Women judges in transitional justice and their impact on trials on cases of sexual and gender-based violence committed as war crimes

Les femmes juges dans la justice transitionnelle et leur impact sur les procès relatifs aux cas de violence sexuelle et basés sur le genre commis comme crimes de guerre

Anna Adamska-Gallant[1]

Polish lawyer with vast professional experience in Department of Law, Economy and Administration

University of Wroclaw

Lublin, Poland

https://orcid.org/0000-0001-7547-0216

Adw.AnnaAdamskaGallant@pm.me

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Abstract: Unfortunately, sexual and gender-based violence (SGBV) against women and men who are identified as enemies very often appears as a tool of war. For a long time, SGBV-related atrocities were not perceived as an element of combat, thus they were not investigated as war crimes. None of the war criminals prosecuted in the Nurnberg and Tokyo trials was ever charged with crimes that specifically targeted women, despite overwhelming evidence of mass-scale rapes committed during World War II by their subordinates. Only in 2000, the Women's International War Crimes Tribunal on Japan's Military Sexual Slavery was established to hear cases of women forced into sexual slavery by the Japanese Imperial Army more than

[1] international criminal law; lecturer, assistant professor in University of Wroclaw. She served as a judge for 17 years, including almost 6 years in international judiciary in Kosovo, where she heard war crime cases and crimes against humanity in the first instance and in the capacity of the Supreme Court justice. She graduated in law from the University of Gdansk, completed postgraduate studies in Intellectual Property Law at the Jagiellonian University, and European Law at the University of Cambridge. She was awarded PhD in law *cum laude* from the University of Wroclaw for her dissertation on "The Vulnerable Witnesses in Practice of International and Hybrid Courts".
Since 2018 Anna Adamska-Gallant has been involved in strengthening the rule of law in Ukraine working as a key international expert on the judiciary of *Pravo Justice*, the biggest EU project supporting the judicial reform in the country. She was appointed by President Zelyensky as an international member of the Council of Experts on Judicial Reform in Ukraine. In 2019, she joined Polish Bar. She specializes in the criminal law, international humanitarian law and human rights. She is proficient in English and Ukrainian. She also speaks French, Serbian and Russian.

50 years earlier.
The perception of the SGBV crimes in armed conflicts has considerably changed because of the mass atrocities committed in Bosnia and Hercegovina and in Rwanda. Women who as victims of the sexual violence dared to talk about their suffering, played the crucial role in changing the general attitude towards SGBV crime committed during the war. Simultaneously, the composition of international prosecution and judiciary included numerous female prosecutors and judges.
It may be argued if judge's characteristic, personal experience, or gender indeed or to what extent influence judicial decisions. Some fundamental questions related to the judge's gender remain without an answer: Would the gender of judges impact the quality of fact-finding in SGBV as a war crime? Would a female judge assess the evidence more thoroughly than a male judge? Would a SGBV victim's well-being be better protected by a judge of the same gender? Would the risk of a victim's re-traumatisation be lower if the trial was handled by a judge of the same gender as the victim? And finally: would the risk of a victim's re-traumatisation be lower if a judge of the same gender as the victim handled the trial? All these questions seem particularly relevant in the context of the new wave of war crimes SGBV cases resulting from the war in Ukraine.

Keywords: sexual and gender-based violence, war crimes, responsibility, gender, female judge, accountability

