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**Ungendering Justice
Constituting a Court, Securing a Conviction,
Creating a Human Right**

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That rape and sexual enslavement of Muslim women and girls was used as an ethnic cleansing strategy by the Bosnian-Serbs in the wars in the former Yugoslavia is now well known. On February 22, 2001 when the International Criminal Tribunal for the former Yugoslavia, the ICTY, convicted three Bosnian-Serb soldiers of crimes against humanity for this tactic, its verdict was hailed as groundbreaking. It signaled that the business as usual dismissal of war-time rape as a matter of boys being boys or collateral damage was at an end. Less well known are the forces that converged to make this conviction possible. Less discussed are the radical implications of this judgment and the promise it holds for uncovering the gender biases of international law and challenging them.

The February 22, 2001 verdict, in what is known as the Kunarac case, was the culmination of a trial that was groundbreaking from beginning to end. First was the unique nature of the indictment. This was the first war crimes trial that dealt exclusively with rape, sexual abuse and sexual enslavement. It was the first indictment that clearly distinguished rape from torture. The nature of the proceedings was also distinctive. In addition to defining rape in terms of criteria of consent rather than force, so that rape was understood in terms of unwanted rather than forced penetration, the Court distinguished genuine consent from apparent consent, indicating that the context of the situation established whether or not genuine consent was

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possible. It noted that situations characterized by power imbalances, for example, the relationship between a civilian and a soldier, or imbued with threats, for example, terrorizing a civilian population, made genuine consent impossible. It also made the woman's experience of what happened to her body rather than the man's explanation of what was going on in his mind (I thought her no meant yes. I took her silence as consent) the determining factor in deciding whether or not a rape occurred. In this way the Court acknowledged the woman's epistemic authority—her right to define and bear witness to her experience. Finally, the verdict. In finding the soldiers guilty the court cited two principles. One principle stated that that men of substance do not abuse women. The other cited the women's human right to sexual self-determination. Though the first principle is somewhat conservative insofar as it reinforces the gendered ideology of men as protectors of women, the second is radical—it effectively creates a new human right—the right to sexual integrity. In creating this right it reframes human rights discourses. Instead of being invoked to defend the dignity of the invulnerable body, a body traditionally gendered male, they now need to be seen as affirming the dignity of the vulnerable body, a body traditionally gendered female.

In this piece, I take a closer look at the forces that converged to make this groundbreaking judgment possible and, using this case as a case study, I consider the radical and promising implications of appealing to human rights to affirm the dignity of the vulnerable body.

Constituting a Court

On May 25, 1993 the UN Security Council, judging that the wars in the former Yugoslavia were a threat to international peace and security, established the ICTY. The Court was expected to restore peace and security by prosecuting violations of established international war crimes and humanitarian law and by strengthening

existing legal codes.¹ Given this expectation and the fact that most of the ICTY judges were academics interested in developing international law and institutions we might say that the Kunarac indictment, in taking the radical steps of focusing on the gendered criminality of the Bosnian-Serb genocide strategy, in reformulating the criteria of rape and in creating a human right to sexual self determination, did what the Security Council expected it to do.²

Catherine MacKinnon had high expectations for the Court. Speaking at the Yale Law School in April 1994 she declared: “The ICTY stands poised to develop an international jurisprudence of sexual assault as integral to the law of nations for the first time.”³ She based her expectations on the statute that established the ICTY – especially on the differences of this statute from those of the Nuremberg and Tokyo courts. Unlike these post World War II courts whose directives were either silent on the issues of rape and forced prostitution, or only saw rape as a species of torture, the ICTY statute specifically named rape and forced prostitution as prosecutable crimes. Further, Rule 96 of the ICTY statute stipulated that no corroboration was required in sexual assaults, that consent was not an acceptable defense, and that no evidence of prior sexual conduct was admissible.⁴ MacKinnon also believed that women’s demands for accountability played a role in the structuring of the court, and that given these demands and the court’s statutes, the ICTY had an historic opportunity to identify rape as a human rights violation.⁵

Despite their different charges, the Tokyo and Nuremberg courts and the ICTY faced similar situations—they were charged with prosecuting war-time actions that had yet to be identified as criminal in international law. Both courts had to push the edges of

¹ Rachel Kerr, *The International Criminal Tribunal for the Former Yugoslavia: An Exercise in Law Politics and Diplomacy* (Oxford: Oxford University Press, 1999), 3.

² *Ibid.*, 34, 95.

³ Catherine MacKinnon, *Are Women Human? And Other International Dialogues* (Cambridge: Harvard University Press, 2006), 178.

