

Progress Without Results

Lessons from the ICTY/R and their Relevance to Sexual Assault in Canada

ERIN STEVENS

Le Tribunal pénal international de la Yougoslavie et celui du Rwanda ont rendu possibles les poursuites judiciaires du viol comme une arme de guerre et de génocide. Ces développements encouragent de nouvelles perspectives face aux problèmes du consentement et de la corroboration qui jusqu'ici ont empêché les poursuites efficaces des viols commis dans l'intimité des foyers. Quoique la loi sur les pratiques sexuelles au niveau international diverge de la loi canadienne et de sa pratique, des pistes émergent en vue de réconceptualiser le crime du viol et cela en dépit de la persistance et du peu de conviction perçues dans les contextes canadiens et internationaux.

The International Criminal Tribunal for Yugoslavia, the International Criminal Tribunal for Rwanda (hereafter the ICTR/Y) and the Rome Statute of the International Criminal Court [ICC] have forged a promising international legal regime equipped to prosecute sexual violence. Incidents of rape in international conflict have been included under the banner of war crimes, crimes against humanity, and genocide. Rape is treated as an international crime with the same degree of seriousness as crimes of torture, murder, and enslavement. However, as scholars such as Doris Buss have pointed out, stories of rape told through individual accounts go un-

acknowledged or are deemed unacceptable script for the language of tribunal convictions (8).

In domestic sexual assault jurisprudence in Canada rape is rarely acknowledged as a social pandemic (with the exception of the dissenting opinions of L'Heureux-Dubé J. in cases such as *R v. Seaboyer*). This lack of awareness of the social nature of rape and its ubiquity is coupled with dismal reporting rates, frightening “unfounding” rates by police, and relatively low conviction rates for sexual assault. In this paper, my purpose is twofold: first I will contrast the distinctions between how sexual violence is prosecuted in domestic criminal law with how sexual violence is prosecuted in international criminal law through issues such as corroboration and consent. From this vantage point I will highlight those elements of the international regime that seem progressive in comparison to how rape is dealt with at the national level. Second, I will briefly explore how these progressive features are vitiated by a poor conviction rate for rape at the international level. Although the international regime shares similar challenges with the domestic regime in regards to the prosecution of sexual assault, the recognition of the systemic nature of sexual violence in international prosecutions provides pertinent considerations for understanding the failures in prosecution

of sexual violence in the domestic context.

In looking to the international criminal law regime for ways to improve sexual assault prosecutions domestically, we must be wary of how international law, like Canadian criminal law, cannot be sanitized of its colonial and racist heritage. Although international criminal law seeks to condemn the most heinous acts of systematic violence, historically, international law has been selective in its recognition of these forms of violence. At the conclusion of the Second World War, the Allied States were quick to prosecute the Nazi regime, but only using laws and legal theories that could not be used against them in regards to their treatment of their own minorities and colonies. This approach gave rise to forms of “crimes against humanity” that were specifically applicable only to international armed conflict, not domestic conflict (Anghie and Chimni, 88).

Although not within the scope of this paper, it is important to note these considerations, and to constantly interrogate, not only the outcomes of these legal regimes, but to challenge the ideologies of the neutrality of criminal law and the individualizing of criminal behavior that they propagate. Such regimes as the ICTY/R are formed by international bodies dominated by powerful states that were arguably complicit in the events,

circumstances, and ideologies that gave rise to the conflicts in Yugoslavia and Rwanda. Thus, the ICTY and the ICTR are inherently limited in their credibility and legitimacy, especially to the populations they were created for in order to promote justice and reconciliation (Anghie and Chimni 89-90). This perspective parallels the notion that domestic sexual assault is not solely individual behavior or “deviance,” but is also a product of a system that normalizes women’s subordination to men, economically, socially, and politically, and of white supremacy, which devalues the worth and humanity of racialized “others.” As such, the maintenance of such violence is used to reproduce these forms of subordination. Thus, the courts, lawyers, judges and police that have sought to prosecute rape, as will be noted in my analysis below, continue to play a role in the impunity of those who rape.

