

# Pernicious Patriarchy or Prosecutorial Progress?: Confronting Culture, War, and Rape in International Law

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Résumé de l'article

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## **Pernicious Patriarchy or Prosecutorial Progress?: Confronting Culture, War, and Rape in International Law**

by

*Sara L. Zeigler and Gregory G. Gunderson*

### **ABSTRACT**

*In the aftermath of the wars in the former Yugoslavia, feminist activists have encouraged the use of international law to prosecute those leaders employing rape as a tool for ethnic cleansing. First, we will analyze the reasons that rape is effective in disrupting social and familiar structures in particular contexts. In the absence of patriarchy, we suggest, rape loses its distinctiveness as a weapon against women. Second, we will elucidate the peculiar problems of prosecuting war criminals whose offenses targeted female non-combatants in the form of sexual violence. We begin with an examination of the international law related to war crimes, as well as the ethical implications of various techniques used to enforce the law and bring war criminals to justice. A brief examination of key areas of US rape law will demonstrate the relative leniency extended to perpetrators of violence against women domestically in a nation that guarantees women full juridical equality. After examining some specific prosecutions, we will apply the lessons learned to the larger context of international law.*

### **INTRODUCTION**

When stories regarding the atrocities committed at rape camps in the former Yugoslavia began to surface in the nineties, they were met with universal horror and condemnation. The US Department of State responded to the Balkan horrors in early 1992 by characterizing the rapes as a “war crime,” worthy of prosecution under international law and the Geneva Conventions.<sup>1</sup> Both non-governmental organizations and state actors deemed sexual victimization of women, whether as a privilege of conquest or as an instrument of terror, as unacceptable. Yet, while condemning the actions of the military men in the former Yugoslavia,

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the international community ignored both the long history of rape in the context of war, as well as the sexual abuse of women that routinely occurs in most societies independent of armed conflict. In doing so, these governments and international organizations tacitly condone rape.

Nonetheless, the willingness to decry practices at the rape camps marks a progressive step in how the international community responds to such widespread violation of women's bodies and psyches. Furthermore, the international disapprobation gives rise to a need for an in-depth analysis of the relationship between the legal treatment of rape in peacetime and the prosecution of sexual violence that occurs in the context of war. Specifically, there is a compelling need to determine if the international condemnation of mass rapes in the former Yugoslavia represents a shift in the dominant paradigm that normalizes and minimizes men's use of sexuality to reinforce their dominance over women. Alternatively, some other element or characteristic peculiar to the Yugoslavia war crimes might explain the attention given to the violation of women's human rights in this context. Unfortunately, the apparent progress represented by criminal convictions of those organizing mass rapes is illusory. The prosecution of the mass rapes does not reflect an intolerance of rape as an offense against women, but rather it signifies intolerance of rape used particularly as a tool for ethnic cleansing, or rape perpetrated systematically to humiliate a male enemy. While the creation of a tribunal and incorporation of rape into existing definitions of genocide and torture are seemingly feminist actions, in truth they do not represent a reconceptualization of men's sexual rights over women.

The sexual appropriation of women's bodies, both in wartime and in peacetime, reflects a universal sense of patriarchal entitlement to the use and abuse of women's bodies. This attitude extends to the implicit exclusion of violence perpetrated against women as women from the definitions of human rights violations. Underlying the absence of stronger, legally defined, international condemnation and action is a fundamental lack of concern for women as humans, as women, who are physically, psychologically, spiritually, and otherwise injured by the violence of rape. Compare, for example, the language contained in international conventions on the elimination of racism and sexism. The preamble to the International Convention on the Elimination of All Forms of Racial Discrimination begins, "convinced that any doctrine of superiority based on racial differentiation is scientifically false, morally condemnable, socially unjust and dangerous and that there is no justification for racial discrimination, in theory or in practice . . ."<sup>22</sup> This rhetoric condemns racism on four powerful, distinctly unique grounds. In contrast, the Convention on the Elimination of All Forms of Discrimination Against Women reads, "recalling that discrimination against women violates the principles of equality of rights and respect for human dignity . . . hampers the growth of the prosperity of society and the family and makes more difficult the full development of the potentialities of women in the service of their countries and of humanity . . ."<sup>23</sup> This view focuses upon harms to the

community, in general, and invokes women principally in their social role as nurturers.

In short, the UN, speaking for the international community, declared that racism should be eliminated because it is immoral. Sexism, however, merely hampers “equality” and “dignity,” and should be eliminated to encourage women’s contribution to society. The denial of rights to women as women, while irrational and unfortunate, is not “morally condemnable.” It should come as no surprise, then, that punishing violations of women’s rights is a relatively low priority. This is not a novel claim given the vast literature on the acceptance of rape in Western culture.<sup>4</sup>

Beginning with the Bosnian conflict, the international community began to condemn rape in the context of war, distinguishing it from the normal, everyday rapes that occur in times of peace. As reports of rape camps and first-hand accounts of those experiences emerged, rape, when perpetrated in an organized fashion and sanctioned by military commanders, ceased to be an unfortunate concomitant of war and became a war crime worthy of condemnation and prosecution. To that end, the International Criminal Tribunal for the Former Yugoslavia (ICTY) was charged with the task of prosecuting those responsible for mass rapes, using the conventional legal techniques applied generally.

However, conventional legal practices ignore the connection between domestic legal structures that effectively fail to distinguish between rape and sex, thus replicating the challenges that accompany the prosecution of rape using Anglo-American legal practices. The ready acceptance of rape as a “normal” part of life in most nations necessarily affects the ability of international tribunals to redress the crimes committed by rapists in the context of war. The policies the United States uses to define a crime worthy of punishment by the criminal law express the fundamental values that are brought to bear in its advocacy for redress of war crimes abroad. A discussion of the legal treatment of sexual violence against women in the United States will elucidate this connection and the implications thereof.