Résumé : Les violences sexuelles et celles de genre (VSBG) contre les femmes et les hommes identifiés comme des ennemis apparaissent malheureusement et très souvent comme une arme de guerre. Pendant longtemps, les atrocités liées à la violence sexuelle et basées sur le genre n'ont pas été perçues comme un élément de combat ; elles n'ont donc pas fait l'objet d'enquêtes en tant que crimes de guerre. Aucun des criminels de guerre poursuivis dans les procès de Nuremberg et de Tokyo n'a été inculpé de crimes visant spécifiquement les femmes, malgré des preuves accablantes de viols à grande échelle commis pendant la Seconde Guerre mondiale par leurs subordonnés. Ce n'est qu'en 2000 que l’on institua le Tribunal International pour les Crimes de Guerre commis à l’encontre des Femmes suite à l'esclavage sexuel militaire pratiqué au Japon, chargé d’entendre les cas de femmes contraintes à l'esclavage sexuel par l'armée impériale japonaise, plus de 50 ans plus tôt.
La perception des crimes SGBV dans les conflits armés a considérablement changé en raison des atrocités de masse commises en Bosnie-Herzégovine et au Rwanda. Les femmes qui, en tant que victimes de violences sexuelles, ont osé parler de leurs souffrances, ont joué un rôle crucial dans le changement de l'attitude générale envers les crimes de violence sexuelle et sexiste commis pendant la guerre. Simultanément, la composition du ministère public et de la justice internationale comprit de nombreuses femmes procureurs et juges.
On pourra s’interroger alors dans quelle mesure le caractère, l'expérience personnelle ou le sexe du juge ont influé sur les décisions judiciaires.
Certaines questions fondamentales liées au sexe du juge restent sans réponse : le sexe des juges jouerait-il sur la qualité de l'établissement des faits en matière de VSBG en tant que crime de guerre ? Une femme juge évaluerait-elle les preuves de manière plus approfondie qu'un homme juge ? Le bien-être d'une victime de VSBG serait-il mieux protégé par un juge du même sexe ? Le risque de re-traumatisation d'une victime serait-il moindre si le procès était mené par un juge du même sexe que la victime ? Et enfin : le risque de réveiller un nouveau traumatisme chez la victime serait-il moindre si un juge du même sexe que celui de la victime gérait le procès ? Toutes ces questions semblent particulièrement pertinentes dans le contexte de la

nouvelle vague d'affaires de crimes de guerre SGBV résultant de la guerre en Ukraine.

Mots clés : violences sexuelles et sexistes, crimes de guerre, responsabilité, genre, femme juge, responsabilité

Introduction

Judges dealing with crimes classified under the international humanitarian law face very specific challenges on a daily basis. It is due to the complexity of such cases, which is a result not only of the mass and vastness of atrocities, both in space and time, but also from the huge number of victims. Each victim not only struggles with individual trauma but is also burdened with the collective experience of the ethnic or national group, she or he belongs to. The specificity of adjudication in these trials requires judges not only to know the law, its principles, but also to understand the local context. Such knowledge allows them to better recognise the background of the conflict which led to armed clashes and violations of the international law.

The ongoing armed conflict brings numerous negative consequences in various spheres, which also includes breaking of existing social ties between people. It affects strongly the most vulnerable individuals who are deprived of the support and care not only from their family members but also from the whole community, which leaves them being exposed to danger. During the conflict, the standard mechanisms which are applied in time of peace to ensure order and protect against aggression cease to function. Entire communities and individual families are being disintegrated, social norms are being violated, and the desire to survive, often at any cost, becomes a predominant need (Marsh, Purdin, Navani 2006: 15).

The dynamics of armed conflict make women and girls particularly vulnerable to sexual violence. Alone, left behind by men of their community who have gone to fight, they are exposed to a great risk of sexual violence, consisting not only of one-time acts, but also of long-term abuse. The chaos resulting from military action exposes them to a threat not only from combatants, but also from other people not directly participating in the conflict, who take advantage of the situation that favours impunity. Tolerance for violence, rather alien in times of peace, is growing to such an extent that entire communities are beginning to treat it as a justified way of expressing resentment towards others, affirming their belief in their own superiority, correcting historical injustices, or resolving other conflicts. As a result, people who, under ordinary circumstances, would not allow themselves to behave illegally feel so unpunished that they go so far as to commit common crimes (O'Toole, 2005: 5).

A look at the practice of various international and hybrid courts and tribunals indicates that shortage of women judges in the judiciary led to ignoring crimes committed against women during the armed conflict. None of the war criminals prosecuted in Nurnberg trials was ever charged with crimes that specifically targeted women, despite overwhelming evidence of mass scale rapes committed during II World War by their subordinates (Askin, 1997: 138, 202-03; Goldstone Hon., 2002: 279). The situation was to a certain extent different in the Tokyo Tribunal, because some defendants were accused with rape which occurred in the city of Nanking during its occupation. However, despite 20.000 of identified cases of rape, not a single woman was called to testify (R.J. Goldstone Hon.,2002: 279). The victims of these rapes had to wait for justice for over half a century, until 2000 when the Women's International War Crimes Tribunal on Japan's Military Sexual Slavery (Chinkin, 2001: 335-341).