Comparing sexual violence that occurs domestically to sexual violence in war and conflict is a risky analytical undertaking. There are risks that such comparisons may lead to an oversimplification of the causes of rape at both levels for the sake of finding commonalities. Rape within conflict has been generalized as a weapon of war, which risks concealing the cultural, class, and geographical dimensions of rape (Buss 3). This conception of rape as a weapon of war also fails to account for rape that is committed by militaristic groups against their own people in a time of conflict (United Nations). In spite of these risks, I posit that domestic rape (prosecuted by local state authorities) and rape in war and conflict are not alien to one another. In every incident of rape a woman’s dignity is threatened (often injured), her persona is stigmatized and her physical body is assaulted (invaded against her will), putting her health and life at risk. Outside of this shared experience, the social, psychological, economic, and physical challenges that arise from these acts are varied. When a woman who has experienced rape is brought

before a tribunal she is reconceived as a victim/witness called on to provide the evidence necessary to sustain a criminal conviction. In international criminal law, actions of rape are translated into a legal language that is meant to acknowledge the harm of rape and the intolerance of such harms by the international community—building the vocabulary of international criminal law.

Though international criminal law seeks to condemn the most heinous acts of systematic violence, historically, international law has been selective in its recognition of these forms of violence.

Comparing and Contrasting the Legal Treatment of Rape

On the surface of the ICTR/Y jurisprudence, the recognition of the systematic nature of sexual violence seems to be a progressive approach to the prosecution of rape within these various processes of transitional justice. In domestic sexual assault law and practice, there is no recognition of the social/pandemic nature of rape. The connections between seemingly individual acts of rape are made almost exclusively by feminist activists and scholars who condemn rape as socially rooted—underpinned by misogyny and gendered power relations that intersect with racism, classism, and able-ism (see, for example, McIntyre et al.). In Canadian courts, the only connection between acts of rape subject to criminal prosecution is their categorization as sexual assault and

the rare acknowledgement that sexual assault is predominantly a crime committed by a man against a woman (*R. v. Osolin* para. 166).

The international prosecution of rape seems to be an inversion of this perspective. International tribunals are willing to accept the prevalence of rape and acknowledge some of the shared motivations for rape in conflict (*Prosecutor v. Jean-Paul Akayesu* para. 731-732), such as the goals of destroying the enemy, forced impregnation of women, and inciting fear. The very acknowledgement of rape as a means to carry out genocide or as a war crime demonstrates the tribunal’s willingness to acknowledge shared or systemic motivations for rape. This is in part due to the technical and layered definitions of the offences of genocide and crimes against humanity, such as killing, torture, rape, or enslavement, carried out as part of an attempt to destroy another group. This element of the legal definition of the offence requires finding common motivation behind a series of actions, and looking at actions as an aggregate rather than as isolated incidents of violence. However, individual victims are rarely incorporated into official records of rape and few rape convictions are actually produced by the tribunal (Nowrojee 2005).

Sexual Assault Law and Practice in Canada: A Misogynistic Legacy

In the history of sexual assault prosecutions in Canada, the burden imposed on women who are raped reflected long-standing principles regarding women and the crime of rape. Sir Matthew Hale’s maxim,¹ and John Henry Wigmore’s insistence that women who cry rape should have their testimony corroborated by physical evidence and their heads examined, prevailed in most domestic jurisdictions until the 1980s (cited in Mack 335). Legislatures slowly began enacting laws to eliminate the common law corroboration requirements and to instruct

finders of fact that physical corroboration is unnecessary in sexual assault cases (Mack 329). Besides misogynistic rules dissuading women from reporting rape crimes, social expectations pertaining to women's body language, tone of voice, and linguistic habits affected how women were perceived as witnesses. Since women tend to differ from men in terms of manner of communication, women were found wanting in comparison to male norms of credibility when they testified in court (Mack 330-1). Other expectations of ideal "rape victims" dictated that to be believed, women must have raised an immediate hue and cry and shown great "resistance" to the attack. The presumption that women witnesses were lying, combined with unrealistic expectations of how raped women behave, justified entrenched rules ensuring that rape convictions would not be returned without physical corroboration or third party witness testimony to the relevant facts of the rape.

Corroboration and Consent in Domestic Context

At the domestic level, some improvement has been made to rid the common law of special corroboration requirements for victims of sexual assault. In 1983, Parliament enacted Bill C-46, which created section 274 of the *Criminal Code*: "If an accused is charged with an offence under sections 151, 152 or 153, 153.1, 155, 159, 160, 170, 171, 172, 173, 212, 271, 272, 273 no corroboration is required for a conviction and the judge shall not instruct the jury that it is unsafe to find the accused guilty in the absence of corroboration."