## **NORMALIZED RAPE IN PEACETIME**

Certainly, the United States is not the only nation participating in the development of international law, nor is it the most liberal in its domestic treatment of women. Other nations provide broader protection to women and allow for much greater reproductive autonomy. However, as the world’s only remaining superpower, the United States exerts extraordinary influence upon the formation and enforcement of international law and practices. It pays lip service to human rights, yet uses violations of human rights as a justification for military interventions. Another reason to focus on the limitations of the law within the United States relates to the role of individualist norms in shaping the law and

masking its gendered nature. Criminal trials, as conceived in Anglo-American law and in war crimes tribunals, are adversarial situations involving an accused individual and the society or community against which s/he has transgressed. The victim, while brought to testify, is neither a party to the case nor an individual whose rights must be protected. Once the trial begins, the rights of the accused become paramount.

A key norm in Anglo-American jurisprudence, the presumption of innocence, embodies the privileging of the accused and his or her version of events. The presumption requires the court to favor the account of the accused, while regarding that of the victim with skepticism. The prosecution does not represent the victim, but represents the society as a whole. As such, a system is created in which individual rights dominate, but the victim's role is to be a living, breathing piece of evidence. She is not an individual and thus lacks rights. The focus on the individual provides protection to the accused, but also requires the court to scrutinize a particular set of facts involving a defendant and the evidence against him. This approach focuses on the particular rather than the general. Thus, larger patterns of dominance and submission are sublimated and, because they are not made manifest, they are ignored. The indifference of the authorities can exacerbate the victim's suffering, by further marginalizing her and minimizing the significance of her experience and trauma.<sup>5</sup> Because the law fails to recognize the perspective of the subordinate (indeed, the law characterizes the accused as the weaker party, facing the might of the state), it instead applies the perspective of the dominant. Therefore, individualism and patriarchy intertwine in a manner that becomes apparent only when the crime cannot be distinguished from the normal pattern of domination and subordination. Such is the situation with rape law.

When the evidentiary practices and institutional norms of Anglo-American jurisprudences are transferred to the international sphere in the enabling statutes for war crimes tribunals, those same biases and difficulties transfer as well. They are embedded in the law itself. For this reason, a full understanding of the challenges inherent in prosecuting rape in war requires an elucidation of the problems of prosecuting rape in peace. The United States is a useful comparator, not only as a result of the substantial feminist literature examining its rape law, but also because its powerful constitutional commitment to individual rights illustrates the ways in which a focus on the individual disguises the operation of patriarchy.

Violence against women is so difficult to redress because it occurs routinely and is thus normalized. It is important to recognize that mass rapes occur outside of the context of war and not infrequently. Scandals regarding the behavior of fraternities and athletic teams abound. The relationship between organizations promoting hypermasculinity (teams, fraternities, the military) and the acceptance of sexually coercive behavior is well established.<sup>6</sup> As anthropologist Peggy Reeves Sanday explains, the gang rape that occurs when fraternity men decide to "run a train" on an inebriated party-goer reflects a need to display power and dominance – the same need that predisposes men to rape in the context of war.<sup>7</sup>

Through a phallocentric ritual of dominance, a group of men asserts its superiority over women and the men to whom those women “belong.” Yet, the domestic variation of gang rape is seldom prosecuted, dismissed as the thoughtless acts of drunken men presented with an opportunity for sex with a foolish, and possibly unconscious, young woman.<sup>8</sup> If these rapes are dismissed as lapses in judgment, the message is that rape during wartime is taken seriously only when perpetrated by the men on the losing side of a conflict *and* when perpetrated with a genocidal purpose. To seek redress, women must appeal to yet another group of men, given the overwhelmingly male composition of the ICTY tribunals. Unfortunately, the new recognition of rape as an act of institutionalized violence does not reflect a fundamental change in the status of women. It simply indicates that this particular group of men, combatants in the former Yugoslavia, went beyond the limits of “normal” rape.

Rape is a uniquely complex crime in that its very criminality is determined not by the act itself, but by the perpetrator’s asserted perception of the victim’s intentions. That is, instead of determining whether or not the defendant committed an act, courts must determine whether the defendant believed that the victim agreed to participate in a sexual act. Under the common law, courts would assess the victim’s willingness not by her testimony but by how effectively she conveyed her unwillingness to the accused.<sup>9</sup> The court might inquire as to whether she resisted fiercely enough to leave marks on the accused, whether she reported the crime promptly, and whether she had a history of promiscuity. As Catharine MacKinnon notes, “rape is a sex crime that is not regarded as a crime when it looks like sex . . . The level of acceptable force is adjudicated starting just above the level set by what is seen as normal male sexual behavior . . . rather than at the victim’s, or women’s point of violation.”<sup>10</sup> The defense, then, is consent, and all of the resources of a defendant in a rape case focus upon proving that the victim is being dishonest or disingenuous – that she did, indeed, consent. In short, the defense must destroy the credibility of the victim to win the case.