The phenomenon of sexual violence linked with armed conflict attracted particular attention of the international community only in the 90s of the XX century as a result of the massive scale of such violence during the wars in the former Yugoslavia (Harbour, 2016: 19-23) and during the civil war in Rwanda (Mischkowski, Mlinarevic, 2009: 5). In particular, Muslim women from Bosnia and Herzegovina

contributed to disclosure of this problem, because they decided to speak publicly about the events which they were victims of. The enormous number of the rapes committed during the conflict in the former Yugoslavia led to adoption of the Resolution 798 in 1992 by the United Nations Security Council which condemned for the first time the practice of mass rapes committed in connection with the hostilities. The Resolution 808, which was later adopted as the basis for the creation of the International Tribunal (ICTY), explicitly provided that its jurisdiction should also apply to the rape of women in the former Yugoslavia.

The reports produced by various groups of experts, who investigated and analysed information on crimes against humanity and war crimes committed in the former Yugoslavia, indicated that sexual violence and *gender-related* persecution were planned and targeted at causing irreversible effects affecting the whole communities and constituted an element of the ethnic cleansing. Both women and men were victims of rapes, were forced to perform sexual acts in the presence of others to intensify their humiliation, shame and fear. Women were forcibly impregnated, and afterwards were held in camps for a period long enough to prevent them from having an abortion, forcing them to carry their pregnancies (Copelon, 1994: 256; Pratt, Fletcher, 1994: 372-374). The data indicated that the sexual violence was carried out as a part of a systematic and wide-range action against the civilian population, based on orders issued by political leaders or military commanders or at least with their knowledge and consent (Harbour, 2016: 22-23).

Women judges' impact on recognition of sexual violence linked to armed conflict

The error of purely male composition of the Nurnberg and Tokyo tribunals was not repeated when the international courts to deal with atrocities in the former Yugoslavia and in Rwanda were created. As a result of joint pressure from states and various non – governmental organisations, female judges were called to the bench (Grossman, 2011: 650; Goldstone Hon., 2002: 280). Furthermore, in the process of negotiating the Rome Statute, which led to creation of the International Criminal Court (ICC), the necessity of involving female judges to better respond to women's concerns was recognised. The Rome Statute provides for a fair representation of female and male judges (Art. 36 p.8). Patricia M. Wald noted that:

> the need for women was especially urgent on a court dealing with the laws of war and international human rights. For centuries women and children had been the predominant victims of war crimes. But they played no significant role in the peace negotiations or punishment of war criminals. Even the nature of the crimes committed against them, principally rape, was disguised in international law linguistics under generic terms, such as outrageous against dignity and honor. Women were basically invisible in the war calculus (Wald, 2005: 650).

It has been identified that gender balance on the bench plays its role in the way how cases are decided. Nienke Grossman indicated that the presence of both sexes brings a unique perspective to the act of judging. Each of them, due to their gender, may approach law or facts differently. As a result, considering that none of the approaches is right or wrong, for an impartial process both are required (Grossmann: 2011: 643). It is evident in cases related to kinds of experience which are specific for each sex. The analysis of the sentencing practice of judges of the ICTY showed that panels with participation of female judges imposed more severe

punishments on defendants who were found guilty of violence against women than the panels composed exclusively from male judges (King, Greening, 2007: 1065 – 1066).

It is also worth referring to prominent women judges, working on war crime cases, including these with elements of sexual violence, who underlined the importance of gender diversity on the bench. According to Patricia M. Wald, a female judge's life experiences inevitably can and should influence judgements in many cases. She underlined that women had "unique experience and insights" that "can and do make a difference", what she observed in many cases in which she was at the bench, both at home and abroad (Wald, 2009). Navanethem Pillay, former ICC judge and ICTR president said that women judges come "with particular sensitivity and understanding about what happens to people who are raped." She added that women understood when they were told that a rape was like getting a death sentence (Terris, Romano, Swigart, 2007: 48). Judge Cecilia Medina Quiroga, who served at the Inter-American Court of Human Rights, admitted that her woman's perspective helped in questioning on facts relevant to reparations in a case related to the massacre and rape in Guatemala (Terris, Romano, Swigart, 2007: 186 -187).

