SYMPOSIUM ON THE INTERNATIONAL CRIMINAL TRIBUNALS FOR THE FORMER YUGOSLAVIA AND RWANDA: BROADENING THE DEBATE

FEMINIST LEGACIES

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In February 2013, Navi Pillay, then UN High Commissioner for Human Rights, gave a speech to the General Assembly reflecting on the twenty years that had passed since the Vienna World Conference on Human Rights. She discussed three principal achievements of the Vienna Declaration and Programme of Action, two of which were "its role in advancing women's rights" and "its impact on the fight against impunity."[1] With regard to the first, she discussed the success of the "Women's Rights are Human Rights" slogan at the conference and the institutional gains it spawned around violence against women (VAW). As for the second, she noted that "[p]erhaps most significantly, just one month after the establishment of the first ad hoc tribunal since Nuremberg [the ICTY], the Declaration nudged the International Law Commission to continue its work on a permanent international criminal court." Although Pillay did not connect those two achievements—the recognition of women's human rights and a new focus on impunity alongside international criminal responses to combat it—they were in fact intertwined.

The ICTY, as all of the essays in this special symposium on the legacies of the tribunals make clear, turned out to be the beginning of a rapid development of international criminal justice institutions. Those include the International Criminal Tribunal for Rwanda (ICTR) in 1994 (on which Pillay served as a judge) and the International Criminal Court in 1998, with negotiations beginning much earlier. Matheson and Scheffer's piece reminds us that people and politics were behind the establishment of the ICTY.[2] But there were of course many actors beyond the U.S. policy-makers they discuss. Journalists and human rights advocates as well as feminists inside and outside the former Yugoslavia engaged in various—sometimes opposing—efforts to affect international responses to the conflict, including military and judicial intervention. Reports of and publicity around rapes played an important role in those efforts.

Together, the essays in the symposium tell stories of both origins and effects (or, in the cases of Milanović and Nouwen and Kendall, lack of effect). None of the pieces, however, addresses the roles of feminists and human rights advocates in either roots or results. In this short intervention, I aim to begin to fill that gap by

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[1] Navi Pillay, *Opening Statement by Ms. Navi Pillay United Nations High Commissioner for Human Rights at the 22nd Session of the Human Rights Council* (Feb. 25, 2013).

The third achievement she listed was "its swiftly realized recommendation to create . . . the Office of the High Commissioner for Human Rights." *Id.*

[2] Michael J. Matheson & David Scheffer, *The Creation of the Tribunals*, 110 AJIL 173 (2016).

considering the legacy of many feminist activists involved in both the turn to criminal law and the treatment of rape and sexual violence in the tribunals, much of which was done in the name of human rights. At the same time, I consider the legacy of some of the jurisprudence of the tribunals around rape and sexual violence, which I in turn connect to a particular structuralist approach of much early feminist advocacy. That approach not only saw the subordination of women by men as deeply embedded in political, societal, and legal structures, but it considered sex to be the primary vehicle for that subordination.

Connecting the jurisprudence and its legacy to the advocacy is controversial because feminists have not, for the most part, claimed their legacy in international criminal law. To the contrary, while feminists acknowledge successes, they often see them as modest, in large part because they believe the tribunals have not followed through on their enormous promise with regard to sexual violence.[3] I therefore use this moment to remind us of some accomplishments of feminists, but also to call attention to their role in the continued and problematic focus on and understanding of sexual harm. I am therefore less celebratory than some of the symposium authors of both the turn to criminal law and the jurisprudence of the tribunals, which I contend reflect many of the biases and blind spots that at least some feminists brought to it.

Let me begin by situating the establishment of the ICTY in women's human rights advocacy. In the early 1990s—before the Vienna Conference and the establishment of the ICTY—a coalition of feminists and feminist organizations based in New York formed a group they called the Ad Hoc Women's Coalition Against War Crimes Against Women in the Former Yugoslavia. That group met regularly, as a New York Times article reported in January 1993, "to discuss how to put pressure on the international law system to bring people responsible for rape to justice," including by advocating for the United Nations to establish a war crimes tribunal.[4] The coalition was comprised largely of human rights and feminist organizations and individuals who came together under a name that they chose "to emphasize that rape is forbidden by the Geneva Convention."[5]