A wave of reform efforts in the eighties, precipitated by feminist criticisms of existing law, appeared to offer new protections to victims. The changes recognized the shortcomings of common law approaches to rape and enacted statutes altering the legal standards. Many states’ statutes softened the common law standard of “utmost resistance.” For example, the Delaware statute requires “reasonable resistance under the circumstances to communicate nonconsent,” Idaho allows for resistance “overcome by force or violence,” and Louisiana law provides that forcible rape requires “force or threats of physical violence that make resistance useless.”<sup>11</sup> Other states, including Iowa, Minnesota, Montana, New Jersey, Ohio, Rhode Island, Vermont, and Virginia eliminated the resistance requirement altogether.<sup>12</sup> Despite the best efforts of legislatures, many judges continued to apply common law resistance requirements in rape cases.<sup>13</sup> Thus, a victim can expect to testify about how much resistance she offered, why she failed to offer more resistance, how she came to be with the defendant, when and why

she reported the assault, and the like. Even if the victim's judgment was impeccable, she must re-live the assault through questioning; therefore, she may appear emotional and irrational during testimony. This behavior, too, can affect perceptions of her credibility. Because reporting a rape may well subject a victim to a process that requires her to respond to questions and thus review the assault repeatedly, many victims choose to remain silent.

Rape shield laws represent another legislative effort to secure legal protection for victims, preventing defense counsel from gratuitously eliciting testimony regarding the victim's prior sexual behavior. State statutes shielding the victim's sexual history from scrutiny take a variety of forms. Some admit all relevant testimony, some require a hearing prior to the introduction of testimony about the victim's sexual past, others limit the use of such evidence to a very few, specifically defined circumstances.<sup>14</sup> However, even the most restrictive jurisdictions continue to allow evidence of the victim's sexual activities if there is doubt regarding the source of the physical evidence (usually semen) or if the prior behavior involved the defendant and is offered to show consent.<sup>15</sup> New York admits the victim's prostitution convictions, suggesting that the victim's willingness to sell sexual access constitutes exculpatory evidence for the defendant<sup>16</sup>

At the federal level, the law recognizes the following exceptions:

evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury, or other physical evidence; evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent or by the prosecution; and evidence the exclusion of which would violate the constitutional rights of the defendant.<sup>17</sup>

Such exceptions, considered necessary to protect the rights of the accused, significantly weaken protections extended to victims, as the same courts which continue to apply a common law resistance standard despite statutory revisions determine when it is appropriate to admit evidence of prior sexual history. The exceptions also give wide latitude to judges, who may incorporate their biases and perceptions as they determine what is necessary to protect the rights of the defendant under the third exception noted above.

Both judges and jurors in rape trials may also include their biases and perceptions in their decisions. Consider the following examples concerning the characterizations of rape victims by judges and jurors who heard their testimony:

- A juror voted to acquit William Kennedy Smith of the rape of a woman he picked up at a bar because "he's too charming and too good-looking to have to resort to violence for a night out";

- A judge referred to a 12-year-old victim as an “unusually promiscuous young lady”;
- A juror voted to acquit three St. Johns University fraternity brothers of a widely publicized gang rape on the assumption that “Hell hath no fury like a woman scorned”;
- A judge voted to overturn a rape conviction on the theory that “when an adult woman goes to a man’s room, [she certainly has] to realize that they [are] not going upstairs to play Scrabble.”<sup>18</sup>

Therefore, despite the presence of rape shield laws, these examples epitomize the way in which a patriarchy sexually objectifies women.

Because many rape victims believe they will be blamed for their own rapes or considered “dirty” or promiscuous, experts believe that the reported rates significantly underestimate the actual rates. In addition, forms of sexual assault that do not involve penetration of the vagina are frequently classified as distinct (and lesser) offenses<sup>19</sup> and in ways that excluded marital and acquaintance rape.<sup>20</sup> Quite simply, rape is common and underreported in the United States. In fact, the US holds the dubious distinction of having the highest rate of reported rape in the industrialized world. One in six women and one in thirty-three men have experienced sexual assault.<sup>21</sup>

The underlying acceptance of rape in the domestic context, combined with the law’s tendency to question, blame, or dismiss the victim, increases the challenges associated with bringing war criminals to justice, precisely because those challenges are institutionalized in legal procedure and evidentiary rules. Bringing war criminals to justice is inseparable from the legal requirements for prosecuting a rape and from the defenses permitted by law in any country, including the United States. The law encourages, even mandates, a thorough consideration of the possibility that the victim welcomed the crime.

Feminist activists are increasingly disenchanted with legal reform, identifying limitations of legal discourse focused upon the masculinized individual, as described at the beginning of this section. Nivedita Menon identifies multiple lines of argument that intertwine in feminist discourse regarding the law. Three are relevant in the context of juridical equality. First, the law extends full rights to women only when they assimilate to male norms; that is, when they do not behave in distinctly gendered ways. Second, the law fails to recognize the existing, powerful differential by treating men and women as “similarly situated” when they are not. Third, the law favors objectivity over subjectivity, which renders women’s subjective suffering invisible.<sup>22</sup> The last point elucidates the fundamental problem with rape jurisprudence as it is currently constructed. Its insistence on an objective assessment of whether the victim was sufficiently clear in communicating her lack of consent renders her experience irrelevant. The only subjectivity acknowledged is that of the accused; the court assesses the reason-



ableness of his perceptions as well. Yet, the accused has the advantageous presumption of innocence and the concomitant constitutional protections. The effect of the presumption *in favor* of the accused is an equivalent presumption *against* the veracity of the victim.

## INTERNATIONAL LAW AND WAR CRIMES

In most UN member nations, women are raped on a daily basis and thus victimized by men who are otherwise respected members of the community.<sup>23</sup> Despite the assertion that women do enjoy full juridical equality in the United States and should enjoy it everywhere, an ally's treatment of its female population is not a major consideration in foreign policy.<sup>24</sup> The gendered biases of our own laws devalue women and minimize the significance of abuses against them. This bias is mirrored in our foreign policy and in our understanding of human rights (and violations thereof) in international conflicts. For violence against women to be taken seriously, it must be horrific, and traceable to causes other than "simple" sex discrimination.