Judge Navanethem Pillay contributed significantly to the development of applicability of international humanitarian law to accountability for sexual violence. She was the only woman in the ICTR panel assigned to hear the case of Jean-Paul Akayesu, which was initially limited only to charges of crimes against humanity and war crimes but had not explicitly referred to any sexual assaults (*Akayesu* Case: Decision of the Trial Chamber on Leave to Amend the Indictment; Judgment int the Trial Chamber, par. 416–17). Thanks to judge Pillay, who took the lead over the questioning of witnesses, the evidence of SGBV violence was gathered, which allowed the indictment to be amended with additional charges of rapes and sexual violence as elements of the genocide and crimes against humanity (Pillay, 2008: 665 – 666).

Pressure from the ICTY judge Elizabeth Odio Benito made prosecutors amend the indictment in the case against Dragan Nikolic and add charges related to the gender violence. Initially, prosecutors believed there was no sufficient evidence to support such charges. Judge Odio Benito, while deciding upon one of interlocutory appeals at the initial stage of the proceedings, publicly exhorted the prosecutors to include the gender crimes based on the evidence from some witnesses heard during the investigation (Goldstone Hon., 2002:281). The Trial Chamber made the following statement:

> It appears that women and girls were subjected to rape and other forms of sexual assault during their detention ... Dragan Nikolic and other persons connected with the camp are related to have been directly involved in some of those rapes and sexual assaults. These allegations do not seem related to solely to isolated incidents. The Trial Chamber feels that the prosecutor may be well advised to review these statements carefully with a view to ascertaining whether to charge Dragan Nikolic with rapes and other forms of sexual assault, either as a crime against humanity or as a grave breach of war customs (Goldstone, 2002: 281 – 282).

As a result, the defendant was convicted for several charges, including aiding and abetting rape which was classified as a crime against humanity (*Nikolic* Case: Third Amended Indictment; *Nikolic* Case: Sentencing Judgment).

Judges Teresa Doherty and Julia Sebutinde played a similar role in the panels of the Special Court for Sierra Leone (SCSL). Through their active participation in examining witnesses, they disclosed substantial circumstances related to gender crimes. Consequently, the indictment was amended by adding charges of rapes and forced marriages as crimes against humanity (*Brima, Kamara and Kanu* Case: Appeal Judgment, para. 194)

According to Rhonda Copelon, the presence of female judges and prosecutors in the ICTY and ICTR was crucial to advance gender perspective in their case law (Copelon: 2000: 228, 238). The role of female lawyers, both prosecutors and judges in holding perpetrators accountable for gender violence committed during the armed conflict was also underlined by Richard Goldstone, former Chief Prosecutor of the ICTY and ICTR. He wrote that:

> This judicial diligence in facilitating testimony on gender crimes and in urging the inclusion of such crimes in indictments, together with diligence of Patricia Sellers and others in the Office of the Prosecutor, contributed to the significant progress that the Tribunal ae made in their recognition and prosecution of gender crimes (Goldstone Hon, 2002: 282).

Patricia Sellers was a prosecutor in the trials before the ICTR against Akayesu, and before the ICTY against Furundzija, Kunarac, Nikolic and Oric. She developed legal argumentation which led to issuing landmark decisions by the tribunals which recognised sexual violence as a constitutive element of war crimes, crimes against humanity, genocide, torture and enslavement under international criminal law.

Judge Patricia M. Wald noticed that women were always at the front and center of the events that international criminal law focused on. They were the primary victims of displacement, which usually resulted from the combat. They also suffered the most from many crimes, including those connected with sexual violence. Women judges may be more sensitive and have a better understanding of the degradation suffered because of such crimes (Wald, 2011: 403).

From the perspective of an international judge that heard SGBV-related war crimes cases and exchanged opinions with other members of the judiciary I have developed a very firm opinion, fully concurring with the above quoted statements from the most prominent female judges. Yes, participation of female judges contributes positively to the quality of the justice process and preservation of the well-being of victims and witnesses of SGBV war crimes.