Despite the enactment of this amendment to sexual assault law, changes in medical evidence gathering have undermined this provision. According to Georgina Feldberg, the use of rape kit evidence has both created expectations about the availability and utility of physical evidence and re-

invigorated a focus on finding means to corroborate women's testimony. When a rape kit is performed, physicians tend to look for signs of bodily harm as an indication of rape. This problematically assumes that all rapes produce physical damage (109). Also, many judges are unwilling to convict without physical corroboration of the assault when victims/witnesses deviate from the social expectations

When triers of fact analyze the claim of honest mistake, they often err by evaluating the "honesty" of the accused's belief, rather than evaluating what facts the accused was aware of at the time of the assault.

of women, or when these women face intersecting disadvantages (Feldberg 108). Women who opt not to have a rape kit performed, or were unable to due to a lapse in time, are also at risk of appearing less credible (Feldberg 108). The use of rape kit evidence was presumed to be an advantageous development in sexual assault prosecutions, but has seemingly reincarnated myths that attach to the nature of the crime of rape, and our expectations of the women who report it (see also Du Mont and Parnis).

These reforms of 1983 also removed the recent complaint doctrine, whereby the timeliness of a complainant's report of assault was evidence admissible as a matter of credibility: the less time that had passed between the incident and the complaint, the more credible the complainant was perceived to be (Clark 16-17). According to Lorraine Clark, these law reforms have been subject to varying

interpretations by lawyers and judges (Clark 63-64). Despite the objective of the 1983 reforms to eliminate the doctrine of recent complaint, the case law demonstrates that a complainant's post-assault behavior still remains relevant to her credibility, especially in cases where the defence attempts to suggest fabrication, thus requiring the Crown to dispute this theory by entering evidence respecting the nature of the complaint made by the complainant following the assault (Clark 64-66).

At the domestic level, issues of consent feature prominently in the prosecution of sexual assault. This is due in part to the requirement of non-consent built into the definition of the crime (see *Criminal Code of Canada* s. 265). *R. v. Ewanchuk* spells out the respective elements: touching, of a sexual nature, with the absence of consent (*R. v. Ewanchuk* 24-25). Since non-consent is a key element of the offence, "consent" provides a wide terrain for defence lawyers. Parliament has been forced to intervene to prevent unsound presumptions about consent from informing the prosecution of these offences.³ Canvassing all of the issues related to consent cannot be meaningfully attempted within this paper, so I will highlight only the defence of "honest but mistaken belief" in consent.

According to Lucinda Vandervort, the defence of honest but mistaken belief in consent, as deployed by defence lawyers and understood by many judges, leads to errors in determining the (*mens rea*) culpable intent required for the crime. When the defence is raised, triers of fact tend to focus on the accused's "moral innocence," ignoring the fact that the actions of the accused were more akin to wilful blindness or recklessness than "honest" mistake (Vandervort 639-40, 647). When triers of fact analyze the claim of honest mistake, they often err by evaluating the "honesty" of the accused's belief, rather than evaluating what facts and circumstances the accused was aware of at the time of the assault, or whether in fact the

accused's claimed "mistake" was as to what the legal limits of permissible sexual coercion are (Vandervort 642). This tendency to immediately equate an accused's assertion that he thought the woman was consenting with "moral innocence" has detrimentally affected the investigation and laying of charges, as police and Crown attorneys may assume that these cases are unlikely to garner convictions (Vandervort 639). When the police and the Crown refuse to prosecute because the defence of honest mistake is claimed, women's access to justice is thwarted (Vandervort 639). The misconstruing of honest but mistaken belief is one of many issues that undermine the prosecution of sexual assault (McIntyre et al.). Since the enactment of section 273.2(b), the courts have wrestled with the new requirement that men take reasonable steps to ascertain consent and have failed to meaningfully explicate what actions are required to ascertain consent (Sheehy).

