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The Fixation on Wartime Rape: Feminist Critique and International Criminal Law

Nicola Henry
La Trobe University, Australia

Abstract

Since the early 1990s, wartime rape has been successfully prosecuted as a war crime, a crime against humanity and a crime of genocide. Feminist scholars, however, warn that the unprecedented attention to wartime sexual violence within international criminal law has had wide-ranging and unintended consequences. The aim of this article is to examine the heightened consciousness around wartime sexual violence and its ascendancy as a crime against 'humanity'. The article draws attention to two discourses. The first is the feminist political project, which sought to delineate wartime rape as a crime of grave magnitude that warranted explicit treatment under international criminal law; the second is the post-modernist feminist discourse, which questions the desirability of fixating on sexual violence against women in conflict. The point of this article is not to situate myself in either camp but rather to examine the power of international criminal law to pronounce meaning, demarcate the gravity of crimes and silence alternative stories. I will argue that due to the impassioned political controversy over rape within populist, scholarly and legal realms, not only are the substantive problems associated with rape prosecutions often left obscured but problematic rape hierarchies are reified and victim experiences further marginalised.

Keywords

Agency, armed conflict, feminist critique, international criminal law, recognition, sexual violence

Corresponding author:
Nicola Henry, Department of Politics, Philosophy and Legal Studies, School of Social Sciences and Communications, La Trobe University, Bundoora Campus, Melbourne, Victoria 3086, Australia.
Email: n.henry@latrobe.edu.au

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Introduction

Rape has always been an emotional yet familiar narrative of armed conflict. This is not simply due to its sheer prevalence and scale, nor its often horrific dimensions. Rather, because of fervent political ideologies and nationalism, wartime rape has perpetually incited much passion, controversy and outrage. This is illustrated by the vivid portrayals of rape in mythical, artistic and literary representations throughout history – not necessarily as instances of concern for victims, but often as muscular narratives of nationalism, heroism and defeat. Regardless of era or geographic location, these incidences of mass rape have consistently ignited outrage and indignation, despite the fact that historically international and local courts have failed to provide any substantive justice for victims of these crimes.

Notwithstanding the widespread literary, artistic and political attention to wartime rape throughout history, it was not until the 1990s that sexual violence in armed conflict received any substantive international, legal attention.[1] Rape in wartime has since become a much discussed subject in personal memoirs, journalistic accounts, films with Hollywood stars and human rights and activist campaigns. Indeed, the armed conflicts in the former Yugoslavia, Rwanda, Darfur and the Democratic Republic of Congo have virtually become synonymous with rape in part due to the attention given to these crimes (Neier, 1998). The Democratic Republic of Congo, for example, has been widely dubbed the 'rape capital of the world' (BBC News, 2010). This attention is in large part a product of tenacious feminist activism as well as shifting formations of both victimology and international criminal law. But what are the consequences of this unprecedented focus on wartime rape? Does the international criminalisation of wartime rape result in a hierarchy of crimes? Is it wrong or misguided to prioritise the prosecution of wartime rape within international criminal law?

This article draws attention to two discourses. The first section of the article briefly describes the so-called feminist 'success' story of wartime rape and the developments of international criminal law since the 1990s that sought to clearly delineate wartime rape as a crime of grave magnitude that warranted explicit treatment as a crime that offended humanity.[2] In the second section, I thereafter critically examine postmodernist feminist[3] debates that question the desirability of fixating on sexual violence against women in post-conflict justice initiatives.[4] I end the article by focusing on the key concepts of recognition, redistribution and representation (Fraser, 2008) as the measuring sticks for international criminal justice in an attempt to show why prioritising the prosecution of wartime sexual violence is necessary but not unproblematic. This should not be taken to mean that international criminal courts are neutral, universal, apolitical or respectful spaces for the disclosure of traumatic wartime experiences. My point, rather, is to underscore the importance of appreciating both law's limits and its potential as well as to emphasise the gap between law in rhetoric versus law in action. I seek to demonstrate that the construction of problematic hierarchies (namely discourse on the comparative gravity of crimes) is problematic. I argue that the assumption that rape is in fact the 'worst of crimes', or equally, the assumption that rape is treated in this way, may draw attention away from the substantive problems associated with prosecuting sexual violence at the international level. If we look closely at such problems, we may gain a

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better understanding of the universal issues surrounding the prosecution of sexual violence – in both international and domestic jurisdictions.

Weapons of War: Wartime Rape and International Criminal Justice

Wartime rape has been viewed and treated, at least historically, as abhorrent, incomprehensible and unspeakable, yet at the same time as inevitable, excusable or even laudable. Since the early 1990s, the inevitability of wartime rape and its subsequent treatment within the international community has undergone a massive conceptual shift. No longer is wartime rape an inevitable by-product of armed conflict or a 'spoil' of war, but rather it is now widely viewed as a 'weapon of war' (Stiglmayer, 1994), a military strategy or an 'instrument of genocide' (Askin, 2003; see also Buss, 2009). Indeed, the 2008 United Nations Security Resolution 1820 explicitly states that sexual violence can be used as 'a tactic of war in order to deliberately target civilians or as a part of a widespread or systematic attack against civilian populations'. This label has been applied consistently across most modern conflicts where rape has been prolific.

