

Remedies for War Crimes at the National Level

Catharine MACKINNON.

Skip other details (including permanent urls, DOI, citation information)

Volume 6, Issue 1, Fall 1998

Permalink: <http://hdl.handle.net/2027/spo.4750978.0006.103>

1

On the view that the most particular can be the most universal, I will contrast one experience of bringing human rights claims in a national forum with the experience to date in bringing the same violations and the same people under the same laws to the bar of an international forum. The people are Bosnian Muslim and Croat women survivors of the genocide carried out by Serbs in Bosnia and Herzegovina and Croatia. The violations are sexual atrocities. The laws are the international prohibitions against genocide, war crimes, and crimes against humanity. The two forums are federal district court in the United States and the International Tribunal on Crimes in Former Yugoslavia (ITY).

When a coalition of five groups of Bosnian and Croatian survivors of Serbian genocidal sexual atrocities approached me in 1992 to represent them in seeking what they called "international justice," my first question was, "where?" Their answer was, "that's your first job." Find or create a forum. They wanted to be heard by a war crimes tribunal like Nuremberg, so we became instrumental in pushing for the establishment of the ITY. But by design, the ITY was not accountable to survivors, but to international bodies and international politics, a particular problem for women, who are largely excluded from this arena. The women wanted a process that would be accountable to them. So we created our own forum, so to speak, in the Southern District of New York.

It should be said that even before having a place to take these injuries, they needed to be believed. Substantially through the efforts of our clients, the press eventually published what was to the rest of the world news of the "mass rapes" in Bosnia-Herzegovina and Croatia. This gave the credibility to the fact of the rapes and also brought international attention to the genocide as a whole. The human rights organizations, including women's rights groups, that had, up to that point, denied or minimized the rapes then decided that they had happened.

Meantime, we canvassed avenues for legal relief in light of the clients' priorities. Their first priority was to stop the genocide. They knew this was not a war with "ethnic cleansing" as one goal. It was (or is) a genocide euphemized as "ethnic cleansing" conducted in part through war. They wanted it stopped. Second, the clients wanted to hold those responsible, from the top to the bottom of the hierarchy, accountable to them for what they had done to them. International bodies were not set up to achieve either of these goals. Briefly put, the applicable international law was strong in principle but weak on delivery. Domestic law in many countries had the reverse problem. It was often short on principle by international standards but long on teeth. We concluded that if you want a statement of principle, go to an international forum; if you want delivery, go to a national court. Again briefly put, the clients were not attracted to a confidential investigation by an international inquiry leading to a secret report in which perpetrators were told they did something bad. The genocide was on-going. The survivors had real and severe damages. There was no regional human rights association with jurisdiction over their claims to bridge this gap, as they can in some other places. The survivors

needed the kind of follow-through that domestic courts best provide on the basis of principles that are best articulated under international law.

The central problem was that women are not states. In an international system that remains centrally a community of nations, no state took up these women's international injuries. Nobody who could have stepped forward to carry Bosnian or Croatian women's injuries in the International Court of Justice (ICJ), for example, did so. Bosnia-Herzegovina itself did later include sexual atrocities in its own claim for genocide against Serbia and Montenegro in the ICJ, representing all their violated people.

At that time, along with the legal abdication went the military one. No one who could have intervened to stop the genocide on the ground did that either. The international community was largely denying that the conflagration was a genocide at all. Preferring to think of it as a "civil war," they absolved themselves of taking sides or stopping it. Part of this denial came from believing Serbian propaganda. Part of it stemmed from an image of genocide that required the Holocaust to be replicated, when the legal definition of genocide is not so limited^[2].

Mainly, it was driven by a desire to avoid the consequence of admitting that it was a genocide: mandatory intervention. The Serbian aggression in the region was not being called a genocide in law or in fact not because it wasn't, but because no one wanted to have to face them to stop it.

Unexpectedly, from our point of view, Radovan Karadzic, leader of the Bosnian Serbs committing the genocide in collaboration with the Milosevic regime in Belgrade, showed up in New York City. We quickly brought a civil action against him under the Alien Tort Statute^[3] and the Torture Victim Protection Act^[4]. We had our national forum for our international claims.