Protecting Female Victim/ Witnesses in International Fora: Rules on Corroboration

With this history of sexual assault law in mind, the drafters of the *Rules of Procedure and Evidence* for the ICC and the ICTY/R drafted rules to protect women from unfair presumptions based on unsound principles. Some commentators such as Anne-Marie L. M. de Brouwer consider this a major achievement "in comparison with several national rules on admissibility of evidence regarding crimes of sexual violence, which tend to discriminate against victims of sexual violence, who are mostly women, by allowing their credibility to be challenged, and thus preventing them from coming forward" (261). Besides aligning with domestic jurisdictions that had abolished special corroboration requirements, the drafters of the rules were attuned to how armed conflict warrants increased protections for women who testify:

In spite of the non-technical character of the Rules, Rule 96 is a special evidentiary rule which applies to the admissibility of evidence in cases of sexual assault. In contrast to the general presumption of admissibility which governs the rules, evidence concerning past sexual conduct of the victim is inadmissible under sub rule 96

This tendency to immediately equate an accused's assertion that he thought the woman was consenting with "moral innocence" has detrimentally affected the investigation and laying of charges.

(iv). The rationale underlying the existence of such a provision is closely related to the nature of the conflict during which the crimes which the ICTY/R has jurisdiction were committed and where appalling allegations have been made of the systematic and mass rape of women ... moreover in establishing the tribunal the security council in resolution 827 (1993), once again expressed its grave alarm at the situation in the region, emphasizing the continuing rape and detention of women. (*Prosecutor v. Delalic et al.* 43-44)

The tribunal recognized that the coercive circumstances in which rape occurred in these particular conflicts warrants specific rules to protect women who have been sexually assaulted. Widespread violence and

situations of conflict diminish the relevancy of issues of "consent," corroboration, and women's prior sexual conduct (de Brouwer 260, 261). Yet, if conflict and war diminish the relevancy of consent and corroboration, does that mean they maintain relevancy in the domestic context? To explore this idea I will review the rules pertaining to corroboration and consent at the ICTR/Y level, and compare these developments with current issues pertaining to these areas of sexual assault law in Canada. From this comparison it will become apparent that these rules and practices are more progressively developed at the international level than they are in Canadian law.

The ICTR and ICTY established specific rules to provide protection for women who testify as to sexual violence to ensure they are not subject to inappropriate corroboration requirements:

Rule 96 – Rules of Procedure and Evidence

In cases of sexual assault:

- (i) Notwithstanding Rule 90(C), no corroboration of the victim's testimony shall be required;
- (ii) Consent shall not be allowed as a defence 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 in evidence or as defence.

From this rule it is clear that the tri-

bunals intended to ensure that women who testify to sexual violence are viewed as reliable as victims of other crimes and should not be required to corroborate their testimony. The tribunal has maintained this rule in cases such as *Muhimana* where the testimony of a single witness was enough to establish that she was raped. Similar findings were made in *Giacumbutsi, Celibici, and Stakic* (cited in de Brouwer 262).²

In contrast to developments in the domestic context, at the ICTR/Y there is no focus on extracting and preserving physical evidence due to the time lapse between the crimes and the proceedings. Neither Yugoslavia nor Rwanda maintained a social/healthcare infrastructure to process sexual assault as the crimes were being committed. Thus, is the comparison of corroboration requirements really a useful exercise? Although the previous discussion of rape kits and how they have reinvigorated corroboration requirements is not comparable to the international prosecution of rape, it is necessary to recognize the persistence of rape mythology in the international tribunals.

Although legislative advances in member countries such as s. 273 of the *Canadian Criminal Code* are in part what motivated Rule 96 at the ICTR/Y, the approach at the international level seems far more effective in protecting women in a situation where the widespread occurrence of rape and the violent conflict in which it took place are recognized and established as fact. This observation suggests that minor legislative reforms alone are not enough to improve rape prosecutions in Canada. Furthermore, this observation also suggests that rape committed in large scale atrocities is substantially different from rape committed at the domestic level.

The Progressive Approach to Consent in International Rape Prosecutions

In regard to consent, the ICTY/R have enacted rules incorporating

language that clearly suggests that situations of conflict will negate consent in almost every instance (see Rule 96 (ii) (a) *infra*).