Wartime rape is now – at least formally – treated as a crime beyond a crime; a violation of 'humanness', and an offence against all of humankind (Luban, 2004). This significant reconceptualisation has enabled rape and other forms of sexual violence to be formally and explicitly classified as extraordinary crimes prosecutable under international criminal law. The politicisation of wartime rape as a serious international crime has thus opened an important space from which to bring attention to the experiences of victims and to counteract the legal silence that has long persisted (Zarkov, 2007).

The establishment of international criminal courts during the 1990s has subsequently led to a number of symbolic, procedural and substantive victories for both victims and gender justice. Although some of these developments are only relevant to the International Criminal Court (ICC) and/or are relevant to all victims of international crimes, these are nonetheless significant achievements specifically for wartime sexual violence.[5] For example, a number of specific sexual violence crimes, such as rape, sexual slavery, enforced prostitution, forced pregnancy and enforced sterilisation, are explicitly prohibited in the Statute of the ICC. The Rome Statute of the ICC also prohibits persecution on the grounds of gender as a crime against humanity. Progressive victim friendly rules and evidence of procedure have been introduced in an attempt to avoid the perpetuation of stereotypes and rape myths through particular evidentiary rules, such as rules on consent and corroboration, as well as the introduction of protective measures in the courtroom to avoid, as much as possible, secondary revictimisation. Victim and witness units have been set-up with special expertise in assisting and counselling sexual violence victims in preparation for bearing witness. Additionally, a special gender advisor has been appointed to the ICC with gender-sensitive expertise, including staff with a background in trauma work, including trauma caused specifically by sexual violence. Notably, for first time in the history of international war crimes courts, victims at the ICC are able to express their views and concerns; are entitled to legal representation; may be awarded reparations, compensation, restitution and rehabilitation through the Trust Fund for Victims (which includes several activities and projects to address the harm of sexual

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violence) and are the recipients of greater outreach and support than ever before in this context.

Finally, rape and other forms of sexual violence have been successfully prosecuted as war crimes, crimes of genocide and crimes against humanity, signalling that these crimes are among the 'most serious crimes of concern to the international community as a whole' (Article 5, Rome Statute). Prior to the 1990s, the only occasion where rape crimes were prosecuted by an international war crimes court was at the Tokyo Trial in 1946, where a small handful of perpetrators were prosecuted for war crimes, which included rape as an ancillary charge. Since 1993, 78 individuals in 24 different cases have been charged with crimes of sexual violence at the International Criminal Tribunal for the former Yugoslavia (ICTY). Sexual violence allegations and charges are also included in the 14 at-trial cases and pretrial cases currently before the ICTY – including the trial of Ratko Mladić. Thus far, 28 individuals have been convicted for crimes of sexual violence at the ICTY (Mischkowski and Mlinarevic, 2009). In comparison, at the International Criminal Tribunal for Rwanda (ICTR), 37 individuals in 26 different cases have been charged with crimes of sexual violence since 1994. Thus far, 14 individuals have been convicted for crimes of sexual violence at the ICTR (pre-appeal); 14 acquitted of any rape charges; and 4 have had the rape charges against them dropped due to guilty pleas. Of the other individuals accused of rape, one died during the trial; three others had their cases transferred to national jurisdictions and one is currently at large. And finally, in relation to the record so far at the ICC, 16 individuals in 11 different cases have been charged with crimes of sexual violence since 2002, including 8 accused still at large; 1 who was released; 3 whose trials are scheduled for 2013; and 1 currently at trial. At the time of writing, there was only one case where the verdict for rape and sexual slavery (among other charges) is pending at the ICC.[6]

Taken together, these substantial developments in international criminal law have been described by de Brouwer (2009: 187) as 'model legislation on sexual violence crimes' that have the potential to 'positively impact on many other legal systems and to promote justice for victims/survivors of sexual violence'. De Brouwer (2009) adds that this is in stark contrast to the treatment of gender crimes in historical war crimes trials, whereby wartime rape was largely treated as a by-product of armed conflict. Drumbl (2005: 1323) too argues that although the goals of retribution and deterrence may remain elusive for these crimes, nonetheless 'making such conduct firmly and flatly illegal has tremendously positive implications in the struggle toward gender equality' (see also Mitchell, 2005).

The appearance of victims as witnesses, and the trial, prosecution and conviction of perpetrators within international criminal courts, has no doubt contributed to the collective memory of wartime rape in general, as well as wartime rape specifically in relation to the conflicts in the former Yugoslavia, Rwanda and elsewhere (Henry, 2011). These trials collectively have contributed to a particular story about rape as an integral part of a widespread campaign of politicised violence (Central Africa Republic; Côte d'Ivoire and Democratic Republic of Congo); armed resistance movements (Uganda); post-election violence (Kenya); ethnic cleansing (the former Yugoslavia) and genocide (Darfur and Rwanda). The trials have also contributed to collective memory; to an understanding of the patterns of rape that include individual and gang rapes, sexual humiliation,

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intimidation and mutilation , as well as an understanding of the impact on victims and their communities (Henry, 2011).

The purpose of outlining this brief history is to provide some context and background to the debates that have since ensued amongst feminist scholars and others regarding the prosecution of sex crimes under international criminal law. Below, I critically examine some of these emerging debates and ask, what are the consequences of this recognition? Has it gone too far? Does it constitute an 'over-recognition'? (Franke, 2006: 823) And what in turn are the unintended consequences of these emerging feminist discourses of wartime rape?