International law does not develop in a vacuum. While the United Nations is the closest approximation of "world government" that exists, it falls far short of that description. Participation in the United Nations is voluntary and the UN Charter, its conventions and regulations, are binding only upon those parties that agree to be bound. Thus, international law is the law of compromise – positions negotiated among diverse nations to reflect values acceptable to all. Nations may sign conventions yet "opt out" of offensive provisions, exercising the international version of a line-item veto. Thus, although a nation may agree to the principle of the "elimination of all forms of discrimination against women," it may also reject portions of the convention that conflict with existing legislation, the religious principles supported by the current government, or provisions deemed "impractical" or inconvenient.

Nations choose the "rights" they wish to honor when becoming signatories to a human rights convention. Those choices reflect the values embedded in their domestic legislation and their willingness to devote resources to eliminating sex discrimination. If domestic law reflects a willingness to accept both discrimination and violence against women as natural and inevitable, international law will reflect such attitudes. In particular, we might expect that "problem" nations, those with appalling human rights records, will have domestic laws that fail to shield women. However, that is not the case. Even those nations that espouse liberal values of equality fail to extend full protection to women; their laws demonstrate a willingness to accept rape as the unfortunate lot of women. Again, the gendered dimensions of the law create obstacles for women seeking relief. Practices that specifically target women, especially rape, are sufficiently common in peacetime contexts that most nations shrink from recognizing them as human rights violations. This reluctance extends to attitudes toward those same acts committed in

the context of armed conflict. The international community is willing to condemn rape as a war crime in two contexts only: first, when it reaches the level of genocide by targeting women of a particular religion, race, or ethnicity; and second, when it seeks to humiliate men by abusing their women. This perspective regards rape during wartime in male oriented terms: to be a violation, it must be a horror that men can imagine or a crime perpetrated against women because of some characteristic that they share with men.

Perhaps this masculine vision of moral wrongdoing reflects an ethical code of conduct that, in theory, governs immoral military behavior. Thus, at least with respect to war, the international community does not agree with the well-worn phrase “all is fair in love and war.” There exists a body of international law – the law of war – whose purpose is to minimize excessive brutality during armed conflicts. The law of war is designed to protect both combatants and noncombatants: it regulates the conduct of hostilities, sets standards for the treatment of prisoners of war, protects combatants removed from active participation in the conflict through sickness and injury, and sanctifies the important distinction between the treatment of combatants and noncombatants.<sup>25</sup> Of course, through the ages the regulations concerning war routinely have been violated – prisoners of war have been tortured and killed, entire villages plundered, civilians killed or enslaved, and entire ethnicities “cleansed.”

Rape, too, is endemic to warfare. In World War I, German soldiers marching into Belgium and France used rape and other atrocities to terrorize the local populations.<sup>26</sup> During World War II, rape was widespread in both the European and Asian theaters of war.<sup>27</sup> As that war came to a close, the Soviets, upon liberating Berlin, reportedly raped between 110,000 and 900,000 German women.<sup>28</sup> During the war that followed East Pakistan’s declaration of independence and its founding as the new state of Bangladesh, at least 200,000 Bengali women were raped by soldiers from West Pakistan in a deliberate campaign of terror and intimidation.<sup>29</sup> Sadly, the list goes on: rape also occurred on a massive scale during armed conflicts in Uganda, Myanmar, Somalia, Sierra Leone, Kashmir, Peru, the Democratic Republic of the Congo (a situation that still exists), East Timor, Kuwait, Liberia, El Salvador, and Guatemala.<sup>30</sup> Despite this record, however, it was not until near the end of the twentieth century, following the events in the former Yugoslavia, that wartime rape was prosecuted as an international crime. It is truly striking how little attention is given to the subject of sexual violence during armed conflict. Kelly Askin’s work is especially informative in this regard. She notes:

- In the entirety of the Hague Conventions, one single article (IV, art. 46) vaguely and indirectly prohibits sexual violence as a violation of “family honour”;
- The 42-volume set of transcripts of the Nuremberg Trial contains a 732 page index. Neither “rape,” nor “prostitution,” nor even “women” is

included in headings or subheadings in this index, although crimes of sexual violence are extensively documented in the transcripts;

- The five indexes added to the 22-volume set documenting the Tokyo Trial, include “rape” under the subarticle of “atrocities,” which might be supportable if afforded representative treatment. Yet, while the [International Tribunal for the Far East] documents include numerous accounts of rape and other forms of sexual violence, only a mere four references are cited briefly;
- The Nuremberg and Tokyo war crimes trials documented extensive reports of sexual violence. Still, in the entirety of the four 1949 Geneva Conventions, comprising a total of 429 articles, only one sentence of one article (IV, art. 27) explicitly prohibits “rape” and “enforced prostitution,” and only a handful of other provisions indirectly prohibit crimes of sexual violence;
- The 1974 Declaration on the Protection of Women and Children in Emergency and Armed Conflicts omits any reference to sexual violence;
- In the 1977 Additional Protocols to the Geneva Conventions, which were intended to supplement and clarify the 1949 Conventions, only one sentence in each explicitly protects against sexual violence (Protocol I, art. 76; Protocol II, art. 4).<sup>31</sup>

The invisibility of gender-specific crimes within the domestic/national legal sphere, in addition to the fact that war is traditionally the business of men, contributes to the lack of attention given to the perpetrating and prosecution of gender-based crimes within the laws of war.