Although consent as been raised in a few cases, such as the *Kunarac* case where the accused unsuccessfully raised the defence of mistake of fact (de Brouwer 267), consent defences have not been successful in ICTY/R jurisprudence. Even the definition of rape in the statutes of the ICTY/R does not suggest non-consent as an element of the offence. However, judges of the two tribunals have diverged on whether non-consent is an element of the crime, and whether the definition only requires some indication that the rape took place in a situation of coercion (de Brouwer 264-5). Given the tribunal's recognition of rape as a form of genocide, and the element of widespread conflict, the notion of consent as a defence in this context is incongruous with the understanding of "rape as weapon of war" (Buss 4-5).

At the international level, therefore, "mistaken belief in consent" is largely irrelevant (*Prosecutor v. Kunarac et al.* para. 453-464). When international tribunals willingly acknowledge rape as a pandemic and are aware of the circumstances of conflict that incite campaigns of mass rape, they are not compelled to look for substantial evidence of non-consent nor or they likely to believe a claim of innocent "mistake."

The case of *Kunarac* demonstrates this point:

Kunarac had put forward that he was not aware of the fact that D. B. did not have sex with him on her own free will but that she had only complied out of fear. The Trial Chamber, however, accepts the testimony of D. B. who testified that, prior to the intercourse, she had been threatened by "Gaga" that he would kill her if she did not satisfy the desires of his commander, the accused Dragoljub *Kunarac*.

The Trial Chamber accepts D. B.'s evidence that she only initiated sexual intercourse with *Kunarac* because she was afraid of being killed by "Gaga" if she did not do so. The Trial Chamber rejects the evidence of the accused Dragoljub *Kunarac* that he was not aware of the fact that D. B. only initiated sexual intercourse with him for reasons of fear for her life. *The Trial Chamber regards it as highly improbable that the accused Kunarac could realistically have been "confused" by the behaviour of D. B., given the general context of the existing war-time situation and the specifically delicate situation of the Muslim girls detained in Partizan or elsewhere in the Foca region during that time.* As to whether or not he was aware of the threat by "Gaga" against D. B., the Trial Chambers finds it irrelevant as to whether or not *Kunarac* heard "Gaga" repeat this threat against D. B. when he walked into the room, as D. B. testified. The Trial Chamber is satisfied that D.B. did not freely consent to any sexual intercourse with *Kunarac*. She was in captivity and in fear for her life after the threats uttered by "Gaga". On the evidence accepted, the Trial Chamber finds that the Prosecution has proved beyond reasonable doubt that the accused Dragoljub *Kunarac* took D. B. out of Partizan and drove her to Ulica Osmana Đikica no 16 together with "Gaga." The Trial Chamber accepts that D. B. was raped there first by "Gaga" and two other men and then forced to have sexual intercourse with Dragoljub *Kunarac* because she had been threatened with death by "Gaga." The Trial Chamber is satisfied beyond reasonable doubt that Dragoljub *Kunarac* had sexual intercourse with D.B. in the

full knowledge that she did not freely consent. (para. 644-647) [emphasis added]

From cases such as *Kunarac*, it is apparent that judges are willing to accept that surrounding circumstances vindicate a woman's testimony that she was subjected to sexual violence. This was also apparent in the case of *Muhimana*:

Having considered the evidence and the Parties' submissions, the Chamber finds Witness BG's account of her abduction and rape credible and reliable. *In light of the coercive circumstances prevailing in the Bisesero area at this time, the Chamber is not persuaded by the testimonies of Defence Witnesses DAB and DAC that Witness BG consented to "marry", or cohabit with Mugonero, an Interahamwe, who had participated in killing other refugees who had been in hiding with the witness.* The Chamber finds the testimony of Witnesses DAB and DAC implausible. In the Chamber's view, the inconsistencies in Witness BG's account of her abduction and rape, such as the circumstances surrounding her detention and eventual escape, are insignificant, and do not undermine the credibility and reliability of her evidence. (*Prosecutor v. Mikaeli Muhimana* para. 322) [emphasis added]

When rape is acknowledged as a widespread tool of the aggressor in a conflict, the burden of proving the woman's credibility is lessened. Her credibility is buttressed by the tribunal's willingness to recognize that the conflict that surrounded the incident negated any possibility of voluntary "consent."

Progressive Rules Yet Few Convictions?

Based on these observations, deci-

sions and the protections of Rule 96, which allow for widespread and systematic claims of violence to preclude defences of consent, a woman need only impart to the tribunal facts about what happened to her. Cases such as *Muhimana* and *Kunarac* suggest that tribunals are willing to convict solely on the testimony of the women who have been raped. Despite these features of international criminal tribunals that create optimism about the prosecutor's ability to launch robust prosecutions of sexual violence, these tribunals have a dismal track record of sexual violence prosecutions (Buss 7).