A Feminist Critique of the Increasing Criminalisation of Wartime Sexual Violence

Contemporary feminist scholarship on rape has identified a number of interconnected problems associated with fixating on sexual violence as the universal source of women's oppression. Postmodernist feminists, for instance, have argued that Western feminists have often (a) fixated on rape as the universal experience of women and have failed to acknowledge or capture the diversity of victims or the intersections of marginalisation; (b) isolated women's sexuality as the basis of oppression, which serves to reinforce the sexed body as an inevitable target of sexual violence; (c) reduced women to passive, vulnerable objects of law, whose identities have become defined rather than challenged by this subjection; and (d) ceded power and legitimacy to law as a source of knowledge and truth and the grantor and protector of women's equality, rights and liberty (see e.g. Brown, 1995; Marcus, 1992; Smart, 1989).

These feminist critiques are useful for comprehending the complexity, contradiction and diversity of the sexual violence perpetrators, victims and legal responses. They provide rich and nuanced understandings of sexual violence and the varied or subtle ways in which marginalisation and powerlessness may manifest. Below, I critically assess the merits of two key overlapping arguments in relation to what some feminist scholars see as the over-criminalisation of wartime rape. These arguments are based in part on postmodernist critiques of sexual violence research more generally, as described in the paragraph above. I argue that a fixation on whether or not rape is the 'worst' of crimes is at best a distraction to the real issues at stake; that is, whether or not international criminal law provides requisite recognition of the gendered harms of sexual violence in wartime. At worst, this fixation further contributes to problematic hierarchies of victimisation that may serve to marginalise victims further in their pursuit of justice after mass atrocity.

Hierarchies of Harm

Law has the power to define and legitimate some narratives, while at the same time, silence and suppress other meanings or stories (Finley, 1989). In other words, law pronounces the 'truth' about a situation; it creates meaning and is an authoritative, selective and slanted source of the past. International criminal law thus produces, legitimates and mediates harm according to its internal and external mechanisms of legal governmentality. It authoritatively dictates which harms are 'extraordinary' and who can speak about them

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(Buss, 2009). For this reason, feminist scholars have been concerned that the unprecedented attention to wartime sexual violence within international criminal law can have two interconnected, troubling effects: (1) excluding other gendered harms (and in the process, constructing an ideal victim subject) and (2) constructing a hierarchy of rape. Each of these effects is discussed in turn below.

The Authentic Victim Subject. As rape has been recognised as a war crime, a crime against humanity and a crime of genocide in contemporary international criminal jurisdictions, feminist scholars are concerned that other gender-based harms are being ignored or sidelined (Ni Aoláin, 2006). The concern relates to the impact that wartime rape prosecutions can have on suppressing or excluding other harms against women and the way in which the ideal or 'authentic' victim subject (Kapur, 2002) has come to dominate the field. Nikolić-Ristanović (1999), for example, argues that the singular focus on rape in post-conflict situations is at the exclusion of other forms of violence against women and that rape has problematically become synonymous with 'violence against women'. Rimmer (2010: 132) likewise notes that the focus on sexual violence 'seems to have blocked any consideration of other gender-based violence that occurs in conflict', such as the lack of reproductive health assistance and broader socio-economic harms.

Moreover, some scholars claim that the focus on sexual violence against women has the effect of diverting attention away from male victims of gender-based harms. Indeed, it is argued that the tendency to conflate 'gender' with 'female' has meant that sexual violence against males is often not contextualised specifically as a gender-based crime; and when one thinks of rape, 'they inevitably see a raped woman' (Marcus, 1992: 167). Jones (1994), for example, argues that the focus on women has ignored rape and other forms of sexual humiliation and abuse against males, forcible conscription, massacre and torture. Carpenter (2006) likewise claims that there is a widespread assumption that females constitute the majority of wartime rape victims, which has the effect of obscuring the extent to which adult men and adolescent boys also face gender-based violence, including sexual violence. Carpenter (2000) also argues that the discourse on forced impregnation of women during conflict has the effect of placing children born of rape on the periphery, not as rights-bearers or victims of genocide, war crimes or crimes against humanity.

Related to these perceived exclusions, there is concern within post-colonial scholarship about problematic, binary representations of wartime victimisation. Soh (2008), for example, argues that a pre-eminent narrative of the Japanese military comfort system of the Second World War has come to dominate the discourse, where young women kidnapped and forced into sexual slavery are positioned as the authentic victim subject, and the blame squarely laid on imperial Japan. The problem is that this one-dimensional narrative can have the effect of obscuring or suppressing the 'much more complex and varied lived experiences anchored to the painful sediment of … [comfort women's] lifelong suffering …', including the effects of Japanese colonialism and Korean patriarchy on women's lives (Soh, 2008: 229). Along similar lines, Buss (2009) has argued that the rapes of Hutu women or men from both Tutsi and Hutu groups have not captured the attention of the ICTR because the authentic victim subject is predominantly the

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female Tutsi genocide victim. This, she argues, 'reveal[s] the exclusions that are cast in the shadows by the glare of ''rape as an instrument of the genocide''' (Buss, 2009: 159–160).[7] As such, she claims some rapes are paradigmatic or overtly visible in international criminal law, which can have the effect of rendering other rapes invisible, or less important. She also notes that the fixation of rape as an instrument of genocide suppresses or obscures a wider narrative about wartime sexual violence, such as why the rapes happened in the first place, how women expressed resistance and negotiation and the ways in which sexual violence is connected to structural and systemic conditions existing prior to the outbreak of violence (Buss, 2009).