Remarkably, although the ICTY was established in May 1993, as recently as January of that year, its establishment was in no way a foregone conclusion. The coalition very much centered its activity on international criminal law responses to wartime rape, but it also pursued tort claims in the United States under the Alien Tort Statute in case no international tribunal was established. Eventually, they saw their advocacy as crucial to the establishment of the ICTY, both for the attention they brought to the issue of sexual violence in conflict and for their advocacy for an international tribunal. Charlotte Bunch, who directed the Center for Global Leadership at Rutgers University, which was involved in the Ad Hoc Women's Coalition, would later state that the "women's groups were more active in the formation of the new international institution than ever in history."[6]

[3] For an argument that feminist method has failed to affect international law, even though "[s]ome international institutions have to some extent absorbed the vocabulary of women and gender," see Hilary Charlesworth, *Talking to Ourselves? Feminist Scholarship in International Law*, *in* FEMINIST PERSPECTIVES ON CONTEMPORARY INTERNATIONAL LAW: BETWEEN RESISTANCE AND COMPLIANCE? 17, 23 (Sari Kouvo & Zoe Pearson eds., 2011). When feminists downplay their successes in international criminal law, they mostly focus on low numbers of indictments or prosecutions for rape and sexual violence, at least compared to other crimes, thereby pointing to a lack of political will. At the same time, however, they rarely criticize the reasoning found in judgments that pronounce or uphold convictions.

[4] Tamar Lewin, *The Balkans Rapes: A Legal Test for the Outraged*, N.Y. TIMES (Jan. 16, 1993).

[5] Dianna Marder, *Bosnian War Puts Focus On Use Of Rape As A Weapon: The Violence Has Precedent. The Attention Does Not*, PHILLY.COM (Feb. 14, 1993).

[6] Julie Mertus, *When Adding Women Matters: Women's Participation in the International Criminal Tribunal for the Former Yugoslavia*, 38 SETON HALL L. REV. 1297, 1300 (2008) (quoting her telephone interview with Bunch, February 2004).

Robinson and MacNeil call the ICTY statute's failure to list rape as a war crime a "deplorable gap."[7] Though some feminists might have preferred explicit reference to rape as a war crime, its absence was not considered particularly problematic, especially in light of the inclusion of rape in the list of acts that might constitute a crime against humanity. There was little doubt in 1993 that rape could constitute a war crime, given that it had in fact long been seen, and even sometimes prosecuted, as one.[8] And many feminists have noted, along with Robinson and MacNeil here, that over the years the lack of the term "rape" in the articles on war crimes in the statute did not preclude prosecutions either of rape or other forms of sexual violence.[9] Rhonda Copelon, a member of the Ad Hoc Women's Coalition, even later suggested that its absence from the statute might have facilitated the prosecution of other forms of sexual violence: "[I]n retrospect I believe that it was fortuitous as it made it easier to argue for the mainstreaming of sexual violence crimes, else they would be excluded altogether."[10]

Feminists began to pursue these enforcement mechanisms for the international criminalization of rape in conflict around the same time that women's rights began to receive mainstream attention as human rights. Not coincidentally, in addition to being involved in the Ad Hoc Women's Coalition, Bunch was one of the most prominent early advocates for the treatment of women's rights as human rights. Indeed, she and the Center for Global Leadership played a significant role in successfully petitioning for explicit discussion of women's rights at Vienna; the early agenda for the conference had made no reference to women's human rights.[11] Eventually, though, as we saw in Pillay's quotation with which we began, it would come to be the place where women's rights were first officially recognized as human rights.

A central emphasis of women's human rights advocates in the years immediately preceding 1993 was VAW. It became their paradigmatic issue during both the official conference and the NGO activities that ran parallel to it, with sexual violence in conflict often at the forefront. While the Vienna Declaration and Programme of Action includes a broad range of women's human rights, it specifically states that "[v]iolations of the human rights of women in situations of armed conflict are violations of the fundamental principles of international human rights and humanitarian law. All violations of this kind, including in particular murder, systematic rape, sexual slavery, and forced pregnancy, require a particularly effective response."[12] It did so with Bosnia and Herzegovina in mind. Even though the conference was generally committed to not making pronouncements on specific countries,[13] an exception was made for a "Special Declaration on Bosnia and Herzegovina," which noted that "[o]ver 40,000 Bosnian women have been subjected to the gruesome crime of rape."[14] It called for

[7] Darryl Robinson & Gillian MacNeil, *The Tribunals and the Renaissance of International Criminal Law: Three Themes*, 110 AJIL 191, 201 (2016).