## **THE RAPE OF BOSNIA AND THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA**

In the early 1990s, the former state of Yugoslavia began to dissolve and a devastating, brutal civil war started. As early as June 1992, refugees fleeing from Bosnia-Herzegovina to Croatia reported mass rapes resulting from the armed conflict. In August 1992, an American journalist writing for *Newsday* compiled the first complete report concerning the rape of Muslim women by Serb forces.<sup>32</sup> The mass rapes and other sexual assaults continued throughout the war, with as many as 50,000 women victimized. The rapes in Bosnia do not fall into the category of “random rapes,” but were part of a systematic policy of ethnic cleansing. Many of the attackers claim they were ordered to rape as part of a deliberate policy to ensure that the victims and their families would not want to return to a geographic area.<sup>33</sup>

What is the etiology of the mass rapes during the conflict in the former Yugoslavia (or any armed conflict)? The answer is patriarchal desire for domi-

nance. Claudia Card, building upon the work of Catharine MacKinnon, contends “if there is one set of fundamental functions of rape, civilian or martial, it is to display, communicate, and produce or maintain *dominance* . . . . Rape is a cross-cultural language of male domination (that is, domination *by* males; it can also be domination *of* males)” [emphasis in the original].<sup>34</sup> In this regard, part of a man’s masculine self-image is based on power and domination over his world and over the others around him. Thus, rape is a tool of domination in both the domestic context and in the context of armed conflict. A man dominates the women of the enemy by raping them and simultaneously dominates the enemy male by raping, hurting, and humiliating the enemy’s prized possession, his women, whom the enemy has sworn to protect. The enemy’s masculine self-image partially depends upon this protection. Destruction of that part of an enemy’s masculine self-image only enhances one’s own masculine self-image, making it more powerful and thus, more masculine.

Perceptions of both masculinity and femininity impact rape when used as a weapon of war. Ruth Seifert offers several explanations of the role of rape in warfare. The essence of her claim is that rape – in war and in peace – constitutes a manifestation of hypermasculinity and hatred of the feminine.<sup>35</sup> For example, she argues that rapes are part of the “rules” of war: evidence suggests that rape is endemic to armed conflict. War can be viewed as a “game,” with its own rituals and regulations: “when looking back through history we find much to suggest that within this ritual one rule of the game has always been that violence against women in the conquered territory is conceded to the victor during the immediate postwar period.”<sup>36</sup> To the victors go the spoils. As Cynthia Enloe notes, “ ‘Murder, pillage and rape’ is a litany that has been repeated over and over by war reporters as if rape naturally accompanied pillaging.”<sup>37</sup> Women who endure mass rapes lose all agency when their victimization becomes appropriated by the males as subjects perceived only in masculine terms. As a result, “the rapes have been reported as violations of ‘our’ women’s honor, as threats to ‘our’ manhood as fathers, husbands and sons, challenges to ‘our’ collective masculinized honor as an ethnic community, as a nation.”<sup>38</sup> It is not simply the fact that a woman has been violated that is significant. It is the fact that a woman has been violated repeatedly, and in a way that has cultural meaning, that is significant. Had the women in question been victimized by one or two soldiers, then killed or left alone, it is doubtful that any further action would be taken, even if large numbers of women were assaulted. The scale must be extraordinary and the rapes must serve a purpose that has significance for the men of the victimized community. In genocidal rape, the tools of male dominance are employed against an entire population, effectively feminizing the men of the targeted ethnic or cultural group.<sup>39</sup> At that point, as MacKinnon said, rapes become readily distinguishable from sex.

Moreover, once again, rape in warfare echoes rape in the domestic context. This explanation of rape is reminiscent of Sanday’s accounts of rapes perpetrated

ed by fraternities. The rape is a ritual, serving functions that have little to do with the victims themselves, except insofar as the victims represent the feminine and are the antithesis of all that the men involved aspire to be. In war as in peace, rape allows men to prove their power and to distinguish themselves from the weakness and passivity associated with women. The possession and dominance of the feminine defines and reinforces the masculine.

Responding to the on-going tragedies in the former Yugoslavia, in 1992 the UN General Assembly passed Resolution 47/121 urging the Security Council to establish an *ad hoc* tribunal for the prosecution of war crimes committed in Bosnia.<sup>40</sup> In 1993, the Security Council established the International Criminal Tribunal for the Former Yugoslavia since 1991. During the creation of the ICTY atrocities were still underway in the former Yugoslavia: rapes occurred as late as 1995, although most documented cases happened between the fall of 1991 and the end of December 1993, with a concentration of rapes occurring between April and November 1992.<sup>41</sup>

During the early negotiations about the creation of the ICTY, UN officials were reluctant to address rape and other sexual violence because it was “very difficult to bring up these kinds of issues.”<sup>42</sup> Nonetheless, pressure brought to bear by a number of human rights and women’s rights groups, as well as the presence of women (and several sympathetic men) as members of the tribunal, helped ensure that rape allegations would be taken seriously.<sup>43</sup> The prosecution of the perpetrators in international criminal tribunals required the explicit inclusion of rape as a crime against humanity.<sup>44</sup>

Even within the context of the extraordinarily brutal treatment the victims endured in the rape camps, they must still undergo the trauma of trial. They must identify their assailants, endure questioning, and provide detailed accounts of their victimization. Although no one implies that the women sought these sexual encounters in any way, many women are too ashamed to come forward: in the former Yugoslavia, religious, cultural, and social factors made the problem of investigating rape allegations even more intractable than usual. In a society in which a woman’s chastity is her honor, a woman may be unwilling to risk shaming her husband or family by admitting that she was raped.<sup>45</sup> Numerous factors, then, in both the international and domestic contexts contribute to the victims’ apprehension to partake in a criminal trial.