The Alien Tort Statute is unusual if not unique in the world. It expressly provides jurisdiction in United States federal district courts for non-U.S. citizens for torts committed against them in violation of the law of nations. It is interpreted to give jurisdiction to a plaintiff who has personal service of process — you have to personally hand the defendant the law suit — and subject matter jurisdiction^[5]. The court has jurisdiction over the subject matter when customary international law or international treaties are violated.

Kadic v. Karadzic was filed in early March, 1993, by women survivors^[6]. They claimed rape as genocide, rape as a war crime, rape as a crime against humanity, and rape as a form of torture, as well as other injuries resulting from Karadzic's intentional destruction of non-Serb communities and peoples. It is a civil claim, seeking declaratory relief (acknowledgment that what happened to them violated these laws), an injunction against the genocide (requiring Karadzic to order it to end), and substantial damages for the human atrocities committed as a result of his policy of genocidal aggression.

Karadzic contested everything, most strongly our right to bring this case at all. The district court initially dismissed the case for legal insufficiency, based principally on Karadzic's assertions of immunities of all sorts, known and previously unknown. The judge also held that Karadzic was not a state actor therefore we had no case under international law, and implied that the issues were (or would soon become) political questions, meaning they had consequences for foreign affairs and properly governmental matters, so we should not litigate them^[7]. We appealed and won^[8]. The U.S. Supreme Court left that decision standing by declining to accept review^[9]. And then, after fighting hard for over three years, Karadzic folded. Once we won a discovery motion ordering him to appear for a deposition in New York — our clients had some questions they wanted him to answer — he

wrote the judge a letter saying he would no longer fight our claims at the trial level. He is in default. We are moving toward a default judgment and in inquest on relief.

3

What did we accomplish, and what did our choice of forum contribute? First, we got jurisdiction over Karadzic under international law for our purposes. The ITY has yet to accomplish this. Second, we got the first judicial recognition of the role of rape in genocide under international law. Now, when rape is an act of genocide in fact, it can be recognized as an act of genocide in law. The ITY is crawling — or, we hope they are crawling — in this direction^[10]. Finally, our clients wanted to testify about their rapes in a court of law. The ITY has presented little to none of this testimony to date. Do the formal features of a domestic civil forum, compared with those of an international criminal one, explain these differences? In part they do, but they do not have to. Nothing about what we have done need be confined to domestic forums or civil courts.

One way to evaluate a process is against goals. Professor Alvarez mentioned some conventional values pursued in international law enforcement: punishment, deterrence, closure, reconciliation, rule of law. Our survivors have a somewhat different list. In order, they are: (1) stopping the violations; (2) naming them what they are; (3) accountability to the violated for what was done to them; and (4) continuity between the legal changes made and other law, so that what was done here counts and has meaning beyond the context of these proceedings.

Attempting to stop a genocide may seem ambitious, but we sought an injunction to end this one. The ITY is not even set up to try, although they have at least as much power at their disposal as we do. As an analogy, civil rights injunctions, such as the structural ones racially integrating schools, have been routinely enforced within U.S. borders. And the U.S. already has a military force in Bosnia-Herzegovina carrying out so-called "peacekeeping" responsibilities. Enforcing a federal court injunction against one man who has ordered a genocide is not beyond the pale at all.

As to naming the injuries, we observe that there is one criticism of the Nuremberg Tribunal that the ITY does not seem excessively sensitive to repeating: evading the group nature of the atrocities. Nuremberg has been criticized for evading the anti-Semitism of the crimes it prosecuted, almost as if the Holocaust were an adjunct to the war. The ITY is charging genocide. It can fight the last war. The question is whether it can fight the current one. As ethnicity was evaded at Nuremberg, sex — in this case meaning sex and ethnicity combined, is being systematically ignored by the ITY today. Rape is overwhelmingly not being charged as an act of genocide. This is a fundamental failure to name the atrocities what they are: genocidal rape. Our case named them and established a legal claim for them under international law.

A forum in which survivors choose their own lawyer, shape their own claims, and direct their own case leaves the process of justice substantially in their own hands. The process, by design, is accountable to them — not to the press, not to international politics, not to the bureaucratic imperatives of international organizations, not to the fundraising competitions or turf battles or empire-building of human rights organizations, and not to criminal prosecutors enhancing their careers by claiming to represent "the law." The ITY is not accountable to survivors by design or in practice. Survivors have no decisive voice in it.

