

Ending impunity and prioritising survivors

Christine Chinkin reflects on international attempts to counter the perpetration of sexual violence in armed conflict



Christine Chinkin is Professorial Research Fellow at the LSE Centre for Women Peace and Security. She was elected a Fellow of the British Academy in 2009. This article has been written under the auspices of an AHRC-funded research project on a Feminist International Law on Peace and Security.

The imperative of combating conflict-affected sexual violence and ensuring accountability has come to the forefront of international relations in recent years, perhaps most prominently through the award of the 2018 Nobel Peace Prize to Nadia Murad and Dr Denis Mukwege, two leaders who have worked tirelessly and courageously to this end. The topic was the focus of a dinner at the British Academy in June 2019, hosted by the Amersi Foundation, where Nadia Murad was the guest of honour. This article discusses both international legal efforts to combat and prevent this atrocious crime and some of the specific issues raised at the dinner.

State obligations for preventing and combating gender-based violence have been a significant aspect of international human rights law since at least 1992, when the United Nations Committee on Elimination of All Forms of Discrimination (CEDAW Committee) explained it to be 'a form of discrimination that seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men'.

Such violence when committed by public authorities may breach the state's obligations under general international human rights law, and the state may also be responsible for private acts of gender-based violence if it fails to act with due diligence to prevent, investigate and punish such acts, and to provide remedies.

The following year, at the instigation of women activists, the World Conference on Human Rights in Vienna declared that 'violations of the human rights of women in situations of armed conflict are violations of the fundamental principles of international human rights and humanitarian law, requiring ... a particularly effective response.' This formulation challenged the traditional binary of international humanitarian law (IHL) as the legal regime applicable to address violations committed in international and non-international armed conflict, and international human rights law, applicable to what might be called 'everyday' gender-based and sexual violence, committed outside conflict – in so-called peacetime.

This assertion of state responsibility

for human rights violations coincided with evolving international criminal law, which posits individual criminal liability for offenders. Following the trials held after the Second World War, at Nuremburg, Tokyo and in many local jurisdictions across Europe and Asia, international criminal law largely lapsed, until the establishment by the UN Security Council of the International Criminal Tribunals for the former Yugoslavia and Rwanda in 1993 and 1994 respectively. These *ad hoc* criminal tribunals were followed by various models of hybrid criminal courts, with a mix of international and local personnel – for instance in Sierra Leone, Timor Leste and Cambodia – and by the permanent International Criminal Court, established by the 1998 Rome Statute and functioning since 2002.

Through legal provision and evolving jurisprudence, conflict-related sexual violence has been designated as a war crime,

a grave breach of international humanitarian law and a crime against humanity, when the other criteria for such crimes are satisfied. Gender-based and sexual violence can also be a tool of genocide when committed with the intent to destroy in whole or in part a group characterised on national, racial, ethnic or religious grounds. Thus, by the end of the 20th century, the longstanding silence about crimes of sexual violence committed disproportionately (but by no means exclusively) against women and girls had been broken, with international legal provision for both state responsibility and individual criminal liability. The silence had never of course been total; both law and practice had in fact long provided for accountability, but this had been rarely achieved.

However, legal provision has not ensured an end to such offences. In 2014 the world was shocked at the violent emergence of ISIS (or Daesh) and its vicious

sweeping through swathes of Syria and Northern Iraq. Over time, more became known about the atrocities ISIS forces committed, especially against members of the Yazidi community. Sexual and gender-based violence was manifest both through new and horrifying means, as well as in ways well-trodden through the annals of war. Women and girls, men and boys were murdered, kidnapped, abducted and raped; some were drafted into the ISIS fighting forces, where they were compelled to commit violent acts, thereby blurring the line between victim and perpetrator. When they were able to leave, either through escape or rescue, such children were brutalised, striking out violently at family members and brainwashed into the ISIS mode of life. Others – especially women who were targeted because of their gender and their minority status – were enslaved, held and traded as slaves, forced into ‘marriage’ and



Nadia Murad, winner of the 2018 Nobel Peace Prize, speaks at the British Academy in June 2019.

child-bearing. All who lived were forced to comply with the ISIS determination of Islam. Sexual and gender-based violence were used as instruments of war, of spreading terror, as an integral part of the destruction of Yazidi territories, families, social and physical infrastructure and way of life, indeed of genocide.