In the context of domestic rape law, it is in the rules of evidence and procedure that we see the recreation of patriarchal dominance and the continued victimization of the woman. Questions arise about her prior sexual conduct, the veracity of her accusations, and the extent to which she actively resisted the assault. Notably, it is exactly in this area – rules of evidence and procedure – that we see modest “prosecutorial progress” in the ICTY concerning the rights and protection of female victims. Earlier, we noted some of the problems associated with prosecuting rape, where the “trials have been marked by the lack of female

perspective in the courtroom and the application of a male standard.”<sup>46</sup> Furthermore, Susan Edward notes, “it is in the rules of evidence and procedure that we find the reproduction of the precipitating construction of female sexual behavior that makes a charge of assault by the complainant difficult to sustain.”<sup>47</sup> Feminist activists, applying the lessons gleaned from the failures of domestic rape law, secured victim-friendly provisions in the rules governing the work of the ICTY, of which Rule 96 is especially pertinent.<sup>48</sup> In cases of sexual assault:

- (i) no corroboration of the victim’s testimony shall be required;
- (ii) consent shall not be allowed as a defense if the victim
  - a. has been subjected to or threatened with or has had reason to fear violence, duress, detention, or psychological oppression, or
  - b. reasonably believed that if the victim did not submit, another might be so subjected, threatened, or put in fear;
- (iii) before evidence of the victim’s consent is admitted, the accused shall satisfy the Trial Chamber *in camera* that the evidence is relevant and credible;
- (iv) prior sexual conduct of the victim shall not be admitted into evidence.<sup>49</sup>

Relative to the various state laws that govern US procedure, the specific language of Rule 96 represents progress. The rules make the process less burdensome for the victims, increasing the probability that women will cooperate. Yet the reforms neither acknowledge nor alter the patriarchal patterns that give impetus to the rapes and are at best a modest improvement upon an unacceptable *status quo*. Because the rapes forwarded a genocidal purpose, a purpose that carries meaning for men, the usual rules do not apply.

Still other procedural rules are relevant in cases of sexual assault because they further protect the victim: first, the prosecutor may seek an order preventing the disclosure of the identity of a victim or witness during the investigatory phase of the proceedings (Rule 69); second, another rule (Rule 71) provides for some evidence to be presented through a deposition, thus sparing victims and witnesses the trouble of traveling to the Hague where the trials are being conducted; and third, the tribunal may take measures during a trial to protect the privacy of victims and witnesses (Rule 75).<sup>50</sup> Askin notes that these rules of evidence and procedure, especially Rule 96, are the “most progressive in the history of gender jurisprudence, taking into account the coercive nature of rape.”<sup>51</sup> In addition, the tribunal demonstrated a willingness to hold those in authority responsible for mass rapes, even if the prosecutors could not link a particular defendant to a particular victim. Indeed, the many specific rules of evidence and procedure in the ICTY should be the basis of revision to similar rules in both domestic and international legal contexts, as they serve to mitigate the victim’s suffering during the legal aftermath of rape. Yet reforms that fail to recognize the patriarchal biases embedded within legal institutions can accomplish only limited gains.

The case of *Prosecutor v. Tadic* [hereafter *Tadic*] was the first important decision made by the ICTY that illustrates the potential of the above rules. Dusko Tadic, a Serb, allegedly participated in the mistreatment and killing of both Bosnian Muslims and Croats within the Omarska Camp where numerous rapes and other incidents of sexual violence occurred.<sup>52</sup> Although Tadic was not specifically convicted of rape, the tribunal's opinion went to great lengths to note the sexual violence that occurred at the Omarska Camp. The decision stated that women held in the camp were routinely called out at night and raped. Furthermore, Tadic was found guilty of crimes against humanity (under count 11 of the indictment) because the attacks were carried out as part of a systematic campaign against a civilian population intended for discriminatory purposes to inflict severe damage to the victims' physical safety and human dignity.<sup>53</sup> Tadic was sentenced to 25 years in prison, less time served. Although the *Tadic* decision did not directly involve an indictment on rape or sexual violence, the *crimes against humanity* were an important part of the trial chamber's reasoning.<sup>54</sup> Future cases heard by the ICTY would more directly confront the charges of mass rape and other sexual violence toward women.

Later, the ICTY took up the case of *Prosecutor v. Anto Furundzija* where Furundzija was a commander of a special unit of military police known as the "Jokers." While the *Tadic* case represents a small step forward in the prosecution of wartime rape, *Furundzija* signals an unfortunate reversion to past practice. This case may well have wide-ranging *and negative* implications for the prosecution of sexual violence. During an interrogation, a soldier under Furundzija's command raped and beat a detainee.<sup>55</sup> The case was based on the testimony of one person, Witness A, who had been sexually assaulted and raped in the presence of Furundzija. The defense attacked the memory of Witness A, producing a memory expert, Elizabeth Loftus, who contends that all memory is flawed and susceptible to influence, the more so following traumatic events.<sup>56</sup> After the completion of the trial in June 1998, the Office of the Prosecutor [OTP] notified defense council of a redacted certificate and witness statement (from a psychologist) obtained in 1995 concerning Witness A and the counseling she received at a therapy center. The defense filed a motion to strike the testimony of Witness A even though OTP gave the defense timely notice that Witness A received counseling for rape trauma syndrome, thus implying that defense counsel could have discovered the psychologist's certificate during its own investigation.<sup>57</sup> Nonetheless, the trial chamber ruled that the non-disclosure of this evidence constituted "serious misconduct" and ordered that the trial be reopened.