Woman after woman has been willing to risk standing up in public to testify about her own rape in our civil case. They have been unwilling to provide the same testimony to the ITY. Why? It is not because we have more than twenty million dollars to conduct their case, or a better system to guarantee their security, although we do take security more seriously because we take the people involved more seriously. The reason is not because we are more sensitive to their personal needs or to the nature of

their injuries, although we are. The reason is that this case is their case. We are working for them, they are not working for us. This produces other differences between us and the tribunal. Maybe the ITY will eventually figure out how to work for them.

As to closure: so long as a genocide is ongoing, it can't be "closed." Of course the survivors want these events behind them, but not at the cost of forgetting what happened or having it effectively disregarded. Not at the cost of a process that walks over them, colonizes them, exploits, ignores and misrepresents them. Not at the cost of shoving what really happened under the rug and dehumanizing further those whose human rights have already been violated. Not for more accountability to an elite international legal community than to those whose families were exterminated. Not to assuage the guilt of bystanders. What is this "closure" for and who wants it? It is the only item on the conventional list of values that purports to be specifically for the victims. Our survivors are critical of premature closure. Who wants this over with in court, especially when they are not yet willing truly to end it on the ground? Who wants it "put behind us," instead of stopped, named and remembered?

The survivors want law to work for women for a change. This desire underlies their goal of continuity, their version of the rule of law. Sexual atrocities, including ethnic ones, do not happen only in war or genocide. Our clients want to make rape law work in the daily war against women everywhere. Establishing international accountability for their violations through domestic civil litigation has been one way to pursue that goal, and it has affected the ITY and other international forums as well.

This case marks the first time women as a subordinated people were able to complain officially of systematic violations of their human rights during a war while that war was going on. In pursuing international relief for such injuries, the legal system has a lot to learn from the survivors' choice of a process they control themselves.

Catharine A. MacKinnon is Professor of Law at the University of Michigan Law School. Professors Jose E. Alvarez and Katharine MacKinnon discussed solutions to prosecuting war crimes at the 1997 University of Michigan Law School Reunion of International Alumni. The following are papers that developed out of that discussion.

1. Talk delivered to University of Michigan Law School Reunion of International Alumni, 18 October 1997, at the University of Michigan Law School on a panel with professor Jose Alvarez. As this is published one year later, we wish it were outdated. Rape as genocide remains largely unrecognized by the ITY, including in cases in which it should have been charged. We continue to wait for the district judge in New York to adjudicate motions that will make it possible to bring out case to a conclusion. This talk, with all our work for the survivors, is possible only because of the vision, insight and determination of Asja Armanda and Natalie Nenadic.

2. In the Genocide Convention, "genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such: (a) killing members of the group; (b) causing serious bodily or mental harm to members of the group; (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) imposing measures intended to prevent births within the group; (e) forcibly transferring children of the group to another group." Convention on the Prevention and Punishment of Genocide, 78 U.N.T.S. 277-.

3. Alien Tort Claims Act, 28 U.S.C. section 1350.

4. Torture Victim Protection Act, 101 Stat. 73, printed at 28 U.S.C. section 1350.

5. *Filartiga v. Pena-Irala*, 630 F. 2d 876 (2d Cir. 1980).

6. The case was originally filed with the National Organization for Women Legal Defense and Education Fund (NOWLDEF) as co-counsel. Subsequently they were replaced by Paul, Weiss, Rifkind, Wharton, and Garrison, who remain as co-counsel.

7. *Kadic v. Karadzic*, 866 F. Supp. 734 (S.D.N.Y. 1994).

8. *Kadic v. Karadzic*, 70 F.3d 232 (2d. Cir. 1995); *Kadic v. Karadzic*, 74 F.3d 377 (2d. Cir. 1996). The United States government supported our right to proceed with the case.

9. Cert denied cite 518 U.S. 1005 (1996).

10. As we go to press, this prediction has proved true, In *Akayesu*, the Rwanda Tribunal found rape to be a form of genocide (Sept. 2, 1998).