Why these prosecutions fail to deliver guilty verdicts for acts of sexual violence is beyond the scope of this paper, but it is useful to highlight a few trends that have impeded the prosecution of sexual violence. At the ICTR, Binaifer Nowrojee reports a lack of political will on the part of the Office of the Prosecutor, who has frequently deemed sexual violence charges to be of secondary importance to cases of genocide (Nowrojee 2005: 8-10). Also, the investigation of sexual violence allegations has been understaffed and has resulted in significant gaps in the evidence necessary to successfully charge and prosecute these cases (Nowrojee 2005: 13). On a social level, women are frequently deterred from participating in prosecutions of sexual violence for fear of being stigmatized, "dishonoured", and rejected by their communities (Nowrojee 2005: 26). The tribunal also lacks properly trained and adequately resourced investigators who are sensitive to the experiences of women, and the risks they undertake in participating in the tribunal (Nowrojee 2004). Women have also been subject to threats, intimidation, and violence because of their participation in international tribunals (Walsh).

At the ICTR, Rule 34 of the Rules of Procedure and Evidence provide for a Victims and Witnesses Support Unit meant to enable women to

safely participate in trial proceedings, and receive counselling and health services to minimize re-victimization through testifying.⁴ In terms of victim support services, the tribunal is under-resourced and is unable to provide victims and witnesses with adequate healthcare, social services, and counselling. Due to a funding shortage and a question of mandate, the victim and witness support program at the ICTR was partially abandoned after only two years of operation. A substantial health issue that has been overlooked by the tribunal is the high incidence of HIV/AIDS infected victims who require medication in order to participate in trials (Ngendahayo). The tribunal chose not to provide these drugs to women, even though it was providing medication to HIV/AIDS infected accused (de Brouwer 403-405).

A lack of adequate support, especially for women's physical and mental health, deter participation at both the international and domestic levels of sexual violence prosecution. Whenever women voluntarily participate in criminal proceedings as witnesses they expose themselves to harmful cross-examination, and the slow, technically complex, and often disappointing prosecution of sexual violence. Thus, progressive procedural and evidentiary standards are not enough to effectively incorporate women into the fold. If, as in the case of sexual violence prosecutions at the domestic level, a woman has to make significant sacrifices in order to prosecute the perpetrator, including being subjected to cross-examination, tribunals will struggle to acquire the evidence needed to prosecute sexual violence.

At the international level, despite efforts to redeem the law and to change attitudes towards women who testify, a lack of support infrastructure makes participation unnecessarily onerous on someone who has already been traumatized, who most certainly will be re-traumatized if she testifies. This plight is exacerbated in countries recovering from internal

conflict where economic and political systems are unstable and inaccessible to women according to the cultural, social, and economic status of women in the country in question.

The gains and shortfalls of the ICTY/R compared to the prosecution of sexual violence in Canada are apparent. Despite different approaches to issues of consent and corroboration and the lesser burden of proof when women are raped in international conflict, international and domestic prosecutions of sexual violence share a pattern of an exceptionally low number of convictions in comparison to the high incidence of rape.

What lessons from the international context can we incorporate for prosecuting rape in the domestic context? As many feminist scholars have observed (see, for example, MacKinnon), judges in Canada lack the ability to see rape as a socially rooted harm. Women's agency in sexual violence prosecutions continues to be supplanted. It seems that only when judges are willing to observe that rape is a common occurrence in war does a woman's credibility and her worthiness become enhanced. Stripping away the context of war and conflict returns a woman to a state where her claims are heavily scrutinized by enduring myths about her lack of credibility. The perpetrator will have access to an arsenal of discredited tactics to shield him from justice. Although the recognition of sexual violence as "instrumental and not incidental to war" (Buss 5) enables courts to recognize that rape is a crime of the same stature as torture and genocide, focusing on this distinction de-contextualizes rape and detaches it "from the social, political and economic structures that make [rape] possible in the first place" (Buss 3). If wartime sexual violence, as Doris Buss suggests, is not neatly encompassed within internal war and conflict, then waiting until war and conflict erupt before we take raped women seriously as credible witnesses worthy of protection means that we will fail to tackle the sexual violence

during "peace" time. If women must rely on violent political contexts to prove their vulnerability to rape and to assert their agency in criminal prosecutions, then our attempts to eradicate rape will continue to be ignored domestically. Not until women are adequately supported and domestic police, prosecutors, and judges begin to conceive of rape as a weapon of patriarchy, power, and subordination will rape be confronted as a social pandemic in both war and peace.