Additionally, the defense was permitted to recall any witness to address the counseling received by Witness A and could offer any new evidence addressing these issues. Askin explains:

this extremely broad order invades the victim's privacy, allowing access to all medical, psychiatric and psychological records, regardless of any relevance these records may have to memory or the trial



testimony . . . The wording of the order raised grave concerns not only over violations of privacy, but also over the possibility that traumatic events in general, and receiving counseling and/or treatment in particular, may put testimony of survivors in jeopardy by undermining the credibility of their recollection of the event in question.<sup>58</sup>

This development is especially troublesome in the prosecution of rape, where the victim suffers a very personal, traumatic event. In such cases, where counseling is a normal and necessary part of recovery from the trauma of rape, the fact that the very recollection of the events in question automatically will be disputed during a trial means the victims of sexual assault may be left with the choice of either seeking counselling or seeking to have their attackers brought to justice.

Despite the legal manoeuvring and the dangers posed by the trial chamber's order regarding the memory of Witness A, Ando Furundzija was found guilty on 10 December 1998 and sentenced to 10 years in prison. In its judgment the chamber noted that "even when a person is suffering from PTSD [post-traumatic stress disorder], this does not mean that he or she is necessarily inaccurate in the evidence given. There is no reason why a person with PTSD cannot be a perfectly reliable witness."<sup>59</sup> In the final analysis, the trial chamber showed some sensitivity to gender-based crimes and the special problems that exist in such prosecutions. It is significant that Furundzija was found guilty based on the testimony of only one female witness.

One case stemming from the events in the former Yugoslavia that received widespread attention from international legal scholars is *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic* [hereafter *Kunarac*] which dealt with mass rape and other sexual violence in and around the village of Foca. *Kunarac* is important because it was the first ICTY trial predicated exclusively on charges of sexual violence. The trouble began in April 1992, when Serb forces took the village of Foca and the surrounding area. They attacked the Muslim population, then expelled them from the area, with many women, children, and older men taken to detention centers.<sup>60</sup> The Muslim women and girls were detained in a sports complex and a local school where they were subjected to nearly constant rapes and sexual assaults. In the indictment, the three defendants were charged with:

1. rape as a crime against humanity (article 5 of the ICTY statute);
2. rape as a war crime (article 3);
3. "rape as torture" as a crime against humanity (article 5);
4. "rape as torture" as a violation of the laws of war (article 3);
5. enslavement as a crime against humanity (article 5); and
6. outrages upon personal dignity (article 3).<sup>61</sup>



Given the specificity of these charges and their focus on crimes of sexual assault, the *Kunarac* charges signify another step forward in concern for women's rights reminiscent of the *Tadic* case and regain some ground lost in *Furundzija*.

On 22 February 2001, the trial chamber announced its guilty verdict in the *Kunarac* case. The defendants were convicted of war crimes and crimes against humanity under articles 3 and 5 of the ICTY statute.<sup>62</sup> Presiding Judge Florence Mumba noted that the actions of the three defendants constituted a "nightmarish scheme of sexual exploitation" which was "especially repugnant," and that the three had "thrived in the dark atmosphere of the dehumanization of those believed to be enemies."<sup>63</sup> Judge Mumba's distinct references to the horrific, inhumane actions of the mass rapists focus on the impact of the crimes on a society-wide scale. As a result, in *Kunarac*, rape was deemed a crime against humanity as part of a larger policy to terrorize Muslims, to evict them from a geographical area, and to convert the region into a Serb territory.

Crimes against humanity are defined as acts against a population and contain elements of persecutions on political, racial, or religious grounds. In such a frame of reference, crimes committed against women on the basis of sex are conspicuously absent. The defendants in *Kunarac* were also convicted of war crimes involving sexual violence. However, under the provisions of the laws of war, the offense must occur in the context of an armed conflict and there must be a close nexus between the rapes or other sexual violence and the armed conflict.<sup>64</sup> At issue here is the very status of women within the patriarchal hierarchy. The important point to note in the *Kunarac* decision is that rape alone, a crime perpetrated *against women as women*, is insufficient to constitute a crime against humanity. When crimes against women hold a distinctly subordinate status to crimes against humanity, women are doubly victimized, doubly dehumanized. Initially, they suffer the horrors of wartime rape and its accompanying psychological trauma, then they suffer through the subsequent trauma of the trial during which their rights and well-being are not safeguarded as vigorously as the rights of those criminals responsible for their victimization.

## CONCLUSIONS

Through our investigation, we find that the international approach to prosecuting rape as a crime against humanity or a war crime, as embodied by the ICTY, provides some modest protections to the victims, just as the legal reforms in US rape law mitigated some of the secondary trauma of the legal proceedings. The decisions in the cases discussed above provide evidence that the international community condemns mass rape, when used as a means of genocide and ethnic cleansing. Some of the ICTY decisions set precedents for future prosecutions of gender-based crime by the international community: rape is more precisely defined, the rules of evidence and procedure show some sensitivity to the plight of the victims of these types of physical assaults, and rape has been shown to be an element of genocide. Yet problems remain.

The international community is loath to admit that sexual violence against women during armed conflict is largely ignored. The initial reluctance of the tribunal to address such violence, despite the incredible brutality of the rapes in the former Yugoslavia, underscores this phenomenon. Without heavy pressure from women's rights and human rights non-governmental organizations, it is quite plausible that the international community would continue to neglect the issue of sexual violence, as it did in previous military conflicts. Given the incredible brutality of the mass rapes in the former Yugoslavia, the reluctance is disturbing.