Women judges' impact on development of practice of international courts in relation to victims of sexual violence as vulnerable witnesses

It is of crucial importance for judges who are involved in adjudicating war crime cases with sexual violence to decide independently from any bias or presuppositions about the nature of woman and her sexuality. They also need to be particularly sensitive towards the victims who need to testify before the courts about often the most dramatic events in their lives. It is judges' responsibility to ensure that the victims are protected against mistreatment in course of their examination.

Persuading victims of sexual violence to testify and maintaining their will to participate in the proceedings require methods that guarantee the protection of the rights of the accused and minimize the risk of secondary victimisation of the victims

as much as possible. This has been a major challenge in cases dealt with by international courts so far, as the acts falling under their jurisdiction usually took place in societies with a very traditional approach to human sexuality, which significantly limited victims' willingness to testify, also due to the fear of stigmatisation. It is based on a stereotype that the victim contributed to the fact that she was raped, because she must have provoked the perpetrator with her behaviour, words, gestures, or clothing. Another stereotypical presumption is that the victim has consented to have a sexual contact with the perpetrator. That is why women are often blamed on the false pretences that their behaviour has led to the defilement of the honour of the family. As a result, the risk of rejection of the victim by her family is high (Pratt, Fletcher, 2002:338-339).

Due to the role assigned to women in such communities, they usually do not appear in public, nor are they used to talking about their sexual experiences. Many of them have difficulty trusting people, which can result from trauma caused by sexual violence. According to Roy Gutman, in the conservative Muslim society that dominates Bosnia, particularly in rural areas, the adopted moral rule states that a woman is obliged to remain "clean" or "untouched" until she gets married. In such a situation, admitting that she was a victim of rape creates for her the risk of far-reaching consequences in the form of rejection, ostracism, as well as the prospect of life without family and children (Gutman, 1994: 9; Gardam, Jarvis, 2001: 155-156; Healey, 1995:329-332)

Women remain silent about sexual violence against them due to the fear of a negative reaction from both their families and the community in which they live. This understandable reluctance to recollect the rape and present it to strangers meets the lack of a functioning support system for victims. When, to all these circumstances, one adds ignorance of the specifics of the functioning of the judicial process and the associated fear of the unknown, the unwillingness to testify in cases of sexual violence becomes justifiable (Harbour, 2016: 22-23).

I observed such unwillingness in the course of examination of victims of sexual violence in cases which I heard as an international judge in Kosovo. Their reluctance to testify stemmed from various motives, including those of a social nature, which were of a particular importance in a traditional Albanian community, where the honour of the family is associated with the chastity of women. When it was seen as compromised, the value of a woman for a man and the whole family drastically dropped (Gardam, Jarvis, 2001: 109-110; Csete, Kippenberg, 2002: 100-101).

Paradoxically, the social exclusion of a rape victim by her own community could sometimes make her testify. By testifying and disclosing the truth, she could try to regain her self-esteem and control over her life (Mischkovski, Mlinarević, 2009: 55-56). The victim sought confirmation before the court that she was only a helpless victim of the situation in which she found herself against her will, as happened to many other women. Her case was not unique because it was a part of broad activities carried out by the enemy. The confirmation of these facts by the court could not only restore her sense of lost dignity, but also constitute an argument against the exclusion (Stepakoff, Reynolds, Charters, Henry, 2014: 448).

The women judges working in the ICTY and ICTR were the first to confront war crimes involving large-scale sexual violence, and they had to deal with trauma of the victims who came to testify about it. They understood well the burden on these witnesses, who were exposed for a serious risk of re-traumatisation resulting from a contact with the judicial system which had not been so much oriented on a welfare of the victims. With time and better understanding of their needs, the practice of the ICTY and ICTR was gradually changing, also thanks to the women judges who

contributed significantly to designing and implementation of the solutions aimed at protecting the SGBV victims. Several procedural and practical solutions have been developed in the practice of international courts to limit the risk of their re-traumatisation.

