

EVAP Ep. 15: Patricia Sellers

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SPEAKERS

Jaclyn Streitfeld-Hall, Patricia Sellers

J Jaclyn Streitfeld-Hall 00:12

Welcome to Expert Voices on Atrocity Prevention by the Global Centre for the Responsibility to Protect. I'm Jaclyn Streitfeld-Hall, Research Director at the Global Centre. This podcast features one-on-one conversations with practitioners from the fields of human rights, conflict prevention and atrocity prevention. These conversations will give us a glimpse of the personal and professional side of how practitioners approach human rights protection and atrocity prevention, allowing us to explore challenges, identify best practices, and share lessons learned on how we can protect populations more effectively. Today, I'm speaking with Patricia Sellers, an international criminal lawyer involved in criminal law at the International Criminal Tribunals for Rwanda, and the Former Yugoslavia. She is currently the Special Advisor for Slavery Crimes at the International Criminal Court, and was previously the Special Advisor for Gender. She teaches at Oxford University in the master's program on international human rights. Thank you for joining us today. Patricia.

P Patricia Sellers 01:14

Thank you for having me.

J Jaclyn Streitfeld-Hall 01:16

I think we'll just dive right in with focusing on your background in international law and gender and ask how does international law address gender and particularly the unique ways that gender may make one more vulnerable to certain violations or even mass atrocity crimes?

P Patricia Sellers 01:37

Well, that's a very good question. Because I think about 30 or 40 years ago, that would have also been a question that no one would have even posed, more or less tried to understand the

answer - what is the intersection of gender and international law? Well, I'm going to try and narrow it down even more than international law to, say, a subspecialty of international criminal law. We know that gender now is a word that possibly substitutes, although has multiple larger meanings, than just the word "sex". And if we went back into international human rights law, such as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, we see that word sex - that one cannot be discriminating on the basis of sex. And we can even see that, and what I would call now early humanitarian law, just meaning the Geneva Conventions of 1949. But today, when we look at international criminal law and we talk about gender, we're really talking about a much broader understanding, broader than just sex, physical characteristics. We're talking about gender in terms of roles people play in society. Male and female, under the definition of the Rome Statute. But we're also talking about sexual orientation, we're talking about gender presentation. So the intersection of international criminal law and gender is vast. It looks at areas that include sexual violence, areas that include gender persecution, areas that show how does gender drive the occurrence of crime, international crimes, and what is the impact that international crimes have on gender even after they're committed.

J Jaclyn Streitfeld-Hall 03:27

Thank you for that. That was such a, you know, a refreshing way to open because I think in atrocity prevention, a lot of times when we talk about gender and addressing gender, there is that kind of immediate impulse to look at sexual violence. And often in, sort of, policy circles when you talk about gender. If it's not about sexual violence, then it's women peace and security. And there isn't that more nuanced look at the intersection that you've just mentioned here. So I think to go back a little in time, you know, at the top, I mentioned that you worked for the International Criminal Tribunal for Rwanda and Yugoslavia. And I'm wondering if you could talk a little about what it was like being part of those historic legal decisions regarding the interpretation of sexual violence as war crimes, crimes against humanity and genocide.

P Patricia Sellers 04:23

Well, I think the Yugoslav Tribunal and Rwanda Tribunal were remarkable moments, not only in legal history, but I would go as far as to say, as in human history, it's one time when we thought that law could be the response to outrageous harms, that included sexual violence. Let me make a small caveat. In no way did the Yugoslav Tribunal act as the first international tribunal, to ever try and redress sexual violence. One has to look at the Nuremberg Tribunal, and I would underscore the Tokyo Tribunal. The Nuremberg Tribunal is often assailed because there is not the mention once within the judgement of the word rape or other forms of sexual violence. But if you took the time to read the transcripts of the Nuremberg Tribunal, you would see that sexual violence, including sexual violence against male prisoners, sexual violence against female in occupied zones such as France, was part of the evidence that was presented in addition to the sexual violence that happened on the Russian front. So when you read a Nuremberg judgment, even though the word rape doesn't appear, sexual violence was adjudicated in the tribunal, under specific provisions that at that time dealt with sexual violence, such as Article 46 of the 1907 Hague Convention. And I just want to slightly turn our attention to the Tokyo Tribunal, which I think is fearfully overlooked. And one could read Chapter Eight of this very voluminous judgment that comes out of the Tokyo Tribunal, and before finishing the first page, they're talking about mass rapes. And all throughout Chapter