[8] There are many debates as to when the first prosecution of rape as a war crime occurred, ranging from 1385 (Richard II) and 1474 (Peter von Hagenbach) to 1863 (under the Lieber Code) and 1946 (in the Tokyo Tribunals). For all but the 1474 date, see Theodor Meron, *Rape as a Crime under International Humanitarian Law*, 87 AJIL 424, 425-26 (1993).

[9] *See, e.g.,* Kelly D. Askin, *A Decade of the Development of Gender Crimes in International Courts and Tribunals: 1993 to 2003*, 11 HUM. RTS. BRIEF , no. 3, 16, 16 (2004); Mertus, *supra* note 6, at 1316.

[10] Rhonda Copelon, *Gender Crimes as War Crimes: Integrating Crimes against Women into International Criminal Law*, 46 MCGILL L.J. 217, 229 (2000).

[11] Charlotte Bunch, *How Women's Rights Became Recognized as Human Rights*, *in* THE UNFINISHED REVOLUTION: VOICES FROM THE GLOBAL FIGHT FOR WOMEN'S RIGHTS 29, 30 (Minky Worden ed., 2012).

[12] World Conference on Human Rights, Vienna Declaration and Programme of Action para. 38, UN Doc. A/CONF.157/23 (June 25, 1993).

[13] On some of the diplomatic maneuvering that resulted in the Bosnia declaration, *see* JOHN SHATTUCK, FREEDOM ON FIRE: HUMAN RIGHTS WARS AND AMERICA'S RESPONSE (2003), 127-28.

[14] UN Secretary-General, Report of the World Conference on Human Rights 47, UN Doc. A/CONF.157/24 (Part I) (Oct. 13, 1993).

UN Security Council intervention in the former Yugoslavia, particularly in "preventing and punishing genocide in the Republic of Bosnia and Herzegovina." Among the mechanisms for doing so was the ICTY; the declaration stated that "all persons suspected of committing crimes against humanity, including war crimes," should be brought to trial.[15]

If the ICTY appeared to emerge relatively suddenly as the principal means of UN Security Council intervention, the reliance on criminal law in the early 1990s was also in some ways overdetermined, as both feminists and human rights advocates were headed in that direction. They called upon domestic criminal legal systems for the enforcement of rights even before the tribunals were established. Indeed, U.S. feminist responses to VAW had begun to turn in the 1980s and 90s away from social services and progressive grassroots resistance and toward the use and promotion of criminal prosecutions.[16] Arguably the trend extended well beyond the United States. As one scholar explains: "Feminists around the world identified and addressed the failures of the justice system in regard to wife abuse in remarkably consistent ways" so that "an almost irresistible pressure drove the movement toward criminal justice reform and solutions, and to make use of 'law and order' arguments to ensure that criminal justice actors will become involved."[17]

Beginning in the late 1980s, international human rights advocates also turned to criminal law, increasingly expressing concerns about "the culture of impunity" (a term rarely used before 1991).[18] Those advocates began to argue, with some success, that states had an international legal obligation to defy that culture by investigating, prosecuting, and punishing nonstate actors for egregious violations of human rights that incur criminal responsibility, such as forced disappearance.[19] Human rights advocates thus began to be dependent upon some of the very same state institutions, particularly penal ones, that they had once criticized. Many women's human rights advocates lauded this move, seeing it as a way to bring private harms under the purview of human rights and thus to begin to break down the public/private distinction.[20]

This shift within both feminism and the human rights movement fit neatly within the more general governance trend toward international criminal institutions. Indeed, support for an international criminal court, which had waxed and waned since the end of World War II, had been on the rise since 1989. By the end of the Vienna Conference, with the establishment of the ICTY and solid condemnations of impunity at the conference, the future for international criminal institutions looked better than it had in decades. Many feminists emerged from the conference strengthened in their claims that women's rights were human rights, and set to deploy international humanitarian law as they engaged with criminal justice systems to combat rape in conflict.

Having attempted to fill in the origins story of the tribunals to connect two of the achievements of the Vienna Conference identified by Pillay, I now turn to continued feminist involvement with international criminal law and that law's perpetuation of certain understandings of gender, sexuality and ethnicity. While feminists have been critical of particular outcomes, especially failures to indict and acquittals on sexual violence charges, few have questioned the international criminal enterprise *per se*. To the contrary, they have been

[15] *Id.* at 48, 49.