⁴ *Ibid.*

⁵ *Ibid.*, 191.

established law to transform the criminality of a national and military policy into a punishable international offense. In the case of the Nuremburg court, the sovereign right of a nation to deal with its own citizens without interference from other states had to be identified as a violation of humanitarian law. In the case of the ICTY, the use of rape as a war strategy had to be criminalized as an illegal weapon. The Nuremburg court redrew the lines of sovereign immunity. The ICTY redefined the crime of rape and in the process of rejecting prevalent definitions of rape and sexual assault exposed the gendered assumptions and injustices of these definitions.

Securing a Conviction

Unlike the recently named crimes of genocide and ethnic cleansing, rape has been a recognized war crime for centuries. While the crimes of genocide and ethnic cleansing needed to be named to become legally visible, the legally visible crime of war time rape was rendered empirically invisible first by gendered norms of epistemic credibility that establish men's reading of events as objective and rational (thus meeting the rational man legal standard) and women's accounts as emotional and suspicious (thus failing to meet the rational legal standard of credible evidence); second by masculine myths of sexuality that legitimate men's aggressive sexual behaviors as natural; third by myths of femininity that portray women as desiring sexually aggressive men; and fourth by unspoken military codes that accept rape as a spoil of war.

Ignoring reports of rape, and calling rape something else (collateral damage, consensual sex, letting off steam) are common ways of making rape disappear. Legally, the invisibility of rape is aided and abetted by equating rape with torture. The endurance of the tradition that identifies rape with torture relies on several factors: men determining the meaning of rape (including the circumstances in which sexual intercourse can be called rape); rules of shame and modesty that, in ensuring women's silence, ensured that men's account of what counts as rape would not be challenged; and ideas of violation that measure harm by the standard of the masculine

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autonomous body such that absent cuts, bruises, or wounds, no harm can be claimed.

These extra legal factors led to legal standards that, in equating rape with torture, held that a rape could only be said to occur if there was evidence of physical violence. This standard of rape reduces it to a matter among men. It takes no account of the raped woman's experience of having been abused and violated. It can hold only as long as men's voices dominate public discourse; as long as codes of femininity silence women; and as long as women who do speak lack epistemic authority. The ICTY made the crime of rape legally and empirically visible by paying attention to the raped women's experience and challenging the men's accounts. In its sentencing decree, it went so far as to argue that Kunarac's and Kovač's false defenses, Kunarac's claim that a nineteen year old girl seduced him, and Kovač's invented account of his relationship with Witness #87, constituted aggravating factors and should be considered in their punishment. In listening to the women, the Court refused to equate the absence of bruises with the absence of abuse. It signaled that men's account of sexual relationships would not go uncontested.

The lawyers defending the soldiers in the Kunarc case relied on the equation of rape with torture to argue that the prosecution did not prove that the alleged victims of rape were exposed to any severe physical or psychological suffering: that rape in itself is not an act that inflicts severe bodily pain and therefore that no crime against humanity occurred.⁶ In effect, the defense argued that if the Court wished to include rape in the category of crimes against humanity it would have to identify rape with the violence and pain associated with torture, and that if the Court defined rape without reference to this understanding of violence and pain it could not establish rape as a crime against humanity. Given accepted legal definitions of rape and crimes against humanity, there was nothing amiss in the defense lawyers' logic. Their argument failed not because the Court rejected

⁶ Marlise Simons, "Three Serbs Convicted in Wartime Rapes," *New York Times*, 22 Feb. 2001.

the defense lawyer's reasoning but because, attending to the women's accounts of rape, it contested the assumptions of the defense lawyer's arguments. Listening to the women, it refused to accept the traditional understandings of rape, torture and crimes against humanity. Without discounting the matter of physical and psychological suffering, the Court found that the crucial issue in determining whether or not a criminal act rises to the level of a crime against humanity concerns the matter of human dignity. The women's testimonies convinced the Court that sexual integrity and human dignity are too tightly intertwined to be separable. Violating one violates the other.

The indictment, in distinguishing rape from torture, should have alerted the defense lawyers to the futility of their tactic. Rather than accepting the indictment as a warning against their "rape must be the equivalent of torture to be considered a crime against humanity" strategy, however, the defense lawyers challenged the validity of the indictment and the objectivity of the judge. This becomes clear in their appeal. Here the defense argued that Judge Florence Mumba's prior denunciations of rape and sexual slavery in the Balkan war, her previous statements urging a broader definition of rape, and her earlier experience as a former representative of Zambia to the UN Commission on the Status of Women, tainted her ability to be an impartial judge. The Appeals Chamber rejected this argument. It found that Judge Mumba's experience and insights made her uniquely qualified to hear the case. The Appeals Chamber recognized that the trial court, first in distinguishing rape from torture, second in insisting that reports of rape be thoroughly investigated, and third in mandating that those accused of rape and sexual slavery face the bench, brought a gendered eye to the evidence before it. It did not, however, find that this gendered eye was prejudicial. Instead it found that the Court, in paying attention to the dynamics of sex and gender, would take account of realities that a "neutral" eye might ignore, and that its judgments would reflect a more complete assessment of the situation.