Eight there's sexual violence, and what we would call today gender based violence against peoples in Asia and Asia-Pacific, that entailed males, females, children, and even the elderly. So while I would love to raise the flag and say, yes, it all started at the International Criminal Tribunal for Yugoslavia and Rwanda, and it was about us who were there at the beginning in 1994, that would not be true. So we were very fortunate that at the Yugoslavia Tribunal and Rwanda Tribunal that we didn't really, I think, a deep dive into legal history, but into the facts that were presented before us, what facts came out of the armed conflict in the former Yugoslavia, where there were facts that were rampant with sexual violence, such as rape, sexualized torture, enslavement, that was sexualized enslavement in the town of Foca. And then when you look at the genocide that occurred against the Tutsis in Rwanda, the Tribunal finally takes judicial notice, and explains that, you know, unfortunately, every genocide has its main characteristics. But the characteristics of the genocide that occurred against the Tutsis in Rwanda, was basically comprised of killing and of raping. And so the jurisprudence from Rwanda Tribunal certainly illustrates a manifest and finally adjudicates that type of genocide - a genocide comprised of killings, and of sexual violence, particularly rape. And so those days were days when you understood that you were looking at unique evidence under extremely unique situations, but in a very unique institution that had been created specifically to judge international crimes, war crimes, crimes against humanity and genocide. I do have to say that everyone had the sense that you were making history on any given Tuesday, Wednesday or Thursday of the week.

J Jaclyn Streitfeld-Hall 08:28

Indeed, I mean, everything that came out of those trials had a sense of historic elements. And we've spoken before with Ambassador Rapp, who similarly worked on, you know, cases that had a historic element, even though it wasn't the gendered side of things.

P Patricia Sellers 08:49

Oh well, I would differ, I always say that Ambassador Rapp worked on one of the most important gender cases, which is referred to as the Media Case. And that's the case where we look at the radio station of Milles Collines that was in Rwanda, and the newspaper Kangura, where for just absolute months with this type of propaganda that was instigating the eventual genocide. As matter of fact, the charge was public indirect incitement to commit genocide. And what I would like to underscore is that a significant part of that incitement was incitement to do sexual violence. So the Media Case is a case about sexual violence. It's about the type of language that foments sexual violence that becomes part of the act, the constituent act of genocide.

J Jaclyn Streitfeld-Hall 09:39

You know, you've framed this as historical but also following from, you know, prior history with Nuremberg and the Tokyo Trials. So where do you think we've come since the two tribunals for the genocides in the 1990s?

P Patricia Sellers 09:58

Well, I think we have really spread out into legal territory and I would say human territory, that was very underestimated with the commencement of these tribunals. And I often like to say, to use a bit of a militaristic phrase is, the first couple of trials that dealt with, for example, sexual violence, rape as a constituent act of genocide, but even more so that within the Akayesu case, in the Furundzija case that we have rape, sexual violence, being charged as torture for the first time, and the Celebici case, which looks at male sexual violence and female sexual violence in detention. This type of sexual violence that in many ways revolves around rape and genitalia, this is how we in quotes "landed on the beach", almost in Dunkirk, with very undeniable war crimes and crimes against humanity, genocide, that really took in sexual violence. It was difficult for anyone to listen to such testimony, and understand whether it's nexus to an armed conflict as a war crime, or that it was an integral part of the attack against the civilian population as crimes against humanity, or a means to destroy a group as genocide. I think that gave us this opening that now we more could more concertedly look and see how sexual violence permeated these atrocity crimes, and by doing that, we can then start contextualizing and looking at gender and opening up really international criminal law. It means that it had not been registered in the most recent past. There seem to have been a 50 year gap almost between the Nuremberg and Tokyo Tribunals until we get to Yugoslavia - and a lot of amnesia has happened, legal amnesia, between those two time periods. So much to the extent that one was even questioning was rape a war crime? I think we tried to get rid of that dubious question and provided a strong answer. And from there, we went forward to look at various situations where sexual violence and gender became a contextual norm in terms of our investigation and legal submissions.