After the military defeat of ISIS, the crucial questions were how the Yazidi people – now traumatised, dispersed in refugee camps or living in exile throughout Europe and elsewhere across the world – could return to their devastated homelands, regain their faith and way of life; and how accountability for the crimes committed against them could be ensured and adequate reparation delivered. In the search for ways to respond to this daunting challenge, both strengths and weaknesses could be identified.

The greatest strength came from within the Yazidi community itself, exemplified in the inspirational person of Nobel Peace Prize laureate, Nadia Murad. Nadia told the world, including through the UN Security Council, what had been done to herself and to her people, and that she was not prepared for it to be forgotten.

Weaknesses came from the international legal structures and institutions. Despite the development of law as briefly outlined above, the international legal system still lacked the mechanisms to ensure accountability. Nor were states prepared to take all the necessary measures for ensuring justice – in the fullest sense of the word – or to accept their share of responsibility for the catastrophe that had befallen the Yazidis.

At the dinner, guests heard from Nadia Murad about her priorities in the aftermath of the genocide and her initiatives for moving forward. She stated that her first concern was repairing the physical infrastructure of her peoples' country, and thus preventing the accomplishment of ISIS's objectives. To this end, money from the Nobel Prize had been allocated to build a hospital in Sinjar for all communities – Yazidi, Muslim, Christian and others. Another objective was to build a university where there had been none before; while men had been able to leave Sinjar to pursue higher education in Baghdad, this had not been so easy for women. Other projects had focused on restoring farming land, or other local enterprises.

What is remarkable about this listing of priorities is that it echoes what women, when asked, have always said are required

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for post-conflict reconstruction and community recovery: health services, livelihood support and education. The first must encompass both emergency treatment and long-term psycho-social restorative healthcare for addressing trauma as well as physical injury. Secure livelihoods are needed to re-establish self-sufficiency and autonomy. And education is needed to look to the future and prevent a new generation from being permanently disadvantaged by the destruction of their childhood and to open opportunities. Women especially speak of these as the central substantive elements of any peace package. This was also institutionally recognised as long ago as 1919, when the International Labour Organisation's Constitution (incorporated into the Versailles Treaty) spelled out that social justice was essential for the achievement of universal and permanent – what we would probably now call sustainable – peace.

They are also included within the relief and recovery pillar of the UN Security Council's agenda for women peace and security, which it has progressed through nine further resolutions since its adoption of its ground-breaking resolution 1325 in 2000. Resolution 2467, adopted in April 2019, explicitly encourages a 'survivor-centred approach' which must 'respect and prioritise the needs of survivors' without any discrimination. This also entails ensuring that responses are gender-sensitive and appropriate, recog-

nising that 'one size does not fit all', and that women must be able to participate fully in all post-conflict decision-making to make their needs known, including those relating to apposite reparation.

Healthcare, education and livelihood support are not, however, matters just for humanitarian agencies. They are also core economic and social rights that are set out in international treaties, including the 1966 UN Covenant on Economic, Social and Cultural Rights (ICESCR), and the 1979 Convention on Elimination of All Forms of Discrimination against Women. States parties are obliged to take appropriate measures to ensure access to and delivery of these rights on a non-discriminatory basis, to women as well as to men. Nor do inadequate resources justify failing to ensure such rights; under article 2 of the ICESCR state parties undertake to take such steps individually 'and through international assistance and cooperation'.