The construction of a rape hierarchy within national criminal justice systems has been fervently critiqued by feminists. It is argued, for example, that stranger rape attracts significantly more public sympathy and attention than acquaintance rape and is prosecuted far more vigorously than other violent crimes (see Estrich, 1987). As MacKinnon (1989: 172) bluntly but powerfully states, 'under law, rape ... is not regarded as a crime when it looks like sex'. This judicial blindness is evident at the international level also, for example, in the failure of the Tokyo war crimes trial to prosecute the sexual enslavement of 'comfort women' (Henry, 2013); the heated debates surrounding the legitimacy of German women's victimisation during the 1945 Soviet invasion of Berlin; the hostile and suggestive cross-examination of Muslim women and girls who were detained in schools, apartments and sport centres during the conflict in the former Yugoslavia (Henry, 2011); and the silence of post-conflict justice mechanisms regarding forced marriage and other forms of coercive sexual encounters in conflict zones. This historical trajectory reflects law's fixation on consent (as opposed to sexual autonomy) as the determining factor in securing not only a guilty verdict but genuine public sympathy. Like domestic rape trials, the 'authentic' victim subject is not one who has been somehow made – by discourse – complicit in her subjugation.

I agree with other scholars that there are unintended consequences resulting from the international criminalisation of wartime rape, in particular, that the prosecution of sexual violence at the international level can contribute to a one-dimensional narrative of suffering and perpetration, positioning some victims as the authentic victim subject, silencing other less conventional narratives and obscuring the role that colonialism, capitalism and sexism play in the perpetration of these crimes. However, I am less convinced by the usefulness of hierarchy arguments. I am sceptical, for example, of the claims that it is the criminalisation of wartime rape that is the cause or reason for obscuring *other* gender-based harms, including those against women and men, children, adolescents and adults. In other words, while it is correct that a vast array of gender-based harms have either been routinely ignored in post-conflict justice mechanisms or not specifically framed as gendered harms, it is possible that the very attention given to sex crimes against women within international jurisdictions has at least opened up possibilities for pursuing other forms of gendered violence. It should not be forgotten, for example, that at the first trial since the Nuremberg and Tokyo trials at the ICTY, the accused Tadić was convicted for aiding and abetting the sexual assault of male detainees, which included the sexual mutilation of prisoners.[8] I move on next to problematise discussion around whether or not rape is the 'worst' of crimes.

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The Worst of Crimes. There has been much debate about the need to treat international crimes as separate, both procedurally and substantively, from 'ordinary' domestic crimes. International courts and international criminal law prioritise 'exceptional' or 'extraordinary' crimes in the elements of the crimes and the prosecution strategies (see Drumbl, 2007; Luban, 2004). Under international law, these extraordinary crimes are shaped by the fundamental principle of *jus cogens.* This refers to a set of indeterminate 'peremptory norms' accepted and recognised by the international community of states, such as the prohibition of genocide, slavery and torture. These norms are non-derogable by international or local laws or customs and as such their violation should be prioritised due to their gravity. The peremptory norm aspect of the crime is its absolute prohibition based on its severity. When committed during armed conflict, breaches of obligations under these norms constitute 'grave breaches' of international humanitarian law and as such give rise to universal jurisdiction under the Geneva Conventions and arguably underscore the rationale for international prosecution (Copelon, 1994).

In relation to rape, Sellers (2002: 296) states that because rape has been interpreted by international and regional courts to constitute torture, slavery and genocide, this therefore suggests uncontestably that 'acts of sexual violence fit within the prism of peremptory norms'. However, Sellers states that the prohibition of sexual violence can only 'reach the glory of *jus cogens*' if 'piggybacked' with other crimes. In other words, it does not reach *jus cogens* status on its own volition, which she suggests is a 'gendered legacy of patriarchal legal culture' (Sellers, 2002: 303). This issue remains unresolved and scholars and legal experts continue to debate whether rape should be a stand-alone crime subject to universal jurisdiction under customary international law (see Charlesworth and Chinkin, 1993; Mitchell, 2005; Sellers, 2002).

While systematic or genocidal forms of sexual violence at the highest level have been prosecuted, random, isolated or individual rapes are generally not dealt with by international courts (Charlesworth and Chinkin, 2000; de Brouwer, 2009). As such, Copelon (1994) and others have expressed concern regarding the effect of exceptionalising some rapes and not others.

In addition to concerns about exceptionalising rape as a form of genocide, feminist scholars have increasingly debated whether rape 'is a crime of the gravest dimension' (Copelon, 1994: 249). De Guzman (2012: 13), for example, asks, 'why should international courts give priority to sex crimes when allocating scarce resources?' Although both Copelon (1994) and de Guzman (2012) ultimately contend that sex crimes should be prioritised, others have gone further and questioned the 'over-criminalisation' of wartime rape on the basis that rape might not in fact be the worst thing that can happen to a woman during wartime. Grossman (1995), for instance, discusses how rape was not the worst of horrible experiences for German women at the end of the Second World War. Halley (2008a: 80) likewise puts forth the same point, arguing that prioritising the prosecution of rape may not have entirely good effects because (a) the 'badness' of rape can be used in alarming ways to advance certain political and nationalistic ideologies; (b) women's consent to sex during conflict is negated due to stringent rules on consent in some jurisdictions (which has the problematic effect of eliding rape, prostitution, forced marriage and 'garden variety cohabitation') and (c) rape may not be the worst thing that can happen to a woman in wartime. In reference to a common expression of German

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women during the Soviet liberation of Berlin at the end of the Second World War, Halley (2008a: 112) even asks, '*Is* it better a Russki [Russian] on top than a Yank overhead?' (emphasis in original).