J

Jaclyn Streitfeld-Hall 12:30

And what did you do to help frame this in your role as Gender Advisor at the ICC?

P

Patricia Sellers 12:38

Well, building upon my role as a prosecutor and legal adviser for gender at the Yugoslav Tribunal and the Rwanda Tribunal, one of the things that we became quite apparent is that, legally, we would not be limited to just the charge of rape whenever we wanted to talk about sexual violence. So therefore, in those tribunals, we showed that sexual violence could be legally characterized as torture, it could be really characterized under enslavement, they could be characterized under cruel treatment as a war crime under other inhumane acts. And in addition, the understanding that was brought forward by in particular the Deputy Prosecutor, Michelle Jarvis, that when you contextualize the sexual violence under various legal provisions or crimes, it really revealed the nature of the atrocity, as opposed to being something that was on the sideline. It allows you to understand the very broader nature of the atrocity. So by the time we come to the International Criminal Court, I think that there is an understanding, first of all, that to investigate sexual violence, and then to make legal submission, that wasn't a luxury, that wasn't an act that took away from other investigations. It was more so the necessary gender competent, I would say, responsibility of investigators and prosecutors so that these acts could be adjudicated. At the International Criminal Court, you can understand that the Rome Statute, the very Statute itself, reflects that understanding that sexual violence isn't limited to the crime of rape. And so under the Rome Statute, we see this actually much more

detailed characterization of different crimes that might have a sexual nature, such as forced sterilization or forced pregnancy. We see also the crime of sexual violence. So there are more legal tools to bring into the International Criminal Court in terms of subsequent crimes.

J

Jaclyn Streitfeld-Hall 14:56

From your perspective after, you know, spending years reviewing evidence of gendered crimes and, you know, being a prosecutor, are there trends and signals that we should be paying attention to, before atrocities even take place, that would indicate that gendered crimes will occur or targeting is happening, let's say in a country that would indicate atrocities may be oncoming? Are there lessons learned or lessons to be learned for early documentation or for investigators about the risks of these crimes?

P

Patricia Sellers 15:33

Oh, I would certainly say yes. There are what I call and refer to as types of precursors. I've already mentioned one, and that was with the Media Case, that we should be attentive to propaganda that is inciting violence, and in particularly propaganda that is inciting sexual violence, that could become part of genocide. That's a precursor that could have been stopped in and of itself prior to anyone being harmed in the genocide. We can look at precursors today, when it's important to understand the violence that's happening prior to an armed conflict or prior to crimes against humanity, and also genocide, and what part of that violence is actually gender based violence? Who is being persecuted and harmed, let's say under the rubric of human rights? Prior to getting into the bellicose situation, or the crimes against humanity situation. We can certainly understand by, as I often say, the gender ideology of the perpetrator, that acts of sexual violence became a norm, often during wartime, because the perpetrator comes from a society wherein he could understand, or she could understand the value of inflicting sexual violence against someone who you would claim to be an enemy, or someone who was other than you. So I think if we look at it very carefully, yes, we see that even during situations of armed conflict or crimes against humanity. We know very well that when children are abducted from schools or kidnapped, that sexual violence will follow. And I call those abductions and kidnappings, for many of those children, those are acts of slave trading prior to them being reduced to enslavement and enslavement that's sexualized. We know that when you have situations of detention camps - and once males and females are separated, both of those populations become very vulnerable, and it can often lead to the sexual violence committed against detained men and sexual violence committed against detained females, whether they be girls or women. So we certainly know the precursors. As a matter of fact, we can look at our current societies and we can look historically, of what were the signs that allowed us to know that some type of gender based violence was going to occur. Societies that detest sexual minorities or persons who have sexual orientation that isn't heterosexual cisgender. That type of vile against a sexual orientation could be a precursor as to what would happen in time periods of persecution, crimes against humanity, or armed conflict.

J

Jaclyn Streitfeld-Hall 18:42

I'm glad you've raised that, because what I've noticed, and what we've noticed through our work at the Centre, is that there does seem to be this divergent trend that relates to everything you've talked about so far, where we're advancing accountability for gendered crimes, where

that sort of area of international law is evolving. And then at the same time, within countries, there's sort of transgression of national protection of rights related to women and LGBTQ populations. You know, we're speaking at a time where there's been a rollback on women and girls rights in Afghanistan. They're increasing persecution of LGBTQ populations in other countries. How do you sort of reconcile these different realities in the world and navigate these trends as a legal practitioner?

