunal – the ICTR – established in 1994 in Tanzania. And in one of the ICTR’s very first cases, *Akayesu*, the trial had just been adjourned and the Prosecutor had been ordered by the Chamber to consider amending the indictment to include sexual violence charges. None were initially included, but witnesses appearing before the Chamber were making reference to pervasive sexual violence in their evidence. So, the very first assignment I received upon arrival in The Hague was to prepare a research memo on the possibility of prosecuting sexual violence as genocide.

I remember very well the concern expressed in many quarters at the time – that including sexual violence as genocide would water down the crime and that it was inconceivable that sexual violence could be committed with genocidal intent. Now, we have a firm body of precedents, starting with the *Akayesu* Trial Judgement, confirming that sexual violence, under certain circumstances, can indeed constitute an act of genocide.

Another example, is the bold move to charge rape as enslavement in the ICTY case of *Kunarac*. Again, at the time, fears were expressed that it was pushing



the boundaries too far. Today, it seems unassailable that control of sexuality through repeated rape would be recognized as one of the ways to exert ownership over a person.

Our challenge now is to extend our bold approach into other areas of the international criminal law legal framework that have not yet been subjected to a gender analysis. For example, some of the contextual elements of core international crimes, such as the nexus between crimes and the conflict, are ripe for a gender analysis. I'm also very much hoping that we will see effective gender analysis of the crime of aggression in the context of Ukraine.

### **Understanding gender as a structural driver of international crimes**

Another area where we see promising momentum is on addressing gender as a structural driver of international crimes, including sexual violence crimes.

While historically, drivers such as race, ethnicity and religion have been recognized as elements of international crimes, gender has been absent. If we do not specifically identify and condemn the discriminatory drivers of crimes, what hope do we have of dismantling them as part of our quest for an atrocity-free, more peaceful world?

A few important footholds have emerged in the framework of international criminal law for addressing gender as a discriminatory driver of crimes.



One, is the inclusion of gender persecution in the Rome Statute of the ICC more than 20 years ago. Unfortunately, this provision has been largely neglected, resulting in a paucity of precedents and an accountability gap. But there is at last some momentum towards correcting the historical silence. The first generation of gender persecution charges has emerged at the ICC. The ICC OTP has also recently released a dedicated policy on gender persecution and the IIIM Gender Strategy – more on this later – also embodies a strong commitment to using the gender persecution framework where possible.

Notably, in the German case against Sara O (an individual affiliated with ISIL), a conviction was secured for persecution as a crime against humanity on intersecting grounds of religion and gender for mistreatment of Yazidi victims. And, in 2021, the Colombian Special Jurisdiction for Peace resolved that gender persecution can cover sexual orientation and gender identity.

As I watch these developments, I think about the phrase that I have heard repeated by victims and survivors of sexual violence over and over again in the course of my work: “Despite the trauma, I’m speaking up so that no one else will ever have to go through what I’ve been through.” The victims and survivors clearly understand that the root causes of the crimes committed against them are structural and that it is very likely to happen again to others in the future. We have to use every avenue for exposing and denouncing these structural drivers and advocating for resources to tackle the problem. Otherwise, we are certain to default on our promise of “never again”.



## **Gender sensitive institution building**

Turning now to some of our big challenges, but also opportunities, for the future.

We have much more work to do on building gender sensitive institutions that will ensure the accountability outcomes that we want for conflict-related sexual violence and other gender crimes.

In legacy work that we did at the ICTY, we focused intensively on insights regarding the development of successful institutional strategies for a prosecution office addressing sexual violence cases. These covered best practices in terms of internal gender architecture, the development of policies, strategies and operational guidelines, as well as influencing the office culture. But I do not think we have succeeded in disseminating these insights. Too often, gender sensitive institution building is ignored, or at best, approached as a box-ticking exercise.

However, pressure is mounting. The IIIM is an interesting and important experiment in this regard. The IIIM has developed a Gender Strategy and Implementation Plan to guide its efforts to integrate a gender analysis into all aspects of its work and institutional environment. It was made public in October last year and is available on the IIIM's website. The IIIM's approach is different from what has been the norm for accountability mechanisms up until now. We are fostering broad-based gender competence across our whole team, rather



than relying solely on isolated gender teams or focal points.

