

**International Criminal Law and Sexual
Violence against Women: The
Interpretation of Gender in the
Contemporary International Criminal Trial
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Introduction

This book is about the prosecution of wartime sexual violence in international criminal tribunals. It explores what this development means for gender justice and equality in an era where feminism seemingly has made significant strides in international law. It addresses what the juridicalisation of gender-based violence represents for women in the contemporary context by adopting a critical legal feminist position. Its key argument is that modern-day international criminal tribunals have constructed women in wartime as either helpless women, mothers or wives of soldiers. Tribunals have often foreclosed the possibility that women could exercise resistance, or even be perpetrators of war crimes. By focusing on cases that show women's agency during war, the book suggests that to gain greater legitimacy, international criminal tribunals should encompass a broader understanding of female identity in armed conflict.

The volume explores the portrayal of the various female identities that surface in armed conflict by asking whether international law is capable of reflecting multiple gendered subjectivities in subsequent judgements. Two major legal developments underpin this book; the first is the creation of the ad hoc International Criminal Tribunal for the former Yugoslavia (ICTY) in 1992 by United Nations Security Council Resolution 827, established to prosecute individuals for the most serious violations of international humanitarian law committed during the Yugoslav conflict from 1991 to 1995. The second is the establishment of the ad hoc International Criminal Tribunal for Rwanda (ICTR) through U.N. Security Council Resolution 955 in 1994 to prosecute individuals for the most serious violations of international humanitarian law committed during the genocide that took place from April to July 1994. Both tribunals have been instrumental in placing wartime sexual violence on the map by prosecuting and convicting perpetrators of gender-based crimes. In the case of the Rwandan prosecutions, the judges redefined rape as an instrument of genocide, whereas in the case of the Yugoslav tribunal, rape was conceptualised as a crime against humanity. These redefinitions allowed the prosecution to focus on sexual violence as a deliberate wartime strategy.

ICTY wartime sexual violence jurisprudence, moreover, has been particularly substantive in defining, delineating and developing new crimes. The tribunal has rendered decisions concerning the nature of modern-day armed conflict, such as on the application and scope of Common Article 3 of the 1949 Geneva Conventions, while also 'breathing life' into the grave breaches regime by being the first institution to systematically apply it to sexual violence offences.¹

The ICTY has added significant definitional value to the Geneva Conventions by identifying comprised acts, such as rape and other sexual violence crimes, as well as

distinguishing these acts from those enumerated in the 1984 United Nations Convention against Torture. In substantially redefining gender-based crimes as serious human rights violations, both tribunals have, moreover, drawn attention to the widespread use of rape as a weapon of war and have made the connection between gendered and sexualised harm by linking it to the definition of war crimes in international law. The courts have also been pivotal in incorporating a definition of 'gender' into the Rome Statute underpinning the International Criminal Court and in criminalising a host of gender-based crimes, ranging from enslavement as a crime against humanity to an incorporation of rape as a form of torture and a crime against humanity.

While these legal successes have been extensively analysed in feminist legal scholarship and in international scholarly publications, less space has been dedicated to other crucial perspectives. The voices of feminist legal scholars who view these developments with trepidation have been largely sidelined from the dominant discourse on gender-based violence in international law. The book argues that they are just as central to the debate surrounding wartime sexual violence against women. It critically reflects on dominant feminist discourses surrounding wartime sexual violence by challenging the idea that a critique of the 'women-friendly' successes achieved by international criminal tribunals necessarily signifies the destabilisation of the female subject. Liberal feminist scholars, in particular, have voiced their concern that the legal results accomplished through the concerted efforts of feminist advocacy over the past two decades could be undermined in this way. What is most interesting is that there has been a palpable absence of gendered identities that slightly depart from the stereotypical roles associated with women in war. Unorthodox roles occupied by women have been scarcely

reflected in the judgements of the tribunals. Only rarely are instances of female agency apparent in the decisions, with very few examples of female resistance emerging in the portrayal of female identities.