Inevitably perhaps, international criminal law constructs a hierarchy of crimes due to the grave breaches regime, the linking of various crimes with the categories of crimes against humanity and genocide and the associated decision to prosecute some crimes over others. However, while this is to some extent unavoidable, the debate about whether or not rape is the worst crime that can happen to a woman or for a man; whether rape is worse for a man than it is for a woman and vice versa, or whether sexual violence inflicts greater harm than killing, or is a more serious crime (see de Guzman, 2012; Sharratt, 2011), is, in my view, problematic for three key reasons. First, although I appreciate the reason behind questioning the uniform gravity of sexual violence (i.e. to avoid universalism and embrace diversity), I nonetheless believe this line of argument is empty rhetoric. It begs the question, conceived of as 'worse' by whom, how and when? Second, I argue that a fixation on whether or not rape is the worst of crimes is a distraction to the more important questions surrounding the efficacy of international criminal law for providing recognition and justice for victims. Third, this fixation reifies and consolidates problematic rape hierarchies (that are all too familiar in domestic settings) and as such may serve to reinforce rape myths and marginalise victims further by calling them to account for their injury and victimisation.

Sexual and Political Agency

A second critique relating to the increasing criminalisation of wartime rape concerns sexual and political agency. More generally, postmodernist theorists have been critical of the assumptions surrounding subjectivity, agency and interiority in sexual violence discourse (Mardorossian, 2002). Marcus (1992: 167), for example, argues that women are represented in feminist and broader discourses as 'already raped' and 'already rapeable' because women are perpetually defined and identified by their sexual victimisation. Smart (1990) argues that law, a discourse of power, reproduces women in a sexualised and subjugated form, whose bodies become sites of power and a mode of political identity.

Despite the array of procedural innovations for victims and witnesses of these crimes, common cross-examination strategies and judicial statements appear to likewise reproduce discourses of sexualisation and incapacitation at international courts (see Henry, 2011). Feminist scholars have also critiqued the focus on sexual violence in wartime as the universal experience of women's oppression (Halley, 2008a). Mibenge (2010: 38) argues that the focus on women as victims of rape and sexual slavery can have the effect of eroticising rather than challenging hegemonic relations.

Moreover, it is interesting to note that transitional justice scholars have increasingly pointed to the marginalisation of the storyteller and the ways in which witnesses may become the objects of voyeurism in human rights activism and academia (see e.g. Jackson, 2002; Ross, 2003). For example, de Alwis (2010) argues that the 'victim-spectacle' is a voyeuristic space that is intrinsically connected to the pleasure of consuming the pain of the 'other'. On the other hand, she also points out that in the absence of the explicit

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narrative of suffering, victims are questioned about the veracity of their stories. She goes on to argue that victims may not want to speak or testify because they are discursively represented as 'native subjects' or 'suffering bodies' – the 'other' (see also Victoor, 2010).

Some feminist scholars have specifically critiqued the ways in which the international criminalisation of wartime rape can deny or underplay women's sexual and political agency. As such, they have raised some thorny issues surrounding consent within this field, which are also apparent in others, including sex trafficking and sex work.[9] Engle (2005), for example, contends that the dominant narrative of international criminal law is of women solely as victims of rape. She states that other narratives are obscured or ignored, including that women might also have consensual sexual relations with men during war; that enemy soldiers may not sexually abuse women or that women themselves may play an active part in the support or perpetration of violence.

Likewise, Halley et al. (2006: 340347) argues that the criminalisation of rape as torture at the ICTY removes the agency of the female victims because they are unable to choose to have sex with their male guards. She uses the ICTY *Foča* trial as her example of this denial of agency.[10] In this case, the defendant Dragan Kunarac, a commander of a special unit for reconnaissance of the Bosnian Serb Army, was accused, along with his two co-accused, of taking part in the mass rapes of Muslim women and girls in the various detention facilities and local apartments in the Bosnian town of Foča. Kunarac raised the defence of consent by claiming that he had been seduced by a young 19-year-old Bosnian woman known at the trial only as 'DB'. In closed session, DB testified that she did take the initiative with Kunarac because one of the soldiers who had previously raped her said that if she did not 'satisfy the commander's desires' she would be killed. But ignoring this threat of violence, Halley et al. (2006: 340–347) uses this example to highlight the problems associated with the rules on consent in international criminal law. Halley's (2006; 2008a) point (as well as Engle's, 2005) is that the rules on consent in some international criminal jurisdictions (where rape is defined as a physical invasion of a sexual nature, committed under coercive circumstances) allow the possibility that male perpetrators who engage in consensual sexual relations with enemy women will be unfairly convicted of torture or sexual slavery. However, in some jurisdictions, consent can be raised as an 'affirmative defence' but only in exceptional cases, and where the accused must establish on the balance of probabilities that the victim consented (Schomburg and Peterson, 2007; see also Grewal, 2012; Halley et al., 2006). Currently, there is a lack of clarification around consent at the ICC, namely, whether the ICC will adopt a consent-based or broader coercive circumstances approach to rape (Grewal, 2012). This is yet to be resolved.