P Patricia Sellers 19:34

Well I think that it's absolutely excellent to have provisions of law that one can resort to, in particular for egregious situations. And at times that law itself acts as a deterrence, acts as a means to prevent, acts as a means to signal. But it doesn't necessarily for certain perpetrators and for certain, I would even say, national authorities or even non-state actors that are intent on rolling back or inflicting harms. That law doesn't necessarily prevent, what we'll see is that they will say that the law is disdainful, that the law does not apply to them, that certain provisions of the law are biased for some countries in the world as opposed to how their traditional societies. But it's very noticeable that once a country starts taking away, in particular, rights of females, girls and boys, and ignoring certain rights, that traditionally one would say, men would have, such as detaining political opponents and then gender based and sexual violence against those men occur, we can see that the law is often ignored because it does not serve the perpetrators purpose. When one looks at jurisprudence from World War II, it's very interesting that the defense of both the Axis powers in Germany and the Axis powers in Japan, is that those conventions, the early Hague Conventions and Geneva Conventions are customary law. They said that that didn't apply to them. So it's not necessarily for an absence of having the law. It's in the perpetrators interest to say, "oh, that law doesn't pertain to me". At the same time, we do see a push back before the law is even written. It's quite curious that in Europe, we have many countries who have not signed the Istanbul Convention for Violence Against Women, that the United States is not a member of CEDAW. We can understand that there are countries that might claim to be signatories to CEDAW and then make reservations against some of its most important provisions. But with that being said, recently, I've written on the fact that gender discrimination, or discrimination based on gender grounds, is still not considered a jus cogens value under international law. So I can tell the power of the provisions of the law that exist, but I can also recognize that they can be ignored by perpetrators. And that there are some, I think, very essential laws, that even countries who are in the forefront of guaranteeing some human rights, have not exceeded to human rights conventions themselves.

J Jaclyn Streitfeld-Hall 22:49

There is often that unfortunate mismatch between words and deeds, with many countries who we believe either are, or should be at the forefront of these very important issues. I want to turn quickly now to your new role and ask, you know, what does it mean to be a Special Advisor for Slavery Crimes at the ICC? And why does that role exist now?

P Patricia Sellers 23:16

Well, I think role exists now because Prosecutor Khan agreed when I asked, "could I fulfill that role?" I've been Special Advisor for Gender, and then he had proposed to be Special Advisor At Large. But ever since, in particularly doing the Kunarac case, which is commonly called the