The standards adopted by the ICTY and ICTR. have determined the way how victims of SGBV crimes are treated by other international courts. Many of them are characterised by a victim-oriented approach to sexual violence that takes into account the needs and expectations of the victim. It is manifested by the statutory requirement to include an expert on sexual violence and gender in the work of the ICC at every stage, while maintaining an appropriate proportion of women to men (Lupig, 2009: 20). It has been implemented also through establishing the Gender and Children's Unit at the ICC Prosecutor's Office, whose tasks include advising on cases related to sexual and gender crimes (Lupig, 2009: 54-55). Victims and Witness Unit (VWU) is also obliged to employ experts who are prepared to work with victims of sexual violence.

The gender parity as well as adequate competencies in SGBV crimes, also apply to judges called to the bench. In the end, it is their responsibility to decide how the trials will be proceeded, especially whether sexual and gender-based violence will be duly considered and its victims will be treated in a manner consistent with applicable standards. Women judges with expertise of sexual violence offences show a better understanding of their victims and the context in which the crimes occurred. They are also seen to be more empathic to victims during their testimony, especially during cross-examination, what makes them more active in situations where witnesses testifying about sexual violence may be exposed to risk of excessive pressure and even aggression from the defence. When assessing evidence, female judges avoid harmful stereotypes about victims' behaviour (Seelinger, Silverberg, Meija, 2011: 50; Gopalan, Kravetz, Menon, 2016: 145-146).

The risk of victims' secondary victimisation often arises from defence tactics designed to undermine the credibility of a witness. It is not rare that aggressive interrogation techniques are used. Especially at the initial phase of operation of the ICTY and ICTR, defence sometimes tried to obtain evidence to show that the victim had consented to engage in sexual activities, encouraging them by their own behaviour. Defence used references to her previous way of life, especially the so-called misconduct, which was to indicate the victim's openness to sexual experiences (McGlynn, 2017: 367-392; McColgan, 2016: 275-308). Arguments were raised concerning the lack of other evidence to corroborate the witness's testimony, and even the slightest contradictions or inconsistencies were used to contest witness' credibility. Such tactics, combined with existing stereotypes about sexual crimes, often made it difficult for the victim to testify about rape (McGlynn, Downes, 2019: 327-332; Gopalan, Kravetz, Menon, 2016: 137-138). Thanks to the efforts of women judges working at the ICTY and ICTR the rules related to evidence gathering were amended to better respond to these challenges and difficulties faced by the victims.

According to *the Rules of Procedure and Evidence* applied by the ICTY and ICTR a testimony of a victim of sexual violence does not require corroboration by other evidence which means it can serve as a sole and decisive evidence. If the testimony is sufficiently reliable in the light of the evidence gathered in the case, it can itself form the basis for establishing that a sexual assault occurred. A similar evidentiary rule is applied in the proceedings before the ICC. In its judgment in the case against Tadic, ICTY stressed that because of this rule the same evidentiary requirements were introduced into proceedings in cases of sexual offences as for other criminal acts. At the level of national legislation, the standard of in cases of sexual violence

was often higher than for other offences. These higher demands on proving sexual crimes stemmed primarily from the assumption, present in many cultures, that a woman as a rape victim is unreliable (McGlynn, 2010: 143-144). The option to recognise the victim's testimony as the only and decisive evidence will inevitably put an end to impunity in many cases. The ICTY and ICTR procedural rules prohibit presumptions regarding the alleged consent of the victim for a sexual act. It is not allowed to assume that the victim consented to a sexual act when he or she was subjected to violence, coercion, deprivation of liberty or psychological pressure, when he or she was threatened with such behaviour or when he or she had reasons to fear their use. Similar rules on the prohibition of evidence were provided for in the *Rules of Procedure and Evidence* applicable before the ICC. They also excluded the possibility of presuming the victim's consent to a sexual act due to the circumstances in which it occurred, thus protecting victims from re-victimisation.

Furthermore, the ICTY and ICTR evidentiary rules provided that the admissibility of evidence that consent to a sexual act had been given in a conscious and voluntary manner was to be decided in a closed session with the participation of the parties, including the victim and her representative. The task of the defence was to demonstrate that the proposed evidence was relevant to the case and was credible. Only if those two conditions were met it was possible to present the evidence during the trial. This solution provided additional protection for the victim against his or her re-victimisation, to which he or she could have been exposed if the defence's application had been publicly considered.