Related to concerns about consent and agency within international rape trials, scholars have also expressed concern about victimisation rhetoric and the production of injury as political identity. Brown (1995: 69) argues that modernity is characterised by an increasing 'ressentiment': 'an effect of domination that reiterates impotence, a substitute for action, for power, for self-affirmation that reinscribes incapacity, powerlessness, rejection'. Her main contention is that through the moralising discourses of victimisation, injustice and vengeance, the fixation on injury as a source of identity can trap victims and give power to the (masculine) state as a vehicle of recognition; 'a dissimulated political

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discourse of recriminations and toxic resentments parading as radical critique' (Brown, 1995: xi). According to Brown (1995: 27–28), these moralising discourses, which legitimate and promulgate the state as the grantor and protector of human rights, have the effect of constructing 'a plastic cage that reproduces and further regulates the injured subjects'.

Building on Brown's ideas about the subjection, powerlessness and incapacity that law seeks to amend, but reproduces, scholars have argued that the criminalisation of wartime rape likewise renders victims vulnerable and passive (Engle, 2005). In an introduction to a gender and transitional justice edited collection, Buckley-Zistel and Zolkos (2011: 10) contend that the fixation on wartime rape, reduces women to targets of one particular crime and constructs them as perpetual victims, fixing their social positions and political identities in the newly emerging society as passive, inferior, vulnerable, and in need of (male) protection'. Although Brown's critique of 'emancipatory projects' that seek to redress injuries (such as international criminal law) is compelling, I am sceptical of overly deterministic arguments about victims and their engagement with law and believe that a revision of the figure of the victim in international legal discourse is required so that we might think differently about injured subjects (Brown, 1995). This might include viewing the victim as an 'agentic bearer of knowledge' (Stringer, forthcoming 2013) who leaves behind an 'impression of injury and trauma on law' (Grabham, 2009) that is not necessarily reflective of his or her fixed identity in post-conflict contexts. One example of this in practice is the ICTY *Foča* trial. In this case, the defence maintained that the 16 rape victims who testified in this case could not have been raped because they had not displayed any signs of psychological trauma when they testified to the crimes. Although of course the defence assertion represents a problematic reinforcement of a number of rape myths, nonetheless, these victims resisted the toxicity of this narrative, as well as challenged the pre-given political identity of 'rape victim'.

This leads to an important question: is bearing witness not also an act of resistance (Douglas, 2001), a counter-memory that might somehow challenge both power and systemic violence? As Oxley (2011) importantly notes, missing from these various feminist critiques on wartime rape are the voices of the survivors. Oxley (2011: 1158) writes, 'It is paradoxical that in the feminist debates over the impact of the ICTY and the UN decisions, the voices and testimony of the women who actually lived the violence of wartime rape in Bosnia have largely been overlooked'. In relation to rape in peacetime, Mardorossian (2002: 771) likewise argues that 'we need to resist the facile opposition between passivity and agency that has motivated popular and academic discussions of violence against women'. In other words, it is important to avoid binary or simplistic representations of agency that exist on polar ends of the spectrum, between empowerment and disempowerment.

My argument here should not be confused with a denial of the ways in which criminal trials can undermine victim accounts through narrow procedure, controlling judges and lawyers, and the nature of the adversarial system in general (see e.g. Franke, 2006; Henry, 2009; Mertus, 2004). My point rather is that despite the power dynamics within courtroom procedure, victims (of rape or of other violent crimes) may nonetheless find ways to assert their agency, both inside and outside the courtroom. As such, it is essential to be mindful about problematic generalisations regarding law as the cause and effect of passive and submissive victimisation, and instead view power as shifting and expressed

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in complex and multiple ways. Victims are diverse and heterogeneous, and agency is not solely determined by any unidimensional, uniform, consistent, monolithic and coordinated power of law (Smart, 1989).

The second problem with the agency focus is that often these discourses are contingent on the idea of the autonomous individual subject, removed from a societal or community context; a subject that may be isolated and motivated by personal motivations of healing and justice. This fails to take into account more collectivist or non-liberal forms of subjectivity. It is striking, for example, how many victims express the need to contextualise their stories within a broader framework, or how they have come to speak on behalf of the dead (Stover, 2005; see also Sharratt, 2011). Some empirical and anecdotal evidence suggests that victims who testify at war crimes trials do so as part of a civic obligation. Stover (2005), for example, found in his study of ICTY witnesses that the obligation to speak for the dead was 'so pervasive' that even if witnesses held suspicions or doubts about the Tribunal, they would testify again in order to ensure that those who had died were not forgotten. In fact, 90% of Stover's respondents listed moral duty as a motivation for testifying at the ICTY. For victims who are sexually violated during armed conflict, the choice to defy the stigma and shame and confront perpetrators in court may likewise represent a desire to speak on behalf of those who do not have the courage to testify: a deliberate expression or invocation of agency.

Disclosure, therefore, is not simply connected to the isolated self but is also intricately connected to a perceived moral obligation to the community to tell the world what happened. This does not mean that war crimes trials are not selective, political, gendered, imperialistic or even narcissistic, but it is important to underscore that the process does not begin and end with the individual. War crimes trials thus extend beyond temporal, individual and autonomous spaces. Individuals occupying those spaces may find ways to express their agency, even within the confines of legal procedure and ceremony and despite the struggles of an adversarial style of justice.