Erin wishes to acknowledge the immense support and mentorship of Professor Doris Buss who inspired the pursuit of this research.

Erin Stevens is an LLB graduate of the Faculty of Law at the University of Ottawa. For the past three years Erin has served as a research assistant to Professor Doris Buss in her extensive research into sexual violence and genocide. Erin has spent the last two years tracking the treatment of sexual violence in the ICTY/ICTR. From 2008-2009, Erin served as a Legal Research Intern at the Canadian Centre for International Justice, working on various war crimes issues.

¹"Rape is an accusation easy to make, and hard to be proved, and harder to be defended by the party accused tho' never so innocent" (Backhouse 171-172).

²This is not to suggest that the ICTY/R consistently accept the testimony of women. For example, in *Stakic*, a victim's testimony that she was repeatedly able to find clothes in the place where she was detained after he clothes had been ripped off by her perpetrator raised the scepticism of the chamber because they "found it difficult to believe that she had so many clothes with her while in detention." (*Prosecutor v. Stakic* para. 796). Despite this scepticism over a seemingly innocuous detail the chamber still found that the acts of rape testified to were true.

³273.2 (2) No consent is obtained,

for the purposes of sections 271, 272 and 273, where

(a) the agreement is expressed by the words or conduct of a person other than the complainant;

(b) the complainant is incapable of consenting to the activity;

(c) the accused induces the complainant to engage in the activity by abusing a position of trust, power or authority;

(d) the complainant expresses, by words or conduct, a lack of agreement to engage in the activity; or

(e) the complainant, having consented to engage in sexual activity, expresses, by words or conduct, a lack of agreement to continue to engage in the activity.

(3) Nothing in subsection (2) shall be construed as limiting the circumstances in which no consent is obtained.

273.2 It is not a defence to a charge under section 271, 272 or 273 that the accused believed that the complainant consented to the activity that forms the subject-matter of the charge, where

(a) the accused's belief arose from the accused's

(i) self-induced intoxication, or

(ii) recklessness or wilful blindness; or

(b) the accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting.

⁴(A) There shall be set up under the authority of the Registrar a Victims and Witnesses Support Unit consisting of qualified staff to:

(i) Recommend the adoption of protective measures for victims and witnesses in accordance with Article 21 of the Statute;

(ii) Ensure that they receive relevant support, including physical and psychological rehabilitation, especially counselling in cases of rape and sexual assault; and

(iii) Develop short term and long-term plans for the protection of wit-

nesses who have testified before the Tribunal and who fear a threat to their life, property or family.
 (B) A gender sensitive approach to victims and witnesses protective and support measures should be adopted and due consideration given, in the appointment of staff within this Unit, to the employment of qualified women.