In the ICTY, the ICTR and the ICC, any evidence of the victim's previous sexual conduct is not admissible. This rule is based on the presumption that an attempt to prove such circumstances leads to an unjustified questioning of the witness's reputation. It also may expose her to additional stress and emotional harm. It was stressed that the primary purpose of this rule was to protect victims of sexual violence from embarrassment and humiliation. It also serves to combat the stereotypic presumption that the victim could consent or encourage the offender. Derogations from this rule are unacceptable.

All the above-quoted rules have constituted a firm response to gender stereotypes functioning in many societies. There are still legal systems where the statutory elements of rape include overcoming the victim's resistance, which means that it is necessary to prove that the victim opposed the perpetrator (Radačić, Turković, 2010: 173-174). When the victim does not resist because she fears the consequences and stays passive while trying to survive, the perpetrator remains unpunished. The procedural framework applicable in international courts, developed thanks to contribution of the women judges, appears in this context as progressive.

In addition to legal solutions addressed to victims of sexual violence, international courts use many practical measures to help them to cope with giving a testimony about traumatic events. Since each of them comes to court with different experiences and expectations, it is essential to treat them individually. A special obligation in this respect rests with prosecutors since they request the hearing of a specific witness. In turn, the role of the judge is to decide how to implement possible measures for the protection of a witness and how to conduct the hearing itself (Gopalan, Kravetz, Menon, 2016: 113). The solutions used by the court refer to the method of introducing the witness's testimony into the evidence and the way of examination. They contribute to alleviating the tension accompanying the witness because of the hearing, and they may make the testimony obtained more detailed and reliable.

As a principle, in international court proceedings, during the examination in chief (direct examination) any leading questions should be avoided. This is a manifestation of the principle of the immediacy of evidence and the assumption that the purpose of the hearing is to obtain an account from the witness and not what she was led to say because of appropriately asked questions. It often happened that the SGBV witness was unable to continue testimony in the court because of her or his emotional reaction. When it occurred, the prosecutor could ask the court for permission to continue the examination using leading questions. By asking them, the prosecutor was able to confront the witness with her or his previous statement, thus enabling the summary of her version of events. In this situation, the witness could only answer 'yes' or 'no', avoiding the presentation of embarrassing details.

When the defence did not contest that sexual violence had occurred, as was quite usual in proceedings against political leaders or military commanders, it became a common practice in international courts that the parties agreed to stipulation of facts. It made further examination redundant, and the victim was not forced to talk publicly about details which were difficult for her or him. It served to streamline the proceedings and protect the witness from secondary victimisation The defence still had the opportunity to cross-examine such a witness to challenge circumstances that might have been relevant to the defendant's guilt for sexual violence which he was not a direct perpetrator. As a result, the testimony of the witness was presented in a concise manner by the prosecutor, after which the victim declared whether she or he confirmed that the event proceeded in this way.

At the beginning of the ICTY and the ICTR operations, the witness evidence was taken exclusively orally. Over time, due to the need to speed up the ongoing trials also by limiting the number of witnesses to be interviewed, this rule was mitigated. An additional argument in favor of such a solution was a need to reduce the risk of secondary victimisation, which was particularly high in relation to victims of sexual violence. As a result, the ICTY/ICTR Rules of Proceedings and Evidence were amended to remove the primacy of oral testimony. Instead, the Rule 92 *bis* was introduced allowing the court to take evidence both orally and in writing, provided there was no overriding public interest in the evidence in question being presented.

Thanks to this rule, in proceedings before the ICTY and ICTR, it was possible to read the testimony of victims of sexual abuse, including those taken during proceedings in other cases. The application of that solution was subject to conditions which ensured that the defendant exercised his rights of defence. The most important of these was to exclude the possibility of using such evidence to prove circumstances directly linked to his conduct, since it could only serve to establish the general context of events. In addition, after hearing the parties, the court could decide whether it was necessary for a witness to appear to allow the defence to cross – examine the witness.