A gendered eye could see what an "objective" eye would not notice: rape, insofar as it is a physical phenomenon, is a crime that

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can be committed by men or women against women and men. In a world where one's gender did not carry cultural and symbolic baggage, rape, if it occurred, would be a non-gendered sexual crime. In our gendered world, however, rape is predominantly a crime committed by men against women. The statistics are clear. In times of war, rape is disproportionately a crime committed by military men against civilian women. In times of peace it is disproportionately a crime committed by men against women. In times of war it cannot be adequately addressed through the gender neutral concept of torture. This was especially true in the ethnic cleansing campaign in the Balkans. The Bosnian-Serb command ordered the systematic rape, not the torture, of Muslim women and girls.

To adequately respond to the realities of the conflict in the former Yugoslavia, the ICTY had to distinguish rape from torture. To understand the motives, effects and criminality of the genocide rape strategy, the Court needed to be alert to the ways that rape and torture, despite their strong family resemblance, constitute different violations of our humanity. The distinction between rape and torture is twofold. First, rape, unlike torture is a specific sexual assault. So long as rape is considered as a species of torture, we will fail to see the ways that our dignity as persons is inexorably tied to our dignity as sexual beings. Second, rape, unlike torture, is a gendered and symbolic crime. It depends on accepted gender codes both for its effectiveness as a military strategy and for the fact that, whether or not it is part of an officially ordered policy, rapists expect to be immune from prosecution.

The Bosnian-Serb ethnic cleansing/genocide strategy paid attention to the difference between rape and torture. The men were tortured and disappeared or murdered. The women were raped, sexually assaulted, and sometimes, but not always, tortured or murdered. The Court also paid attention to the difference. It distinguished the war crime of torture from the war crime of rape, identifying each in its own right as a human rights violation. Though it broke with common practice in its attention to the gendered dimensions of the Bosnian-Serb ethnic cleansing campaign, it also

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followed accepted legal principles in noting the gendered realities of war time rape as articulated in the Geneva Conventions.

There is a certain irony in the fact that the Geneva Conventions, in providing the precedent for the Court's gendered indictment, also provided the script for using women's bodies as instruments of ethnic cleansing and genocide. Article 75 of Protocol I of the Geneva Conventions identifies forced prostitution and indecent assault as an outrage on personal dignity, an outrage that would apply equally to men and women. Article 76, however, speaks of women as deserving special respect. It says that women in particular must be protected against rape and indecent assault, and that special protection is owed them and their small children.⁷ Articles 27 and 14 of the Geneva Convention are more specific. According to Article 27 "Rape, enforced prostitution, e.g. the forcing of a woman into immorality by violence or threats and any form of indecent assault... are and remain prohibited... and women... have an absolute right to respect for their honour and modesty, in short for their dignity as women."⁸ Article 14 states that women shall be treated with all the regard due to their sex. Commenting on Article 14, Cherif Bassiouni, a member of the commission that established the International Tribunal for the Former Yugoslavia, notes that this means taking women's weakness, and the need to protect them into consideration.⁹

Reading these protocols closely, we see that the meaning of a raped woman's body is not commensurate with the meaning of a raped man's body. It cannot be understood simply as an indecent assault or as an outrage on her personal dignity. Matters of her morality, modesty, honour, and weakness, that is, her need for special protection, are issues that concern her entire community. A raped woman's body implicates her people, specifically its men, for it is the men who are charged with protecting and guaranteeing "their" women's dignity. Her honour cannot be separated from theirs.

⁷ M. Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law* (The Hague: Kluwer Law International, 1999), 357-358.

⁸ *Ibid.*, 352-353.

⁹ *Ibid.*, 356.

Raping a woman is an assault on the men of her community. Her raped body is a writing pad upon which men send messages of emasculation and hyper masculinity to each other.