The special concern of this project is to examine how constructions of female identity have been informed by two key trends, namely the conception of women through either the victimhood or the motherhood lens. The central argument is that rather than dismantling patriarchal notions of female identity in wartime, the tribunals have often contributed to a framing of women as either helpless victims of war, or as wives and mothers of soldiers. What is lost in the legal narrative constructed is the possibility of women exercising agency and resistance even in circumstances which seem inherently coercive. The stories of female shopkeepers, small business owners, teachers, police officers, politicians or even perpetrators have not emerged in the case files, but are just as important in understanding gendered identities in wartime.

The second objective is to bring to the surface the multiple gendered subjectivities that materialise in wartime by deconstructing the dichotomised understanding currently adopted in international law. Rather than regarding the law as operating in a vacuum, it has to be conceived of as a broader discipline intersecting with politics, sociology, philosophy and anthropology. Law is neither neutral, nor separate from the very process by which 'crime' and 'order' are constituted. Another claim developed is that the responsibility for promoting gender justice and gender equality falls not solely to international criminal tribunals, but now includes a much wider spectrum of politicians, NGOs and other civil society actors who need to establish formal and informal networks to provide long-lasting support services for women impacted by armed conflict.

Rather than trying to invest complete faith in the instrument of the criminal trial as a way of achieving redress, this is a call on feminists to step back and conceive of alternative ways by which to bring about gender justice.

The book echoes the call of Wendy Brown, who, in her work on tolerance, has made room for the possibility of imagining a feminist critique that can be perceptive, without necessarily destabilising the female subject.² The successes achieved, thanks in large part to feminist advocacy over the past two decades, should be accorded the recognition they deserve, but without losing sight of the critical lens with which to reflect on these crucial moments in legal history. The key questions to be addressed are:

- How are wartime identities represented in international wartime sexual violence jurisprudence?
- What does the increasing juridicalisation of gender-based violence mean for women?
- Are current feminist investments in the law the way forward in advancing the twin normative aims of gender justice and gender equality?

Methodology

The core chapters discuss how women are portrayed in key international legal decisions. These cases have, variously, been hailed as landmark moments in feminist legal discourses and have shaped the trajectory of wartime sexual violence jurisprudence. They discuss the legal tactics by which female identity is constructed, by adopting an intersectional feminist frame to address the extent to which ethnicity, frequently, is used as identity marker constitutive of female identity in the courtroom. The landmark cases to be analysed include cases such as *The Prosecutor v. Kunarac* (IT-96-23&23/1),³ *The Prosecutor v.*

Furundzija (IT-95-17/1),⁴ *The Prosecutor v Nikolic* (IT-94-2),⁵ *The Prosecutor v. Bralo* (IT-95-17-S)⁶ and the celebrated *Celebici Camp* (IT-96-21)⁷ case. In the context of the Rwandan tribunal, the book examines landmark cases, such as the *Akayesu* case (ICTR-96-4-T),⁸ the *Gacumbitsi* case (ICTR-2001-64-A),⁹ the *Kajelijeli* case (ICTR-98-44A-I),¹⁰ the *Muhimana* case (ICTR-95-1B-1)¹¹ and the *The Prosecutor v. Pauline Nyiramasuhuko & Arsènes Ntahobali* case (ICTR-97-21-I).¹² Arguments advanced by both the prosecution and the defence are examined in detail to suggest that there is a tendency to depict women in monolithic fashion with little sense of identity beyond their ethnicity. These chapters, moreover, analyse how the boundaries between ethnicity, nationality, female identity, religion and culture are continually blurred to construe a narrative of war with a clear aggressor and a defined victim. This is important from a feminist legal perspective, as the judgements imply a direct correlation between gender, ethnicity, culture and victimhood, therefore making intersectionality an appropriate framework for analysis. Notions of women as the 'mothers of the nation' are, in this way, frequently invoked in the judgements of the tribunals, in particular in relation to Bosnian Muslim women.¹³ This is problematic in so far as such evocations conjure up stereotypical and patriarchal ideas of female identity, which are not conducive to conceptualising the possibility of female agency in wartime.