References

- Anghie, Antony and B. S. Chimni. "Third World Approaches to International Law and Individual Responsibility in Internal Conflicts." *Chinese Journal of International Law* 2 (1) (2003): 77-103
- Backhouse, Constance. "Child Witnesses—'By Psychological Definition ... A Disservice to the True End of Justice': Souliere, 1951-52." *Carnal Crimes: Sexual Assault Law in Canada, 1900-1975*. Toronto: Osgoode Society, 2008. 165-192.
- Buss, Doris. "Rethinking Rape as a Weapon of War." *Feminist Legal Studies* 17 (2009): 145-163.
- Clark, Lorenne. *Evidence of Recent Complaint and Reform of Sexual Assault Law: Still Searching for Epistemic Equality* Ottawa: Canadian Advisory Council on the Status of Women, 1993. 16-17, 62-66.
- de Brouwer, Anne-Marie L. M. *Supranational Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and the ICTR*. Amsterdam: Intersentia, 2005.
- Du Mont, Janice and Deborah Parnis. "Constructing Bodily Evidence through Sexual Assault Evidence Kits." *Griffith Law Review* 10 (1) (2001): 63-76.
- Feldberg, Georgina. "Defining the Facts of Rape: The Uses of Medical Evidence in Sexual Assault Trials." *Canadian Journal of Women and the Law* 9 (1) (1997): 89-114.
- Mack, Kathy. "Continuing Barriers to Women's Credibility: A Feminist Perspective on the Proof Process" *Criminal Law Forum* 4 (2) (1993): 327-353.
- MacKinnon, Catherine. "Rape: On Coercion and Consent." *Toward a Feminist Theory of the State*. Cambridge: Harvard University Press, 1989.
- McIntyre, Sheila, Christine Boyle, Lee Lakeman, and Elizabeth Sheehy. "Tracking and Resisting Backlash Against Equality Gains in Sexual Offence Law." *Canadian Woman Studies/les cahiers de la femme* 20 (3) (2000) : 72-83.
- Ngendahayo, Francoise. "Gender and HIV/AIDS ICTR Challenges." Expert Group Meeting on the HIV/AIDS Pandemic and its Gender Implications. 16 November 2000. Online: <<http://www.un.org/womenwatch/daw/csw/hivaids/ictr.htm>>.
- Nowrojee, Binaifer. *Your Justice is Too Slow: Will the ICTR Fail Rwanda's Rape Victims?* United Nations Research Institute for Social Development. Occasional Paper No. 10. 2005. Online: <<http://www.unrisd.org/publications/opgp10>>.
- Nowrojee, Binaifer. "We Can Do Better: Investigating and Prosecuting International Crimes of Sexual Violence." Paper presented to the Colloquium of Prosecutors of International Criminal Tribunals in Arusha, Tanzania, 25-27 November 2004. Online: <http://www.womensrightscoalition.org/site/publications/papers/doBetter_en.php>
- Prosecutor v. Delalic et al.* IT -96-21-T. Decision on the Prosecution's Motion for the Redaction of the Public Record. International Criminal Tribunal for the Former Yugoslavia, Trial Chambers. 5 June 1997. <www.icty.org>.
- Prosecutor v. Jean-Paul Akayesu.* IT-96-4-T, Trial Judgment (2 September 1998). International Criminal Tribunal for Rwanda. Online: <www.icty.org>.
- Prosecutor v. Kunarac et al.* IT -96-23-T & IT -96-23/1-T. Judgement. International Criminal Tribunal for the Former Yugoslavia, Trial Chamber. 22 February 2001. Online: <www.icty.org>.
- Prosecutor v. Mikaeli Muhimana.* IT-95-1B-T. Judgement. International Criminal Tribunal for Yugoslavia, Trial Chambers. 28 April 2005. Online: <www.icty.org>.
- Prosecutor v. Stakic.* IT-97-24-T. International Criminal Tribunal for Yugoslavia. 31 July 2003. Online: <www.icty.org>.
- R. v. Ewanchuk,* [1999] 1 S.C.R. 330.
- R. v. Osolin,* [1993] 4S.C.R. 595.
- R. v. Seaboyer, R. v. Gayme,* [1991] 2 S.C.R.
- Rule 96. *Rules of Procedure and Evidence.* International Criminal Tribunal for Rwanda. 29 June 1995. Online: <<http://69.94.11.53/ENGLISH/rules/080314/080314.pdf>>.
- Sheehy, Elizabeth. "From Women's Duty to Resist to Men's Duty to Ask: How Far Have We Come?" *Canadian Woman Studies/les cahiers de la femme* 20 (3) (2000): 98-104.
- United Nations Office for the Coordination of Humanitarian Affairs. "Sexual Violence in Armed Conflict: Understanding the Motivations." Discussion Paper from "Use of Sexual Violence in Armed Conflict: Identifying Gaps in Research to Inform More Effective Interventions Research Meeting." [unpublished] 26 June 2008.
- Vandervort, Lucinda. "Honest Beliefs, Credible Lies and Culpable Awareness: Rhetoric, Inequality and Mens Rea in Sexual Assault." *Osgoode Hall Law Journal* 42 (2) (2004): 626-660.
- Walsh, Connie. "Witness Protection, Gender and the ICTR." Coalition for Women's Human Rights in Conflict Situations. Online: <http://www.womensrightscoalition.org/site/advocacyDossiers/rwanda/witnessProtection/report_en.php>.