I think that it is important to see the role that the idea of women's modesty plays in these conventions. There is an important relationship being established between women's modesty, honour, integrity and dignity, and their need to be protected. In relying on traditional rules of modesty to make the case for the special criminality of heterosexual rape, the Conventions reflect and reinforce traditional gender geographies. Positioning women as needing special attention and identifying the special protection they need with the special protection due to children establishes an uncomfortable analogy between women and children. Both need to be looked after. The logic of special protection of women differs from the logic of the special protection for children, however, once the idea of modesty is introduced. Women cannot, without compromising their modesty or risking their protection and reputation, enter the public domain to bear witness to their experience. Her testimony comes at the price of her modesty. It carries the cost of being shamed by her people and becoming ashamed of herself. It is not just the fear of losing their protection that keeps women from speaking out; it is the shame of having been exposed that keeps them silent. Thus the gendered protection racket and the fear of being shamed ensure that a woman's experience of rape will be filtered through and defined by the words of men.

Creating a new Human Right

The court's finding of guilt is clear. It establishes that the well worn defenses of war-time rape and sexual abuse, are no longer acceptable. In rejecting the usual excuses, the court invoked two principles. One principle refers to men and their responsibility to women. It declares that, "In time of peace as much as in time of war, men of substance do not abuse women."¹⁰ The other principle refers to women and their rights. It links women's dignity to their "fundamental human

¹⁰ Simons, "Three Serbs Convicted in Wartime Rapes."

right to sexual self-determination.”¹¹ The man of substance principle defers to the traditional gendered idea of women as weak and vulnerable. It accepts the standard meaning of war time rape as a violation of women’s unique vulnerability. By finding that men are responsible for ensuring that women are not abused this aspect of the ruling implicitly reiterates the Geneva Convention’s idea that women’s honor and modesty requires special protection. The second principle of the Court’s verdict, the affirmation of the women’s human right to sexual self-determination, however, is silent on the question of women’s honor and modesty and says nothing about men’s responsibility to protect women. Between what this principle says—women have a right to sexual self determination—and what it does not say—men are not held responsible for protecting this right—the Court challenges gender codes that legitimate women’s vulnerability to men’s power

In reminding men of their obligation not to abuse women and insisting that the conditions of war do not absolve them of this obligation, the Court accepts the fact that men can abuse women. It positions men as having the obligation to protect women from men’s abuse without asking how men acquired the power to abuse women and without asking why women need male protection. Whether the Court thinks that men’s power to protect women is a matter of natural/biological or social factors, it is clear that it expects men of substance to protect women from abuse first by disciplining themselves (they should not do what they can do, they should not abuse women) and then by disciplining other men (they should not allow other men to do what men can do). In a military situation, this is a chain of command issue. Officers are expected to use the power of their rank to model the man of substance ideal to those under their command. They are expected to train their men to protect civilian women. This includes preventing rape and sexual abuse. In

¹¹ “Judgement of Trial Chamber II in the Kunarac, Kovač and Vuković Case,” The Hague, 22 February 2001 JL/P.I.S./566-e, 6; available from http://www.icty.org/x/cases/Kunarac/tjug/en/010222_Kunarac_Kovač_Vukovic_summary_en.pdf.

times of peace where there is no chain of command and no military discipline to enforce the men of substance rule, it is a matter of personal responsibility. In pointing to the flawed character and criminality of men who fail to protect women from other men's or their own aggression, this men of substance principle may be seen as deflecting attention from the criminality of gender codes that legitimate women's vulnerability to men's power. By invoking the sexual self-determination principle, however, the Court indicates that it is not altogether blind to the fact that patriarchal gender structures must be named as an accomplice to the crime of war time rape. By speaking of her dignity rather than his responsibility, the sexual self-determination principle shifts our attention from the perpetrator to his victim. In linking women's dignity to their "fundamental human right to sexual self-determination", the court rejects the protector-protected sexual contract. It affirms the principle of embodied subjectivity as it attends to the sexed realities of embodiment, something ignored in previous crimes against humanity judgments.¹²

The Court does not claim to be doing anything radical. It acts as though it is merely articulating the obvious fact that sexual integrity cannot be severed from human integrity such that an assault on one is necessarily an assault on the other. It does not flag the fact that it is only by its judgment that a relationship between sexual and human integrity is being established in international law.

The effects of establishing the human right to sexual self-determination are difficult to predict. If the idea of self-determination is allowed to slide into the idea of autonomy, creating a right to sexual self-determination may have little effect on the autonomous subject's place in human rights discourses. Insofar as the right to sexual self-determination directs us to think of the self as existing in relationship with and vulnerable to others, however, it may get us to reassess our love affair with the autonomous subject. If the newly created right to sexual self-determination is read as a challenge to the way that we have read rights as inhering within individuals rather than as existing between them, it will inaugurate a paradigm shift

¹² Ibid.

where the subject of rights, instead of being understood in terms of the first person singular autonomous I, will be understood in terms of the first person plural corporeal, sexed, intersubjective and vulnerable we.