[16] Aya Gruber, *The Feminist War on Crime*, 92 IOWA L. REV. 741, 749-751 (2007).

[17] Dianne L. Martin, *Retribution Revisited: A Reconsideration of Feminist Criminal Law Reform Strategies*, 36 OSGOODE HALL L.J. 151, 166 (1998). For consideration and critique of feminist criminal law reform strategies in the United States, *see* Aya Gruber, *Rape, Feminism and the War on Crime*, 80 WASH. L. REV. 581 (2009); Martin, *Retribution Revisited*, at 168.

[18] *See* Karen Engle, *Anti-Impunity and the Turn to Criminal Law in Human Rights*, 100 CORNELL L. REV. 1069, 1074-1079 (2015).

[19] A path-breaking case in this regard was Velásquez-Rodríguez v. Honduras, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4 (Jul. 29, 1988).

[20] To this day, *Velásquez-Rodríguez* and its progeny are cited by those who argue for state responsibility for VAW. See, for example, Rashida Manjoo, Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo para. 15, UN Doc. A/HRC/26/38 (May 28, 2014).

some of its strongest supporters, arguably playing a governing role in its development. They have even put aside many old disagreements, particularly ones over whether and how rape might be considered genocidal, in their turn to criminal law.

Perhaps the most systematic feminist organizing with regard to international criminal law occurred during the drafting of the Rome Statute. There, advocates attempted to make up for some of the flaws in, or lack of specificity about, the treatment of sexual violence that they detected in the earlier tribunals. As Janet Halley has described in significant detail, structuralist feminism prevailed at Rome, as a feminist coalition homed in on sexual violence and succeeded in criminalizing a broad range of acts beyond what earlier statutes had explicitly recognized.[21] The lack of disagreement among feminists was striking,[22] but even more so was the "placid calm with which male international law elites from the West received this [structuralist feminist critique] as the voice of sweet reason about how to condemn wartime rape."[23] This acceptance by mainstream elites dates back to the acceptance of women's human rights at Vienna (because, I would contend, of the focus on rape and sexual violence) and continues to be seen in a variety of other fora.

One site of repeated commitment to the criminalization of rape and sexual violence in conflict is the UN Security Council, where numerous resolutions on human security have been passed that emphasize the need to respond criminally to sexual violence.[24] Another is the Group of Eight (G8), which made sexual violence in conflict one of its main areas of focus under the presidency of the United Kingdom in 2013. Indeed, the issue became a celebrity cause, as then-Foreign Secretary William Hague teamed up with Angelina Jolie at the April 11, 2013 G8 summit, at a subsequent meeting of the UN Security Council later that year, and then as co-host of an official U.K.-sponsored Global Summit to End Sexual Violence in Conflict in June 2014.[25]

I share with Nouwen and Kendall a concern about the way in which the notion that criminal justice is necessary to attend to mass atrocity—in this case, widespread rape—has become an *idée fixe*, with little room for contestation. Further, as I noted above, this trend is unique neither to international criminal law nor mass atrocity. As human rights advocates, including feminists, have increasingly turned to domestic as well as international criminal law to respond to issues ranging from economic injustice to sexual violence—both "every day" and "in conflict"—they have reinforced an individualized and decontextualized understanding of the harms they aim to address, even while relying on the state and on forms of criminalization of which they had once been critical.

It is not only the criminalization impulses behind the reforms pushed in the 1990s by many feminists that have largely become common sense today, but also many of their particular ideas about ethnicity, gender, and sexual harm. In a number of ways, including through their successful promotion of legal rules that presume lack of consent in most conflict situations, feminists accepted and reinforced a problematic and essentialized understanding of ethnic differences in the Balkans that portrayed them as age-old and insurmountable. If Milanović's essay accurately reflects ongoing perceptions in the region, it might be worth considering the extent to which the ICTY, rather than having no effect on ethnic attitudes, might have in fact served to

[21] Janet Halley, *Rape at Rome: Feminist Interventions in the Criminalization of Sex-Related Violence in Positive International Criminal Law*, 30 MICH. J. INT'L L. 1, 101-20 (2008).

[22] *Id.* at 2-3. ("[T]manifest consensus view was an updated radical feminism, strongly committed to a structuralist understanding of male domination and female subordination. There was some tension on a few issues between structuralist and liberal-individualist feminists . . . but it was muted by the coalitional style adopted by feminists and compromised usually in the direction of structuralist rule choices.")