larger. But ever since, in particular during the Kunarac case, which is commonly called the "Foca" case, from the Yugoslav Tribunal, the issue of enslavement under crimes against humanity very much intrigued me. Certainly it would, because I'm a descendant of slaves myself, being African American. But even more so to look at enslavement under international humanitarian law and international criminal law was something that I thought had not been done anywhere near to the extent that it need be. And I felt that this was an issue, but also, this was a way that we could raise legal provisions, but also legal submissions, and offer more protection. And let me give you an example of that. I say there's a hidden potential in many other slavery crimes. We often don't recognize that child soldiers, be they boys or girls, are basically enslaved children. We can see them from the aspect of other child soldiers, but we also should see it from the aspect, as I said before, that their abduction and kidnapping is a form of slave trading. Slave trading that's reducing a free person into a state of slavery. So abductions and kidnappings are the slave trading of children who are reduced to slavery as child soldiers. Another reason I wanted to highlight the slavery crimes is that there has been much set in the past, I would say 20 years about sexual slavery. And I think the case I worked on, Kunarac, the "Foca" case, because we looked at Yugoslav females, meaning girls and women who had been held, sexually violated and eventually were traded or exchanged. We understood that enslavement under the Yugoslav Statute could also encompass enslavement that was sexualized. Meaning that the exercise of powers of ownership was exercising powers of ownership over sexual access to you and sexual usage. In the Rome Statute, when we see that the provision of sexual slavery is there, we think in many ways that it's quite a good feminist victory. When one looks closer, we understand that sexual slavery in some ways, it's been much more used for holding females out to be raped, such as in the "Foca" case. But that sexual slavery provision is not broad enough to pick up the breadth of sexualized enslavement. I'll give you an example. When we look at the girls who have been kidnapped and abducted i.e. slave traded, become girl child soldiers, they might not be raped right away. As a matter of fact, often, they wait until they start to menstruate before they can be "distributed", in quotes, which was a term that I really detest. So these enslaved children, even though they are not sexually being abused via raped, those girls have their menstruation checked every month. They are sexually enslaved. Those boys are told who and whom, and when they can sexually assault girls. Those boys are sexually enslaved also. And I think that it's time that we really understand the breadth of sexualized enslavement, but just the breadth of the slavery crimes, including slave trading. Another example I will give is that at the Extraordinary Criminal Chambers of Cambodia, we know that there has been, what has been called conjugal slavery, where males and females are forced to have a conjugal situation. And we understand that the rationale for this conjugal situation from the perpetrators point of view, is actually to breed children, to breed children to be part of a new Khmer state. There, we see that males and females have to interact sexually with each other, because why? Because they are enslaved persons. And then the last aspect I would like to bring out of that with the slavery crimes, is that we often now have fallen into this phrase of talking about children born of rape. But we should understand that when those children are born, usually from enslaved mothers, or they could be from enslaved males and females, mothers and fathers such as in Cambodia, those children per se, at birth, are enslaved children. And so I'm hoping, as Special Advisor for Slavery, that we can bring forward a bit more of the safeguards that should govern our very being in situations of enslavement and slave trade, that right now are fairly reductive that are basically used for sexual slavery of females who are held out for rape.

J

Jaclyn Streitfeld-Hall 28:49

Thank you for that. I think this is, you know, in many ways, a perfect complement to the role you had before. it's sort of. it's different. but also builds on in a very important and powerful

way.

P

Patricia Sellers 29:04

Thank you. Yes, I think it's a continuation, an extension, an evolution. And as I said before, that I think it's also a means of looking back. Today, too often we want to run to modern slavery. I really had to ask myself, well, "what is so modern about it other than its contemporaneously occurring now?" But when one looks at the historic slave trade boats of East Africa, the transatlantic slave trade, and even the intra-African slave trade. And when one looks at the breadth of activity that slavery encompassed, I think, by not having that historical point of view, that today we're letting many acts of slavery and slave trade really pass under the radar, because we keep wanting to see it as this modern slavery. And another issue of raids is that modern slavery kind of leads us to that word of trafficking. And trafficking is a transnational crime. It's like organized crime. It's a veritable plague on humanity. But it's a crime whose jurisdiction is not jurisdiction of international crime. The international crime, slightly equivalent to trafficking, it's really slave trading. And so we should restore slave trading, because it is the precursor to slavery. And we should understand that trafficking, which really evolves out of the white slave trade, is a different crime with its own jurisdiction and its own policy reasons for being. So I think, we should use both of our legal tools, both trafficking, but in particular, we should revive, I think, the slave trade so that we can really understand what's happening in these situations of armed conflict and crimes against humanity.

J

Jaclyn Streitfeld-Hall 31:00

You've had such a formidable career and experience with the intersection between international criminal law, gender and human rights. What advice or closing thoughts do you have for members of our audience working on these issues?

P

Patricia Sellers 31:15

Well, I think what I would like to kind of underline is that all of us, per se, as human beings - there's not one of us that escapes having a sexual nature or gender identity, a sexual orientation, even if we're asexual. That's, that's just part of being human. That's just what human beings come with, and what also human beings have a right to safeguard and preserve. So when I look at international human rights law and international criminal law, I look at those legal regimes as means to really safeguard and protect what we humans come with naturally. And so to be an advocate for gender justice, to be an advocate to make sure that we pick up all forms of sexual violence, irrespective of if it's the boy or the elderly lady or the disabled patient, is just a way of reaffirming our humanity. It is in no way condescending or patronizing. To one would say, "oh, this is just for, you know, feminist do-gooder act", or "this is just something that, you know, makes us feel good". No, this is really protecting our humanity that we all have to be invested.

J

Jaclyn Streitfeld-Hall 32:47

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