Given that to have political effects, re-conceiving the subject of human rights must engage the discourse of the law, we need to return to the ICTY verdict to see how the law can become instrumental in advocating a politics of intersubjective embodied vulnerability. The Kunarac verdict invokes two distinct ways of criminalizing gendered violence. It cites the language of individual responsibility bequeathed to it by liberal social contract theorists to contest the idea of the autonomous subject this language traditionally supports. In creating the human right to sexual self-determination, the Court appealed to the familiar language of autonomy to evoke the idea of the vulnerable subject. The particulars of the Court's judgment make it clear that the issue of individual responsibility weighs heavily in its findings.

Though the court finds that the rapes were part of a systematic campaign to terrorize Muslims in ways that would make it impossible for them to return to the region; and though it finds that the soldiers knew of the systematic transfer of women to detention centers where they were sexually abused; it rejects the claim that the defendants were following orders. In the court's words, "...the evidence shows free will on their part."¹³ Struggling to account for this free will, the Court notes that the armed conflict offered blanket impunity to the perpetrators and called them "lawless opportunists."¹⁴ It describes the accused soldiers as morally depraved, corrupt men who relished exercising absolute power. But the Court cannot decide whether the conditions of war created the opportunity for criminal personalities to flourish or whether war itself, in marking certain people as enemies, seduced moral men into committing immoral acts. Thus while it finds that "evidence shows the effect a criminal personality will have in war on helpless members

¹³ Ibid., "Kunarac Summary Judgement," 2.

¹⁴ Ibid., 3.

of the civilian population”, it also notes that, “the three accused are men with no criminal past. However they thrived in the dark atmosphere of the dehumanization of those believed to be enemies.”¹⁵ If the Court cannot decide how to account for the unforced behavior of these free willed men, it has no trouble categorizing their actions: they are criminal. In peacetime, the Court notes, they would be cited as organized crime.¹⁶

It is, I think, important to note that even when the Court is focused on the criminality of the perpetrators, it does not sever their culpability from the ways that the structure of war, in dehumanizing those identified as enemies, creates favorable conditions for the soldiers’ crimes. While the Court does what the law is charged with doing, assessing individual culpability, responsibility and guilt, its opinion, in critiquing the discourses of war and enemies, allows us to see the ways that the sexual self determination principle situates the rights and responsibilities of the individual within their structural contexts.

Though the men of substance principle appears regressive insofar as it does not address the structural violence that enables and encourages the practice of genocidal rape, the Muslim women’s testimonies make it painfully clear that it is by individuals, not social forces, that structural violence is perpetrated and suffered. Standing alone, the men of substance principle could be seen as limiting the function of the law to that of assessing individual culpability, responsibility and guilt. Joined with the right to sexual self determination principle, however, the man of substance principle positions the law as having the authority to recognize the culpability of those who materialize social codes through their individual actions.

The Court’s verdict does not pit the significance of the individual against the importance of established norms. Rather, it appeals to existing norms of responsibility to rework the norms of criminality. Holding individual soldiers responsible for their actions by finding that they failed to respect the sexual integrity, rather than

¹⁵ Ibid.

¹⁶ Ibid., 2.

the honor, of the raped women, the court transformed the war time crime of rape from the violation of the gendered status of a woman to the violation of the humanity of vulnerability. The two principles of the verdict refer us to the ongoing exchange between anonymous social structures and the individual lives structured by them. They show us that unless these structures are critiqued individuals will continue to unreflectively reinforce them. They also show us that because it is individuals who give these structures life they can be critiqued and changed. Where the men of substance principle alerts us to the importance of individual responsibility, the sexual integrity principle requires that we critique current ways of assessing who is responsible for what. The Court finds the logic of the enemy responsible for the Bosnian-Serb soldiers' abuse of women's vulnerability and invokes the principle of genuine consent to hold them accountable for their violence. The court, in refusing to exonerate men, who use the logic of the enemy as a shield for their crimes, appeals to two lines of logic to find them guilty of crimes against humanity: the logic of gendered protection codes (men of substance) and the logic of human rights (sexual self-determination). As these logics circle each other, they expose the ways that our current gender codes are invitations to genocidal rape campaigns. They warn us that those who accept these invitations are guilty of crimes against humanity.

And so it comes/came to this: a Court that brought a gendered eye to justice, that used this eye to expose the gendered biases of the law, ungendered the stigma of vulnerability and introduced us to the ungendered justice of the dignity of the vulnerable body.