[23] *Id.* at 6.

[24] *See, e.g.*, SC Res. 1820 (Jun. 19, 2008); SC Res. 1888 (Sept. 30, 2009); SC Res. 1960 (Dec. 16, 2010); SC Res. 2106 (Jun. 24, 2013).

[25] The G8 meeting led to the adoption of a declaration by the represented ministers. *See* The United Kingdom Foreign and Commonwealth Office, *Declaration on Preventing Sexual Violence in Conflict* (Apr. 11, 2013).

concretize them further.[26] And, although the turn to criminal law quelled a number of debates within feminism, it strengthened the nearly exclusive focus of many structuralist feminists on the *sexual* harm of conflict, which tended to diminish women's political and sexual agency. That is, feminists often downplayed the extent of women's engagement in conflict and denied women their capacity for sexual activity with those from ethnic groups that came to be constructed as having always been the enemy. As I have described elsewhere, such results could be found in the early jurisprudence of the ICTY's decisions on rape and other forms of sexual violence.[27]

As feminists homed in on rape as one of the greatest harms of war, they also reinforced a Victorian assumption that victims are forever destroyed by rape, in part due to shame and stigmatization that is seen to accompany sexual violence in conflict. This view is particularly apparent in the jurisprudence of the ICTR, where the individual and communal shame of rape was seen as the means by which a people might be destroyed.[28] Although many feminists insisted that their attention to rape was meant to get away from such Victorian notions, their description of the harm of rape, legal or otherwise, beginning with Bosnia, often focused on such harm, with their assumption that Muslim women were particularly shamed by rape. Over time, the problematic understandings of both ethnicity and gender have been perpetuated in a variety of fora.

Perhaps less intended by most feminists involved, the gendered nature of sexual harm dropped out of the picture relatively early on. The ICTY's Office of the Prosecutor treated sexual violence against men and women as one, in part with the hope of obtaining a genocide conviction that included sexual violence. To the extent they have considered male-male sexual violence, structuralist feminists have tended to see it as reproducing the dynamics of male-on-female (sexual) violence. Yet indictments and prosecutions focused on what was considered the degrading harm of sexual violence. The foregrounding of sex as the problem has deflected attention from nonsexual violence, but it has also moved attention from the male-female axis of power critiqued by most feminist approaches. This effect has moved well beyond the ICTY. For example, in 2011, UN Action on Sexual Violence in Conflict, a multi-agency initiative to bring attention and response to sexual violence in war, intentionally replaced the term "gender-based violence" with the term "sexual violence," stating that the latter has become a "self-standing issue of concern."[29]

In its common sense version today, then, sexual violence is represented as a "weapon of war" (a term initially pushed by structuralist feminists) that frightens and affects not only women and girls, but also men and boys, directly as well as indirectly. With the move from the gendered to the sexual aspects of the violence, and loss of connection between the two, comes a hyperattention to sex, which might help to explain but should also give pause about, its mainstream appeal. Seen through this lens, much of the work against sexual violence in conflict aids in the production or at least reinforcement of particular types of "proper" sexuality (heterosexual, of a certain age, monogamous, within the same ethnic group, etc.).

Importantly, feminists were not simply co-opted. For those whose legacy we see, sexual violence *was* gender violence (and vice versa). Their attention to sexual violence resonated with political and institutional actors across political, national, cultural, and religious lines. Many of their political and doctrinal victories depended on such resonance. Whether or not all feminists involved in the criminalization of sexual violence agree with the full legacy of their efforts, they should take seriously that they have acquiesced to, and sometimes spearheaded, the preference for carceral regimes to attend to conflict. Moreover, they should attend to the ways in

[26] Marko Milanović, *The Impact of the ICTY on the Former Yugoslavia: An Anticipatory Postmortem*, 110 AJIL 233, 235 (2016).

[27] Karen Engle, *Feminism and its (Dis)contents: Criminalizing Wartime Rape in Bosnia and Herzegovina*, 99 AJIL 778 (2005).

[28] Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, para. 731 (Sept. 2, 1998).

[29] UN Action Against Sexual Violence in Conflict, *Analytical and Conceptual Framing of Conflict-Related Sexual Violence* 3 (Nov. 8, 2011).

which those regimes have reinforced negative images of sex and sexuality—primarily but not only for women—as well as problematic understandings of gender and ethnicity.

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