In summary, while feminist critiques relating to the international criminalisation of wartime rape importantly bring attention to some unintended consequences of international criminal law, there are a number of problematic, unsupported assertions raised in these critiques, which include that (1) the elevated status of rape does in fact make other crimes under international criminal law somehow lesser in gravity; (2) rape *is* in fact at the top of the international criminal hierarchy; (3) international criminal law itself may be responsible for harmful ideologies surrounding rape that may be used for more violence (that the prohibition of rape can 'weaponise' rape, for example, contribute to starting a war or committing more rape in war); (4) international criminal law negates victim agency and renders them passive and submissive and (5) feminist advocates at the international level have been uncritical of the actual gap between the rhetoric and practice of law (see Halley, 2008a). These assumptions obscure the extent to which international criminal law may have failed in providing victims with substantive justice. They may also have the effect of blotting out the voices and experiences of victims.

Although of course law is imperfect, the prosecution of wartime rape at the international level is, I believe, necessary. Oosterveld (2012) states that there are important justifications for prioritising the prosecution of sexual violence at the international level, including a recognition of the serious physical and psychological impact of rape and

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rectifying the legal silence that has shrouded sexual violence historically. De Guzman (2012) also contends that the justification for prosecuting rape at the international level is largely based on the goal of expressing a global norm against the perpetration and impunity of rape. In other words, rape is included among the extraordinary crimes on the grounds of retribution, deterrence and the articulation of international norms (de Guzman, 2012). As such, arguments about the 'over-criminalisation' or 'over-recognition' of wartime rape are, in my view, misguided. They conflate the rhetoric of international criminal justice (e.g. that rape is among the worst things that can happen to a person during wartime) with the actual practice of international criminal law (e.g. that rape is actually treated as among the worst things that can happen to a person during wartime). Similar sentiments have been expressed in relation to rape law reform in common law countries. It is often stated, for example, that rape is a horrendous crime, but paradoxically, in practice, victims of such crimes are often ill-treated by the criminal justice system due to deeply embedded stereotypes about rape, victims and perpetrators. In other words, rape may well be pronounced as serious in rhetoric, but this does not mean it is treated in the same way in practice. International criminal law has not escaped the tendency in domestic jurisdictions to overcome problematic rape myths. Moreover, although some important victim-friendly developments have been implemented at the international level, there are still a number of issues.

As Franke (2006) has noted, the advances in the prosecution of rape within international criminal law are not revolutionary in substance or practice. As others have argued too, the criminalisation of wartime sexual violence has not inevitably led to any redistributive justice for survivors of such crimes (Rimmer, 2010), nor have the representations of women's experiences within these spaces always embodied complexity, nuance or context. For example, it is argued that the legal co-option of rape as a weapon of war as the epitome of enlightenment and moral progress within the international community has been at the expense of articulating ethical and political wrongs, such as the broader socio-economic and political context of wartime exploitation and the depth and diversity of survivor experiences of these harms. Indeed, international criminal trials do not generally articulate the broader, systemic forms of injustice as the origins of armed conflict. Trials do not result in the 'larger dream' of substantive justice for women in post-conflict societies (Bell and O'Rourke, 2007). In fact, the international legal order may render invisible everyday violence and injustice (Buss, 2007; Koskenniemi, 2002), including the nature and origins of gender-based harms that manifest in pre-, during- and post-conflict situations. There is little recognition, for example, that women from poor, rural areas have disproportionately been the victims of rape and sexual enslavement (see Soh, 2008). There has also been little recognition of the impact of global capitalism on the causes and consequences of war or the deeply embedded structural determinants of sexual violence prior to the outbreak of conflict.

Furthermore, it is important to take into account the problems that continue to hinder rape prosecutions at the international level. Some pertinent issues include: inappropriate interviewing methodology; plea bargaining limitations and the failure of accused persons to express remorse; imbalances in gender representation within the courts; the lack of political will to investigate rape as part of an integral prosecution strategy; the failure of courts to secure convictions for rape; dropped charges and acquittals; sentence

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severity; lack of preparation, information, follow-up and post-trial protection for victims who come to testify to these crimes; and hostile or intrusive cross-examination strategies or judicial intervention (see de Brouwer, 2009; Henry, 2011; Mischkowski and Mlinarevic, 2009; Mertus, 2004; Nowrojee, 2005; Sharratt, 2011).

Following Fraser (2000: 114), this legal paradigm may be appropriately termed a 'misrecognition' – a 'form of institutionalized subordination' and a 'serious violation of justice'. As such, redressing the misrecognition of international criminal law requires changing the rules within law so that victims have 'parity of participation' (Fraser, 2000: 115) – meaning, I would argue, that we need to rethink the figure of the victim in legal, human rights and academic discourse, to challenge the conventional narratives and myths that continue to plague both international and local prosecutions of these crimes, and to insist on a 'non-identitarian' recognition of injury based on identifying the multiplicity of factors leading not only to injury in the moment but also to the institutionalised cultural patterns that serve to further undermine the full recognition of this injury in the aftermath of atrocity (Fraser, 2000).

Conclusion

Wartime rape has very much become a 'passion' of international criminal law, a crime that incites much outrage and indignation. This is no doubt an important marketing strategy of international criminal law's image of itself as an enlightened, progressive moral force that has the power to vindicate victims, prosecute villains and end impunity for these egregious crimes. While some feminist scholars and activists see the inclusion of rape and other forms of sexual violence as a victory for victim vindication, an end to impunity and an albeit extremely limited (and arguably impossible) way to ensure that these crimes do not happen again, others have questioned the ascendancy of rape as a crime against humanity as the producer of a range of unintended consequences for both victim and perpetrator subjectivity and agency.