The central argument weaving itself through the chapters is that the self-contained nature of the criminal trial, with its emphasis on punitive measures rather than on healing, and the law as its vehicle of expression are insufficiently flexible in capturing the multi-dimensional

nature of female identity in wartime. The language of international criminal law can only begin to fully reflect women's multiple wartime identities if it recaptures female agency, rather than if it assumes women in wartime to inevitably be victims.

Counterpoint and intersectionality

The book is underpinned by a critical method, which has been formulated by Wendy Brown as follows:

What kind of subject, produced by what kind of politics is led to seek what kind of rights, in the context of what kind of legal, cultural and state discourses with what kind of effects?¹⁴

Counterpoint is predominantly concerned with the effects and implications of debating wartime sexual violence issues within a contemporary liberal, universalist international legal framework. It does not purport to produce a comprehensive doctrinal analysis of recent developments in international criminal jurisprudence. Rather, it uses the legal materials as a springboard to consider wider issues of gender, ethnicity, culture and violence as they are manifested in the contemporary violence against women debate.

Intersectionality is another important methodological framework, as it showcases the multiple dimensions by which women are discriminated against across all areas of public life. It has been defined as signifying 'the complex, irreducible, varied and variable effects, which ensue when multiple axis of differentiation - economic, political, cultural, psychic, subjective and experiential - intersect in historically specific contexts'.¹⁵ From a methodological perspective, it has raised awareness of the intersection between power relations, cultural practices and

gender roles, drawing attention to their intertwined nature. It is primarily concerned with subjectivity referring to a particular paradigm based on individual categories,¹⁶ as well as with the interplay of different power relations and/or systems of oppression in society. Furthermore, it has made a significant impact beyond feminism, notably in the international human rights arena. This book traces the origins of intersectionality, its international success and its relevance to a critical legal feminist perspective on an issue such as wartime sexual violence against women, while also examining its drawbacks.

Notes

- 1 K. Roberts, 'The Contribution of the ICTY to the Grave Breaches Regime', 7 *Journal of International Criminal Justice* (2009), at 743. Article 3(3) of the ICTR Statute also provides that rape, enforced prostitution and any kind of indecent assault can constitute a grave breach of the Geneva Conventions 1949.
- 2 W. Brown, *Regulating Aversion: Tolerance in the Age of Identity and Empire* (Princeton, NJ: Princeton University Press, 2008).
- 3 *The Prosecutor v. Kunarac* (IT-96-23&23/1), Trial Chamber Judgement, 22 February 2001.
- 4 *The Prosecutor v. Furundzija* (IT-95-17/1), Trial Chamber Judgement, 10 December 1998.
- 5 *The Prosecutor v. Nikolic* (IT-94-2), First Amended Indictment (IT-94-2), 4 November 1992.
- 6 *The Prosecutor v. Bralo* (IT-95-17-S), Amended Indictment (IT-95-17), 18 July 2005.
- 7 *The Prosecutor v. Mucic et al.* (IT-96-21-A), 'Celebici Judgement', Appeals Chamber Judgement, 2003.
- 8 *The Prosecutor v. Akayesu* (ICTR-96-4-T), Judgement, September 1998.
- 9 *The Prosecutor v. Gacumbitsi* (ICTR-2001-64-A), Judgement, 7 July 2006.
- 10 *The Prosecutor v. Kajelijeli* (ICTR-98-44A-I), Trial Chamber Judgement, 23 May 2005.

- 11 *The Prosecutor v. Muhimana* (ICTR-95-1B-1).
- 12 *The Prosecutor v. Pauline Nyiramasuhuko & Arsénes Ntahobali Case* (ICTR-97-21-I).
- 13 In D. Zarkov, *The Body of War: Media, Ethnicity, Gender in the Breakup of Yugoslavia* (Durham, NC: Duke University Press, 2007).
- 14 W. Brown, 'Revealing Critique: A Response to Kenneth Baynes', 28 *Political Theory* (2000), at 469, 477.
- 15 A. Brah & A. Phoenix, 'Ain't I a Woman? Revisiting Intersectionality', 5 *Journal of International Women's Studies* (2004), at 75-76.
- 16 *Ibid* at 1771 (emphasis added).