Nadia Murad also emphasised the related needs for security and legal accountability. The situation of the Yazidi has starkly exposed the continuing deficiencies and gaps in the international criminal legal system. The ICC can only assert jurisdiction where either the territorial state (the place where the crimes were committed) or the state of nationality of the offender are a party to the Rome Statute, or where the Security Council has referred the situation to the prosecutor. Neither Syria nor Iraq have become parties to

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the Rome Statute, and the potential use of the veto has prevented the Security Council from acting. There have been some innovations at both the international and national levels. At the international level, the UN General Assembly acted where the Security Council could not. In resolution 71/248 (2016), it decided to establish an International, Impartial and Independent Mechanism (IIIM) 'to assist in the investigation and prosecution of persons responsible for the most serious crimes under international law committed in the Syrian Arab Republic since March 2011'. This body is mandated to 'collect, consolidate, preserve and analyse evidence of violations' of both IHL and human rights law, 'in order to facilitate and expedite fair and independent criminal proceedings' if and when they might occur.

The inadequacies of the existing international criminal institutions mean that accountability under international criminal law should be sought at the national level. Security Council resolution 2467 emphasises access to justice as an important part of the women peace and security agenda. It calls upon states to 'strengthen legislation and enhance investigation and prosecution' of conflict-affected sexual violence, and urges them especially to 'strengthen access to justice for victims of sexual violence in conflict and post-conflict situations.' As well as reforms to criminal law and procedures, this requires courts to be receptive to strategic lawyering. The dinner was given one such example. Yasmin Waljee from the interna-

tional law firm Hogan Lovells told about civil litigation commenced in Australia through which compensation is being sought for the international crimes committed overseas by an Australian national, Khaled Sharrouf, who had fought with ISIS. In an article¹ Yasmin has explained that, through the New South Wales Victims Compensation Scheme, Yazidi survivors want Sharrouf's assets to be sold to provide for compensation and in this way for Australia to show leadership by giving weight to the public statements it has made about ensuring accountability.

Listening to Nadia Murad was both sobering and inspirational. A number of points became especially apparent to me. First, is the need for the international community to listen and respond to the priorities of those who had experienced sexual and other forms of violence first hand, and to learn from them about traditional forms of healing and cleansing practised within their communities, as well as seeking other forms of redress.

Second, taking a survivor-centred approach requires holistic thinking and recognising that delivery of economic and social rights are integral to access to justice, as well as for healing and human security.

Third, there is a need to seek both individual criminal liability and state responsibility. They are complementary methods for seeking accountability and ending impunity and neither excludes the other. Modes of investigation and evidence collection and collation in accord-

ance with international standards are important, but unless appropriate courts with jurisdiction are found – or are established on some model of an *ad hoc* international or hybrid court – criminal trials will not take place. In any event, there are unlikely ever to be trials of the vast number of perpetrators. What some see as another option – summary execution of alleged offenders – undermines the rule of law central to the human rights canon that states have committed themselves to uphold.

Fourth, there is the importance of appropriate redress for victims, separate from the prosecution of offenders. Various schemes are currently being explored for generating funds, but the basis for allocation of any such funds also needs further consideration. Article 75 of the Rome Statute allowing the ICC to make an order against a convicted offender for reparative relief was innovative, but the lack of any conviction to date by that Court for crimes of sexual violence, has meant that no reparations have been secured for victims who have testified before it. Nor should reparations be dependent upon co-operation with law enforcement or security agencies. Assets frozen around the world under anti-terrorist provisions could be used to fund rehabilitative initiatives. Security Council resolution 2467 on its face reinforces the right to a remedy under international law for an international wrongful act, including a violation of human rights, but without acceptance of this obligation and implementation there is the risk that survivors will remain without redress.

And finally, there is the importance of women's effective inclusion in all levels of decision and policy-making, including with respect to societal reconstruction and reparation. This was urged in Security Council resolution 1325, but remains still too rarely upheld.

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1 Melissa Coad, 'Strategic Justice', *Law Society Journal*, 56, (June 2019), 34.