The implementation of the Strategy is a work in progress, but there are already so many important insights arising out of the experience. It warrants a dedicated convening to discuss best practices and lessons learned.

One thing we can say for sure, is that the adoption of high-level policy commitments are not enough to ensure change. The IIIM's Gender Strategy is accompanied by a detailed implementation plan for the office and then gender action plans for each IIIM section.

It is only when we move forward with concrete implementation that we provoke reactions and get a clearer sense of the gaps and blind spots in our existing frameworks. For example, at the IIIM,

- it was only when we tried to develop gender informed witness interview protocols and evidence tagging methodologies, that we saw clearly the limitations of some of the concepts we have inherited in international criminal law, such as the composite term "SGBV". We were forced to get very clear about what we were actually seeking to do and why;
- It was only when we moved forward on our commitment to test gender competence in recruitment, that we realized the complete absence of effective resources that would guide our team in this process. And we had to develop our own.



Another crucial insight is the importance of starting early. Once an institutional culture develops, it is very, very difficult to correct course.

Integrating a gender analysis into the work of a mainstream institution is not for the feint hearted! It is an immensely challenging process that requires commitment and persistence. We are asking our team to change how they define what is their “core” work. But we have to be prepared to move outside of the comfort of our echo chamber and grapple with the institutional messiness involved. And we have to be prepared for the fact that results will not be achieved overnight.

### **The accountability ecosystem and coordinated action on accountability for sexual violence and other gender crimes**

Another significant opportunity moving forward is the growing realization that accountability is best viewed as an ecosystem – an interconnected array of actors and jurisdictions, whose work would ideally combine to reveal a complete picture of justice.

At the IIIM, we increasingly think of ourselves as part of an accountability ecosystem for Syria alongside national criminal justice actors, Syrian and other civil society actors, UN actors and, potentially soon, international jurisdictions, such as the International Court of Justice. Human rights and humanitarian actors, along with States, are also part of this interconnected system.





The accountability ecosystem for Syria, although still incomplete, presents some real opportunities to pursue meaningful accountability for sexual violence and other gender-based crimes if we can fully harness the coordination momentum that is building. As a justice facilitator within this ecosystem, the IIIM has significant scope to contribute to this. For example, by ensuring the integration of a gender analysis into our work at the IIIM, we can provide evidence and analytical products to recipient jurisdictions that will also assist them to do the same in their cases. We also have an opportunity to advocate for inclusive justice, in our peer-to-peer engagement with investigators, prosecutors and other justice actors in the jurisdictions that we support. We are developing cooperation frameworks with gender-focused civil society actors and women-led/feminist organisations who can help us make our justice approaches more inclusive.

We see the potential of the ecosystem model to facilitate stronger gender justice outcomes in other conflict situations, such as Ukraine, as well.

### **Conclusion: addressing the pitfalls of ‘ad hoc’ ness**

I’m going to conclude with a final call to action. What I have seen over the past 30 years is a significant change in our conceptual thinking about gender and conflict. And, in important pockets, we have seen the development of incredible experience and expertise that has propelled us towards better outcomes.

But there is still a crucial problem for us to address. And that is the problem of ‘ad hoc’ ness in our accountability framework. From the *ad hoc* and hybrid



courts and tribunals, to the short-term mandates of the UN commissions of inquiry, and the justice facilitation mechanisms like the IIIM, we have no effective way to comprehensively transfer knowledge and expertise on gender justice and to ensure that we keep moving progressively forward to strengthen our approaches. To the contrary, the progress that we've made feels largely fleeting, fragmented and at risk of regression. When it comes to national jurisdictions prosecuting core international crimes, resources are limited and potentially stretched across many different conflict zones and crime categories. Specialisation is a rare luxury and the development of gender expertise is hard.

We have all the evidence we need that gender matters in accountability work. But we have to stop starting all over again with each new conflict situation. We desperately need better strategies and frameworks for managing, recording, transferring and further developing practical gender expertise and knowledge across mandates and jurisdictions – and over time. New mandates should be able to start with the benefit of our collective experience and wisdom from the beginning. We owe it to the victims and survivors.