When cases of mass rape are given proper attention and the perpetrators are brought to trial, the victimized women can expect a new round of psychological trauma in the process. While the initial crime is astoundingly horrific, women raped in wartime suffer further harm when the judicial system privileges the rights of the defendant, particularly when that privilege means undermining the state of the victim's mental health. For example, the trial chamber's decision in *Furundzija* to re-open the case is an appalling precedent. Although the result was "right," there is essentially no protection for the victim. As in American law, the need to preserve the defendant's right to undermine the victim's credibility (and thus the case against him) outweighed consideration for the victim. Anyone experiencing similar trauma will need counseling, but that may reduce the credibility of her testimony mainly because such victims are likely to appear unreliable. There are also potential problems if victims learn how to survive a rape through passivity, as some of the accounts suggest they did. Although the rules do not allow consent as a defense if the victim has reason to fear violence, the legal definition of that threshold for violence continues to reflect a masculinist perspective.

The prevailing legal conventions are dysfunctional in prosecuting rape, both domestically and internationally, because they were designed to manage crimes committed by men against men. The progress made in prosecuting perpetrators of sexual violence does not suggest an increase in respect for women's human rights. In former Yugoslavia, the key element that made rape worthy of serious legal attention was its genocidal purpose. Had the rapes assumed a random, rather than systematic character, and had they not been used as a means of ethnic cleansing, it is doubtful they would have received the solicitous attention of the ICTY.

Recent prisoner abuse scandals connected to the war on terrorism illustrate the continued relevance of our analysis regarding the failure to identify the common causality of wartime and peacetime rape. The rituals of sexualized violence in fraternity and sports settings, as described by Sanday, closely parallel the descriptions of abuse perpetrated by groups of soldiers. Unlike the coverage of wartime rapes or the unsympathetic dismissal of female victims of gang rapes in peacetime settings, the accounts of prisoner abuse illustrate the peculiarly gendered role of sex with particular clarity – primarily because the gender roles are deliberately reversed. In the Abu Ghraib prisoner abuse scandals, the victims

were male. They were abused and humiliated by being stripped of their power and masculinity through forced nudity, beatings, and simulations of homosexual activity. The Abu Ghraib abuses provide an especially powerful illustration of the role of sexualized violence in establishing the dominance of the guards over their prisoners. The soldiers perpetrated and documented the ultimate humiliation of their prisoners, captured in the famous photograph of Lynndie England holding a naked prisoner on a leash. Not only were the prisoners being dominated, but they were being dominated by women. Another photograph depicted a simulation of oral sex between prisoners, placing the man who appeared to perform oral sex in the position of the female. News and scholarly analysis emphasized the cultural significance of the abuse, noting that it was particularly cruel because it attacked the prisoners' sense of masculinity and equated them to women.<sup>65</sup> The humiliation was more powerful because of the profoundly patriarchal traditions prevalent in the region. The abuses merited attention for three reasons: they happened to men, women were among the perpetrators, and the abuses assumed a cultural significance in light of the religious and ethnic characteristics of the victims.

At Abu Ghraib, the expected gender equation was reversed and no one, not even momentarily, entertained the notion that the prisoners consented to the activities or that the actions depicted might not constitute torture. Furthermore, no one required the victims to testify at the court martial proceedings against the abusers. Clear differences exist in the treatment of the female victims of rape and these male victims at Abu Ghraib: in the former, the victim's gender disempowers her; in the latter, the victim's gender empowers him. During rape trials, whether or not the women consented to the activity is questioned; the male victims' absence of consent is understood, because his consent to assume the feminine role is inconceivable. In rape trials, women are required to testify in the proceedings; the men at Abu Ghraib were not forced to revisit their humiliation. The core issue is that the men are injured mainly because they are demasculinized, which undermines the foundation of patriarchy. Given the profound media attention paid to the Abu Ghraib scandal, it seemingly constitutes a worse harm than rape of a woman's body.

Any meaningful attempt to address sexual violence against women requires a fundamental reconsideration of the legal principles at work. The norms that function in managing the crimes that men commit against men cannot be applied effectively to gendered crimes, except in those rare situations in which the victims are also heterosexual men. Because the line between sex and rape is blurred, in both domestic and international legal discourses, everything depends upon the interpretation of the particular set of events and the perceptions and credibility of the parties. Thus, by privileging the perspective of the accused, the law gives the victim little recourse. Convictions occurred in the aftermath of the former Yugoslavian conflicts not because of the injury to women, but rather because the rapes were perpetrated with a clearly ethnic intent and on an unusually massive scale. As it stands, the law can cope with crimes that constitute man-

ifestations of racial or ethnic hatred, but not with those that primarily express patriarchal attitudes that are accepted as normal.

## Endnotes

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43. Askin, "Women," p. 106.
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48. It should be noted that, while Rule 96 can be seen as a progressive improvement over domestic law concerning the treatment of rape victims, the text of the rule that was ultimately used superseded an even more progressive rule. The original version of Rule 96 prohibited any consideration of consent at all as irrelevant in the context of the crimes under the Tribunals' jurisdiction. This shift from the original version to the less progressive version contributed to a reduction in the level of trust that the surviving Bosnian community had for the ICTY. The authors are thankful to an anonymous reviewer for bringing our attention to this fact. For a good analysis of the development of Rule 96, see Kate Fitzgerald, "Problems of Prosecution and Adjudication of Rape and Other Sexual Assaults Under International Law," *European Journal of International Law* 8, no. 4 (1997), pp. 638-63.
49. United Nations, *Rules of Procedure and Evidence*, UN Document IT/32, 1994, at <http://www.un.org/icty/legal/doc/index.htm>.
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52. Kelly D. Askin, "Sexual Violence in Decisions and Indictments of the Yugoslav and Rwandan Tribunals: Current Statues," *American Journal of International Law* 93, no. 1 (1999), p. 100.
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54. This could be seen as being problematic. Given the large number of women who were systematically raped at Omarska, rapes that were well-documented, the fact that the ICTY could not indict Tadic for rape suggests that something was amiss with the tribunal. The authors thank an anonymous reviewer for this suggestion.
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