Another solution used to protect victims of sexual violence was to allow the minutes of their interrogation from other proceedings before the ICTY to be read in a situation where (1) the witness was present in court, (2) it was possible for her to be cross-examined and questioned by judges, (3) and she confirmed that the testimony read to her reflected what she had said. Importantly, unlike the solution presented above, such disclosed testimonies could constitute direct evidence of the defendant's actions. As a result, the victim was not forced to report the same events again, exposing herself to the trauma and discouragement. International courts used this rule in proceedings involving victims of crimes connected with sexual violence, because it not only allowed to speed up the proceedings, but also to a significant

extent protected the victims from re-telling once again the painful circumstances of the events that they had experienced.

Another way to avoid repeating of examination of the victim of sexual violence was considering certain facts as proven (judicial notice), which could be done both *ex officio* and at the request of a party. Such a possibility was used in case of circumstances that had already been established in other proceedings and were relevant in the case pending before the court (Rule 94 (B) ICTY RPE, ICTR RPE). It was used primarily in cases where political leaders or military commanders were accused based on principles of the commander's responsibility or on the participation in a joint criminal enterprise. As a result, there was no need to hear once again a testimony of the victims of sexual violence to show that mass rapes had taken place in conflict areas. The judicial notice led to the acceptance of a presumption of certain facts to be proven, which the disputing party could have tried to rebut by proving the contrary.

The ICC Statute also provides for numerous solutions aimed at supporting victims of sexual violence. When deciding on any measure of witness protection, judges shall consider the nature of the criminal act, in particular whether it contained sexual violence (Art. 68 (1) the Rome Statute). If necessary, the judge should first consider conducting examination of the victim in camera or via video call. This principle represents a significant change compared to the regulations on previous international tribunals, where such a priority for the needs of victims of sexual violence was not foreseen. It means shifting the burden of proof that such measures are not needed to defense (McLaughlin, 2007: 208).

The Rules of Procedure and Evidence impose an obligation on judges to control the conduct of the hearing to avoid harassment or intimidation of the witness by the parties or the public (Rule 75 (D) ICTY RPE, ICTR RPE; Rule 88 p. 5 ICC RPE). In the ICC, this obligation is emphasised towards the victims of sexual violence, as the court is to pay special attention how they are treated (Rule 88 p. 5 ICC RPE). Similarly, the prosecutor, as the party who requested the witness to be heard, is responsible for reacting with objections in a situation where the defence conducts the hearing in excessively aggressive way or otherwise in a manner deemed inappropriate. Importantly, rules of the counsels' ethics also oblige lawyers appearing before the ICC to properly address witnesses and victims, including primarily victims of sexual violence. They should refrain from intimidating, humiliating them, and exposing them to disproportionate or unnecessary stress both inside and outside the courtroom.

In multi-defendant cases where allegations of sexual violence involve several defendants, it is a responsibility of both the court and the prosecutor to protect the witness from the excessive burden resulting from the cross-examination conducted by each of the defence attorneys. In practice, the court should define the rules of cross-examination, in particular that a witness may not be questioned several times on the same circumstances. A good practice adopted in proceedings in such cases is coordination of the course of interrogation between defence lawyers (Gopalan, Kravetz, Menon, 2016: 1380. Such approach was also used in proceedings with participation of international judges in Kosovo, where in such cases the cross-examination of a witness started by one lawyer and, when it was finished it, the others only supplemented it by asking questions relevant from the perspective of defence of an own client. The judges, on their own initiative, overruled the recurring questions.

Conclusion

Participation of women judges in international courts dealing with the most outrageous atrocities committed against human beings allowed to include gender perspective in their assessment. Thanks to these judges sexual violence is no longer seen as just an ordinary crime against which was for long time ignored or perceived as of secondary importance in the context of war atrocities. The sexual violence has been placed in a wider context of the armed conflict or systemic and widespread attack against civilian population, and as such is treated as a constituting element of crimes classified under the international humanitarian law. Furthermore, women judges contributed to development of practices adopted in international courts aimed at protecting victims of sexual violence against traumatisation. These solutions can serve as a model also for national courts. Presence of women judges on the bench should be increased to address better challenges resulting from the sexual violence, not only to ensure impartiality of the process which requires also gender parity, but also to address better needs of victims of sexual violence.

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