The increasing criminalisation of wartime rape at the international level no doubt points to the inherent but intractable dilemma of hierarchy arguments and the incredible power of law to pronounce meaning, demarcate the gravity of crimes and silence alternative stories. A balance must be struck, however, between seeing law as a venerable arbiter of horrific atrocities on the one hand and seeing law as the ultimate expression of imperialism and violence on the other hand (Henry, 2009). Such an approach is about embracing a modest, as opposed to a cynical, approach to international criminal law (Booth and du Plessis, 2005), and appreciating both the limits and potential of this form of justice.

To conclude, in sexual violence research, it is important to ensure that first, gendered harms are thoroughly investigated, prosecuted and recognised; second, the fiction of the authentic victim subject is deconstructed and that more nuanced and unconventional narratives are also heard and validated; third, the substantive problems associated with the prosecution of sexual violence crimes are investigated and remedied as much as possible; fourth, arguments about what constitutes the worst crime, including what kinds of rape are worse than others, are actively avoided; and fifth, the figure of the victim is revised in feminist and other discourses so that victims are not simply reduced to a sexed,

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injured and incapacitated body but are instead recognised, represented and respected as complex and diverse agents with differing justice needs. These reminders are equally important for researchers of both domestic and wartime sexual violence.

Notes

1. Throughout the article, I adopt a broad definition of sexual violence that encompasses rape and other forms of sexual violation, such as forced impregnation and sexual enslavement. The terms 'sexual violence' and 'rape' are used interchangeably in line with the International Criminal Tribunal for Rwanda's (ICTR) definition of rape as, 'A physical invasion of a sexual nature, committed on a person under circumstances which are coercive' (*Akayesu Judgment*: para 598). For a discussion of rape definitions at the international level, see, for example, Grewal (2012) and MacKinnon (2006).
2. The prioritisation of sexual violence prosecution at the international level was not solely driven by feminist scholars, lawyers and activists; however, feminism was arguably the most significant force behind these developments in international criminal law (Quijano, 2012). Please note that due to space constraints, I will not be discussing the feminist negotiations, developments and activities specifically in this article (see Engle, 2005; Halley, 2008b).
3. I use the term 'postmodernist feminism' to refer to critical feminist anti-essentialism that seeks to explore difference, multiplicity and complexity in gendered 'otherness' and in opposition to 'phallocentric' thought, language and culture (see Irigaray, 1985). More specifically, I also use the term 'post-colonial feminism' throughout the article to refer to the analysis of the cultural legacies of colonialism and imperialism inherent in Western feminism, international relations and human rights discourse, which, in various manifestations, can have the effect of problematically representing the 'other' as backward, uncivilised and inferior through alluding to universal benchmarks for civilisation, human rights, equality and justice (see e.g. Kapur, 2002; Mohanty, 1988). Postmodernist theories (including post-colonial perspectives) essentially critique the epistemological basis of knowledge and of knowing the world.
4. The populist, activist and humanist project to 'make rape history' is another discourse that has been examined and critiqued, in particular by Engle (2012). Media and scholarly representations of wartime rape have also been problematised. Victoor (2010: 22), for example, argues that wartime rape has become an object of Western spectacle, which can 'erase women's experiences, deny their subjectivity and render them passive' (see also Zarkov, 2007). Due to a specific focus on international criminal law, my article does not examine these other discursive representations, although I have relied on a critique of them in various parts of the article.
5. For a more detailed discussion of these developments, see de Brouwer (2009).
6. The ICTY figures cited here are from Mischkowski and Mlinarevic (2009). The ICTR and ICC figures are based my own calculations from the ICTR and ICC case notes (up to date as of December 2012); see: http://www.unictr.org/Cases/StatusofCases/tabid/204/Default.aspx and http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/.
7. In the *Akayesu* case at the ICTR, rape was prosecuted for the first time in history as a crime of genocide. In this case, the prosecution was able to establish that the mass rapes were in part or in whole committed with intent to destroy a national, ethnical or religious group. The Trial Chamber also found, for the first time in history, that rape constituted a crime against humanity because the rapes were so widespread that the accused must have known about them, yet did nothing to prevent them from happening. The Chamber further declared that 'sexual

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assault formed an integral part of the process of destroying the Tutsi ethnic group and that the rape was systematic and had been perpetrated against Tutsi women only' even in the absence of explicit orders to rape (*Akayesu Judgment*: para 733). There have been a small number of ICTR and ICTY cases where rape has been found to constitute a form of genocide, however, only in *Akayesu*, *Gacumbitsi*, *Karemera*, *Muhimana* and *Musema* have accused persons been found guilty of genocide on the basis of rape.

8. *Prosecutor v. Tadić*, Case No. IT-94-1 (see http://www.icty.org).
9. In particular, forced marriage as a distinct crime under international criminal law presents a number of obstacles that have yet to be fully resolved in feminist and international legal discourse (see e.g. Gong-Gershowitz, 2009; Jain, 2008).
10. *Prosecutor v. Dragoljub Kunarac*, *Radomir Kovač*, *Zoran Vuković*, Case Nos. IT-96-23-T & IT-96-23/1-T (see http://www.icty.org/).

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